ASSET RECOVERY IN CORRUPTION CASES: TOWARDS A MORE EFFICIENT LEGAL FRAMEWORK FOR RECOVERING ASSETS

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G62/34608/2019

A Research Project Submitted to the University of Nairobi Law School in Partial Fulfillment of the requirements for the Master of Laws (LL.M) Degree Program.

November, 2021

DECLARATION

I, OMONDI MERILYNE ADHIAMBO, do hereby declare that this is my original work and that it has not been submitted for the award of a degree or any other academic credit in any other university.

Signature……  …….…….Date……. 10/11/2021..……

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This research project has been submitted for examination with my approval as the University Supervisor

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DR. CONSTANCE GIKONYO

DEDICATION

This thesis is dedicated to my parents, Mr. and Mrs. Omondi, whose support I treasure; to my sister Mildred Achieng Omondi and brother Rodney Rollins Ngwono who are a source of great inspiration; and to all Kenyans who commit themselves to working together to build a just, equitable and prosperous Kenya.

ACKNOWLEDGMENT

The production of this research work was as a result of collaborative efforts of many people without whom, this thesis would not have materialized.

My sincere appreciation goes to God for ordering my steps and for granting me grace to complete this work. I am greatly indebted to my supervisor, Dr. Constance Gikonyo, for her guidance, advice and dedication throughout the writing of this thesis. My further gratitude goes to my friends who offered their invaluable advisory support and input in the process of finalizing this thesis. Appreciation is also to be given to my parents for their support and encouragement during my studies. Lastly, I bestow my utmost gratitude and appreciation to my friend and Master's colleague Lydia Mbacho for critiquing and reviewing this research paper with her usual thoroughness.

LIST OF CASES

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United Nations Convention against Transnational Organized Crime (Adopted 15 November 2000, entered into force 29 September 2003) 2225 UNTS 209.

ABBREVIATIONS

ACECA- Anti-Corruption and Economic Crimes Act

ACPU- Anti-Corruption Police Unit

AFIs- Accredited Financial Investigators

ARA-Asset Recovery Agency

ARIS- Asset Recovery Incentivisation Scheme

EAAACA- East African Association of Anti-Corruption Authorities

EACC- Ethics and Anti-Corruption Commission

FRC-Financial Reporting Centre

GFAR- Global Declaration Against Corruption

IACCC- International Anti-Corruption Coordination Centre

JARD- the Joint Asset Recovery Database (JARD)

KACA- Kenya Anti-Corruption Authority

KACC- Kenya Anti-Corruption Commission

NAO- National Audit Office

NCA- the National Crime Agency

ODPP- Office of the Director of Public Prosecutions

OECD-The Organisation for Economic Co-operation and Development

POCA- the Proceeds of Crime Act 2002

PSC- People with Significant Control

SFO- Serious Fraud Office

SOCA- Serious Organised Crime Agency

UKCA- UK Central Authority

UKFIU- the UK Financial Intelligence Unit

UNCAC- UN Convention Against Corruption

UWOs- Unexplained Wealth Orders

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ABSTRACT

The Kenya's legal framework for asset recovery establishes the EACC and the ARA, and bestows upon them powers to recover assets acquired through corrupt conduct. Although it was expected that the framework would be efficacious in enhancing asset recovery, there is every indication that this vision is still a mirage because the amount of the recoveries being reported constitute an insignificant portion of the reported loot. The study seeks to investigate and determine the legal challenges that impede the EACC and the ARA from achieving significant recoveries of assets acquired through corrupt conduct. The study utilized doctrinal and historical research methodologies.

Some of the legal challenges identified include lack of clear demarcation of their mandates which occasion institutional overlaps, antagonism, sibling rivalry, and parallel investigations. The EACC is yet to achieve full insulation against political patronage which has prejudiced its stability and its jurisprudence. Its lack of prosecutorial powers has also compromised its autonomy and independence. In addition, Kenya's legal frame work for cross border and international asset recoveries is inadequate, rendering problematic the role of the EACC in international recoveries with respect to receiving and providing enforcement cooperation. Also to blame is the problem of culture and the value system in the Kenyan society since it appears that Kenyans have made peace with corruption and they tolerate it. In addition, there is the problem of conceptualization with respect to Kenya's approach to handling corruption, as well as conceptual confusion around the formation of the EACC, its role and the mandates of its top leadership, both of which have occasioned instability at the EACC as an institution. The research fills the gap in literature on the efficacy of the EACC in asset recovery, and its findings will assist policy makers and legislators in identifying the most appropriate legislative reforms.

CHAPTER ONE

INTRODUCTION: A GENERAL OVERVIEW AND OUTLINE

1.1 Introduction and Background to the Study

There is a general agreement amongst scholars and academic commentators on the definition of 'assets recovery,' the rationale behind it and its variant forms. It has been defined as the procedure through which proceeds of corruption and related offenses/ crimes are identified, recovered and returned to the country of origin.[1] An effective asset recovery regime is therefore a crucial tool in combating economic crimes, a disincentive for engaging in corrupt conduct and fostering public confidence in the government.[2]

The process of asset recovery involves collection of intelligence, evidence and tracing of the assets, securing the assets, court process, enforcing orders and ultimate return of the assets.[3] Asset recovery in Kenya is a shared responsibility which involves the Financial Reporting Centre (FRC), Ethics and Anti-Corruption Commission (EACC), the Office of the Director of Public Prosecutions (ODPP), Asset Recovery Agency (ARA) and the police. The process is initiated by the police or the EACC who investigate and trace assets. The EACC or the State prosecutors then proceed to the courts, where they request measures to freeze, seize and confiscate the traced

[1] African Union, '3rd Edition of the African Anti-Corruption Dialogue: Towards a Common African Position on Asset Recovery" (*African Union*, October 2019).<https://au.int/pt/node/37380> accessed13December 2019.
[2]Awamu Ahmada Mbagwa, 'The Role of Procedural Laws in Asset Recovery: A Roadmap for Tanzania' (Master of Laws thesis, University of the Western Cape 2017) 18.
[3] The World Bank Group, 'Module 5: Asset Recovery Process and Avenues for Recovering Assets' (*StAR Initiative*, June 2018) 4. <http://pubdocs.worldbank.org/en/824561427730120107/AML-Module-5.pdf>accessed 17 March 2020.

assets.[4] There is no particular state agency charged with managing the assets leaving their management to the ARA, EACC and ODPP.[5]

There are two major types of asset recovery methods: criminal forfeiture and civil forfeiture. The latter is also known as non-conviction-based forfeiture.[6] The distinction between the two is based on whether a conviction is a necessary precondition to the recovery proceedings.[7] Civil forfeiture involves institution of civil proceedings for recovery of the assets. The distinguishing feature is that the applicant is not obliged to allege the commission of any specific criminal offence; all the applicant must point out is the unlawful conduct by which the asset was obtained.[8] For criminal forfeiture, on the other hand, a criminal conviction is required and the ultimate order of confiscation is usually a component of the sentence.[9]

In addition to these two forfeiture methods, there is administrative forfeiture, which is least common. The forfeiture is not contested and does not involve the judicial system. It majorly occurs when a law enforcement agency seizes a certain asset based on a probable cause to believe that the asset is subject to forfeiture.[10] The seizing authority is required to notify persons whom it has reasons to believe may be having some interest in the seized asset. If the notified

[4] Implementation Review Group, 'Review of implementation of the United Nations Convention against Corruption' Tenth session, Vienna, 27-29 May 2019 8.
[5] Ibid.
[6] As a result, 'criminal forfeiture' also means 'criminal confiscation'; 'civil forfeiture' also means 'civil confiscation'; 'non-conviction based forfeiture' also means 'non-conviction based confiscation.'
[7] Stefan D. Cassella, 'Choose your weapon: Is civil forfeiture really necessary, or is it an undesirable shortcut to real law enforcement?' (2018) 21 (3) Journal of Money Laundering Control 340.
[8] *Assets Recovery Agency v Pamela Aboo; Ethics &Anti-Corruption Commission (Interested Party*) [2018] eKLR 63 *delivered on 13th day of November 2018.*
[9] The World Bank Group (n 3).
[10] Jean B Weld, 'Forfeitures Laws and Procedures in the United States of America' 146th International Training Course Visiting Experts Papers Resource Material Series No. 83. 19.

persons do not come forward to challenge the seizure, within the stipulated timelines, the asset is summarily forfeited to the state.[11]

Key terminologies in the asset recovery discourses are tracing, freezing, seizing and confiscation or forfeiture. Tracing refers to the process by which investigators 'follow the money.' It involves carrying out financial investigations during which the investigators get to establish a person's assets, scrutinize the amounts generated as a result of a criminal activity and follow its trail.[12] In addition, asset freezing refers to a legal process under which a defendant is prevented from dissipating a particular asset from beyond a court's jurisdiction pending the determination of proceedings.[13] Asset seizure refers to the physical restraint of a property or the transfer of custody or control from the possessor or the owner to the government.[14]In the asset recovery discourse, the term 'forfeiture' is used interchangeably with the term 'confiscation.'[15]It refers to the permanent deprivation of assets by a court order without compensation to the holder.[16]

Regionally, asset recovery has been a major concern for African states which have to these effect undertaken legislative measures to facilitate asset recovery. There is a host of treaties which have been ratified to enhance recovery of illegally acquired assets and returning them to the legitimate owner.[17] These treaties require technical cooperation and assistance in recovery procedures

[11] Ibid.
[12] Center for the Advancement of Public Integrity, 'What is Asset Tracing?: A Primer on "Following the Money" for Integrity Practitioners and Policymakers' 1 (*CAPI*, August 2016). <https://www.law.columbia.edu/sites/default/files/microsites/public-integrity/files/what_is_asset_tracing_-_capi_issue_brief_-_august_2016.pdf>accessed 17 March 2020.
[13] The STANDS4 Network, 'Definitions for asset freezing' (*STANDS4 LLC*, 2020) <https://www.definitions.net/definition/asset+freezing>accessed 17 March 2020.
[14] Asset Forfeiture Attorney, 'What is the Difference Between Asset Seizure and Asset Forfeiture?' (*Asset Forfeiture Attorney* 2018) <https://www.assetforfeituredefender.com/resources/what-is-the-difference-between-asset-seizure-and-asset-forfeiture>accessed 17 March 2020.
[15] As a result, 'criminal forfeiture' also means 'criminal confiscation'; 'civil forfeiture' also means 'civil confiscation'; 'non-conviction based forfeiture' also means 'non-conviction based confiscation.'
[16] The World Bank Group (n 3) 5. The order can also be made by any other competent authority.
[17] African Union Convention on Preventing and Combating Corruption and Related Offences (2003, AU Convention); United Nations Convention against Corruption (2003, UN Convention or UNCAC); SADC Protocol

initiated in other member states as well as mandating the states parties to take legislative measures to freeze foreign accounts and facilitate repatriation of these assets to the countries of origin.[18] African states have also made a resolution to ensure that all the financial resources lost through illicit capital flight are identified and returned to Africa.[19]Later declarations by the AU have sought to abolish bank secrecy jurisdictions, ensure declaration of assets by public officials and establish transparency and efficacy in the recovery and the repatriation of stolen assets back to Africa.[20]

Locally, the Government of Kenya has recently taken bold steps towards curbing money laundering by signing bilateral agreements aimed at enhancing recovery of illegally acquired assets. In March and December 2018, Kenya signed bilateral agreements with Jersey, the UK and Switzerland seeking diplomatic assistance in recovering proceed of crime which had been kept illegally in tax havens.[21] In July 2018, a similar agreement was signed by the Swiss President who promised to return funds that were illegally acquired and stashed in Swiss banks.[22] These arrangements targeted recovery of stolen assets majorly proceeds of mega scandals namely the Anglo-Leasing scandal, the Chickengate scandal, the Goldenberg scandal and the NYS I and NYS II scandals.[23]

In addition, a legal framework for asset recovery has been put in place providing intricate procedures on recovery and establishing a well to do institutional framework. The ARA and the

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against Corruption (2001, SADC Protocol); ECOWAS Protocol on the fight against corruption (2001, ECOWAS Protocol) and UN Convention against Transnational Organized Crime (2000, UNTOC).

[18] The African Union Convention on Preventing and Combating Corruption (August 05, 2006) The Treaty was adopted on 1st July 2003 and it came into force on 5th August 2006.

[19] Assembly Special Declaration on illicit Financial Flows. (2015). The adoption followed consideration of the report of the High Level Panel on Illicit Financial Flows.

[20] The adoption of the declaration was preceded by the declaration of 2018 as the African Anti-Corruption Year.

[21] Duncan Omondi, 'Kenya must do more than just find the money' (*Institute for Security Studies*, 18 June 2019) <https://issafrica.org/iss-today/kenya-must-do-more-than-just-find-the-money>accessed 7 December 2019.

[22] Ibid.

[23] Duncan E Omondi Gumba, Regional Coordinator for East and Horn of Africa, ENACT project, ISS Nairobi.

EACC have been empowered to secure assets that are suspected to have been acquired illegally or with illegally acquired finances. The law provides for an avenue through which ARA can recover and preserve certain properties, if it has reasonable grounds to believe that the assets have been used or are being intended for use in the commission of an offence or the property concerned is proceeds of crime.[24] The EACC has been empowered to forfeit unexplained assets acquired as the result of corrupt conduct.[25] There are several institutions which have been empowered to facilitate asset recovery, one of them being the Financial Reporting Centre whose major aim is to help in identifying proceeds of crime and combating money laundering.[26] In addition to this is the Anti-Corruption and Economic Crimes division of the High Court, designed to specialize in economic crimes.

The Kenyan government has recently placed asset recovery at the top of the priority list and much discourse has brought into focus the measures being undertaken by the state agencies to achieve this goal. The EACC has been in the limelight for past three years for its measures, initiative and steps taken to recover assets acquired through corrupt conduct. Public reports, press releases and information from media paint a picture of a commission which is taking no chances as far as recovery of illegally acquired assets is concerned.[27] In May 2019, the Commission had recovered 19 corruptly acquired assets worth Kshs 2.7 billion in the past four months alone. By 16th July 2019, the commission had filed around 400 cases in court seeking

[24] Proceeds of Crime and Anti-money laundering, Chapter 59B s.82.
[25] Anti-corruption and Economic Crimes Act, 2003, s. 55.
[26] Proceeds of Crime and Anti-money laundering, Chapter 59B, s.21.
[27] Everlyne Judith Kwamboka, 'Government's fight against corruption focuses on Sh10 billion in assets recovery' *Standard* (Nairobi, 9 September 2018) 4. (The article discussed how the EACC was pursuing senior officer and politicians in the quest to repossess assets worth more than Sh10 billion acquired using taxpayers' money). See also Nyambega Gisesa, 'Day of reckoning as State moves to repossess looted assets' *Daily Nation* (Nairobi, 5May 2019) 11. (The article discussed how the government was moving aggressively against those implicated in corrupt dealings by charging them and seeking to seize their properties).

recovery, seizure and confiscation of unexplained assets worth over Kshs. 10 billion.[28]To some extent, EACC has made some recognizable achievements in the recovery of illegally acquired assets, through court proceedings and out-of-court settlements. In the financial year 2018-2019, the Commission recovered public assets amounting to Kshs. 3.1 billion were recovered.[29]

These achievements notwithstanding, however, there is overwhelming evidence to suggest that the amount of the recoveries being reported constitute a small portion of the real loot. Although the commission has declared its success in the recovery of illegally acquired public land, the recovered land is a small proportion of the total identified by the Ndung'u Commission.[30] In the regional arena, although upto $ 50 billion has been looted from Africa, only a small proportion of the stolen assets have been recovered and repatriated to the county of origin.[31] In 2016, the commission seized assets worth Sh700.6 million out of the total Sh3.86 billion under scrutiny in the year to June 2016, translating to a recovery rate of 18 per cent.[32] In 2015, the Commission had seized a 3.6 per cent of the total amount put under investigation in the year to June 2015.[33] In 2018, the commission recovered illegally acquired assets worth Kshs. 352, 185, 804.00.[34]

The recoveries are very insignificant if the data on the estimated amount the county loses to graft annually is anything to go by. The commission believes that Kenya losses a third of its state

[28] Twalib Mubarak, 'EACC makes gains in asset recovery' *The Star* (Nairobi 16 July 2019) 7.
[29] EACC, Public Assets recovered in 2018-2019 Financial Year 1-3.
[30] ICPAK, 'The Current Challenges in Enforcing the Anti-Corruption and Economic Crimes Act' 6. <https://www.icpak.com/wp-content/uploads/2015/09/The-Challenges-In-Enforcing-the-Anti-Corruption-and-Economic-Crimes-Act.pdf>accessed 7 December 2019.
[31] Mat Tromme, 'Toward a Meaningful "Common African Position on Asset Recovery"' (*Bingham Centre for the Rule of Law*, 27 September 2019)<https://binghamcentre.biicl.org/comments/63/toward-a-meaningful-common-african-position-on-asset-recovery>accessed 7December 2019.
[32] David Herbling, 'EACC says recovers Sh18 out of every Sh100 stolen from taxpayer' *Business Daily* (Nairobi, 27 November 2016) 8.
[33] David Herbling, 'EACC records worst assets recovery in four years' *Business Daily* (Nairobi, 12 February 2016) 6. EACC recovered assets worth 140.2 million out of a total of Ksh 3.86 billion put under probe in the year to June 2015.
[34] EACC, Report of activities and Financial statements for the Financial year 2017/2018 for the Ethics and Anti-Corruption Commission (EACC) 38.

budget to corruption annually, which is approximately $6 billion.[35]Similarly, the US Ambassador to Kenya believes that the county loses Sh. 800 billion to graft annually, which translates to 30 percent of her budget.[36]

1.2 Problem Statement

Kenya has a seemingly robust legal framework on asset recovery comprising of bilateral treaties, the Proceeds of Crime and Anti-money laundering Act (POCAMLA) and the Anti-corruption and Economic Crimes Act (ACECA). The framework provides intricate procedures on asset recovery and powerful institutions like the EACC and ARA. It is expected that through this framework, the two institutions should be efficacious in recovering a significant portion of the reported loot.

However, there is overwhelming evidence to suggest that the amount of the recoveries being reported constitute an insignificant portion of the real loot. In 2016, the commission seized assets worth Sh700.6 million out of the total Sh3.86 billion under scrutiny, translating to a recovery rate of 18 per cent. In 2015, the Commission had seized a 3.6 per cent of the total amount put under probe in the year to June 2015. In 2018, the commission recovered illegally acquired assets worth Kshs. 352, 185, 804.00.

In response to this problem, the study proposes to investigate several options for making the two institutions more efficacious in recovering assets. It will do so by investigating the efficacy of the Kenya's legal framework on asset recovery and examining the legal challenges that impede EACC and ARA from achieving significant recoveries of assets. It will also identify any positive lessons Kenya can learn from the UK's experience on asset recovery.

[35] Duncan Miriri, 'Third of Kenyan budget lost to corruption: anti-graft chief' (*Reuters,* 10 March 2016) 4.
[36] John Maylord, 'Country Loses Sh. 800 Billion Annually to Graft' *Kenya News Agency* (Nairobi, 14June 2019) 11.

1.3 The Justification of the Study

The significance of the study cannot be overemphasized, considering its implications on the implementation of the national values and principles and the realization of social-economic rights. The study is in furtherance of Vision 2030, especially the political pillar, in which the Government has intimated her interest to enhance transparency and accountability in governance by strengthening the legal framework for anti-corruption.[37] In addition, the government has planned to carry out structural reforms with the aim of expanding governance and anti-corruption in investigation and recovery of corruptly acquired assets.[38] It will also enhance the efficacy of the EACC, which is the Constitutional body with the primary responsibility to ensure compliance with chapter six with respect to fighting corruption.[39]

Furthermore, the study will be advancing the World Bank's view that the seizure and recovery of the proceeds of corruption is a powerful tool to combat corruption.[40] Kenya being a developing country and being vulnerable to the devastating impact of corruption in terms of slowing economic growth and development, the study will chiefly combat corruption by sending a strong message that corrupt officials will be deprived off their illicit gains.[41] To this end, the study will seek to enhance the efficacy of the Kenya's legal framework with respect to attaining a significant recovery of assets acquired through corrupt conduct and enhance lawful utilization of public resources.

[37]Government Printer, *Kenya Vision 2030: A Globally Competitive and Prosperous Kenya* p. xiii.
[38]Ibid 10.
[39]Constitution of Kenya 2010, Art. 79.
[40] JP Brun, L Gary, C Scott, K Stephenson, *Asset Recovery Handbook: A Guide for Practitioners* (2011, the World Bank) Executive Summary.
[41] Ibid.

1.4 Statement of Objective

1. To investigate the efficacy of the Kenya's legal framework with respect to enhancing the recovery of assets acquired through corrupt conduct.
2. To examine the legal challenges that impede EACC and ARA from achieving significant recoveries of assets acquired through corrupt conduct.
3. To examine the extent to which the UK's experiences on asset recoveries provide lessons which Kenya can emulate.

1.5 Research Questions

1. To what extent is Kenya's legal framework efficacious with respect to enhancing the recovery of assets acquired through corrupt conduct?
2. What are the legal challenges that impede EACC and ARA from achieving significant recoveries of assets acquired through corrupt conduct?
3. To what extent does the UK's experience on asset recoveries provide lessons for Kenya to emulate with a view to enhance asset recovery?
4. What are the necessary amendments and reforms on Kenya's legal framework with respect to achieving an efficacious legal framework for asset recovery?

1.6 Theoretical Framework

The study will be premised on two theories namely; the Rational Theory of Institutions and Theory of Justice according to Robert Nozick.

1.6.1 Rational Choice Theory of Institutions

The study employs the Rational Choice Theory of Institutions. The theory will be instrumental in arguing that how an institution is structured automatically defines the outcome of the institution.

The theory underscores the argument that the manner in which the two Acts of parliament structures the ARA and the EACC has a loophole that has occasioned serious information asymmetry and lack of transparency and accountability between the two institutions. The theory was propounded by Gary Becker, Kathleen Thelen and Mancur Olson.[42] The proponents argue that members of an institution have preferences and interests to protect which might differ with that of the organization. Any decision by any members consists of rational actions given by the actors' environments including the principal appointees, politics, professional conduct, expectations and other predetermined rules.[43]

The theory argues that the ability of an institution to make rational choices is informed by three conditions. One; the institution must be able and free to exercise its own choice and preference.[44] Two; the choices of the institution ought to manifest consistency.[45] Lastly, the institution ought to have complete information about the relevant data for making any decision.[46] The theory will be helpful in arguing that the structural foundation and the design of the EACC and ARA on various issues determine the actions and the conduct of the institutions in asset recovery.

1.6.2 Robert Nozick's Theory of Justice

Robert Nozick in his book *Anarchy, State and Utopia*[47] propounds that a minimal state (a "night watchman state") is one whose functions are limited to the protection against theft, force, fraud

[42] Peter A. and Rosemary T., 'Political Science and the Three New Institutionalisms' (1996) 44 Political Studies 936.
[43] Calvert, R.l., 'The Rational Choice Theory of Institutions: Implications for Design' (1995) 43 Institutional design 63.
[44] Lise Rakner, 'Rational Choice and the Problem of Institutions: A Discussion of Rational Choice Institutionalism and Its Application by Robert Bates' (1996) 6 Working Paper, Chr. Michelsen Institute 4.
[45] Ibid.
[46] Elinor Ostrom, 'Rational Choice Theory and Institutional Analysis: Toward Complementarity' (1991) 85 (1) The American Political Science Review 241.
[47] Robert Nozick, *Anarchy, State and Utopia* (Basic Books, New York, 1974) 53.

and enforcement of contracts.[48] He opines that the state should have very minimal interference with the rights of its citizens. Nozick developed a concept of justice which he called the "Entitlement Theory". This theory argues that a person's entitlements to economic goods are just if he is entitled to them by acquisition, transfer, or by through a rectification of an injustice.[49] According to Nozick, in determining whether a distribution of goods is just, one is required to establish if the original acquisition is just.[50]

Nozick's theory is premised on three principles namely; the principle of acquisition which determines the state under which a person can get hold of resources that were previously without ownership.[51]Secondly, Nozick discusses the principle of transfer which considers the methods for transferring ownership and lastly the principle of rectification which seeks to rectify property acquired or transferred unjustly.[52]Nozick's theory proposes that one cannot own property that is not rightly acquired and such sentiments have been echoed under our own constitution. Article 40 (6) provides that the right to property excludes property that has been unlawfully acquired.[53]Nozick's theory of justice will be helpful in advancing the importance of recovering illicit wealth held by people engaging in corrupt conduct.

1.7 Research Methodology

The study will utilize doctrinal and historical research methodologies. With respect to the doctrinal research methodology, it is very suitable when undertaking a critical analysis of a particular legal position. The study shall employ this methodology to analyze the Kenyan legal

[48] Lloyd S, *Introduction to Jurisprudence* (7th Edition M.D.A Freeman) 534.
[49] Van der Veen RJ and Van Parijs P, "Entitlement Theories of Justice: From Nozick to Roemer and Beyond" (1985) 1 Economics and Philosophy 69.
[50] Ibid.
[51] Raymond Wacks, *Understanding Jurisprudence* (Oxford University Press 2012)228.
[52] Ibid.
[53] Constitution of Kenya 2010, Art. 40.

framework for asset recovery by reviewing the structure of the legal provisions, the history behind their enactment and the legal implication of their implementation with respect to creation of rights and duties. It shall also be used to analyze the extent to which the legal framework is at par with the constitutional principles and the right to own property.

The study will conduct a review of relevant literature and secondary sources of data especially Acts of parliament, government reports, text books and policy documents. Lastly, the study will analyze other jurisdictions with a view to identifying any positive lessons which Kenya can learn from more developed democracies like the UK.

1.8 Literature Review

1.8.1 Introduction

The subject of corruption and its proceeds has risen up globally following the adoption of the UN Convention Against Corruption (UNCAC), by the United Nations General Assembly.[54] The recovery of stolen assets is also a fundamental principle in the Convention.[55] It has been established that the amount of public assets lost through corrupt conduct in developing countries is estimated to be around USD 20-40 million yearly.[56] The loss of public assets therefore leads to catastrophic effects in the economies of developing countries.[57] There is therefore an urgent need to recover these proceeds of corruption through asset recovery since this deprives the criminal engaging in corrupt conduct of the proceeds of crime. Regrettably, asset recovery of public assets

[54] Emile van der Does de Willebois, 'Using Civil Remedies in Corruption and Asset Recovery Cases' (2013) 45(3) Case Western Reserve Journal of International Law 616.
[55] Centres of Excellence in Asset Recovery and Training, 'White Paper on Best Practices in Asset Recovery' (2012).
[56] JP Brun, L Gary, C Scott, K Stephenson, *Asset Recovery Handbook: A Guide for Practitioners* (the World Bank, 2011) 1.
[57] Ibid.

obtained through corrupt conduct has always been minimal in comparison to the money being stolen.[58]

In addition, many times even if corruption is identified and exposed, it becomes an uphill task to recover all the assets stolen.[59] Corrupt individuals serving in public offices have always been a step ahead, laundering their criminally acquired assets through financial channels in order to disguise their original illegitimate origins. There is therefore a need for countries to put more resources in the identification, tracing, identification and freezing corrupt assets.

What then explains the use of asset recovery? Asset recovery is used to fight crime through its financial sustenance and to ensure that the illicit wealth is returned to its rightful owner.[60]

The literature review section will look into the works of other authors with a view of establishing what has been written in regard to asset recovery and further examines the efficacy of asset recovery. This section will cover the effectiveness of asset recovery in developing countries, and then look at the stages of asset recovery. The section further considers the standard of proof in asset recovery proceedings.

1.8.2 Effectiveness of Asset Recovery in developing countries

Regionally, Francis Dusabe examines Rwanda's legal regime governing criminal asset recovery with a view to assessing the extent to which her procedural rules allow effective asset recovery[61]. Francis critically examines Rwanda's Law No. 42/2014 enacted in 2015 which governs the

[58] United Nations office on Drugs and Crime, 'Digest of asset recovery cases' <https://www.unodc.org/documents/corruption/Publications/2015/15-05350_Ebook.pdf> accessed on 10th February 2020.
[59] Ibid.
[60] Jesse Mwangi Wachanga, 'Hurdles in asset recovery and fighting corruption by developing countries: The Kenya experience' (2013) Basel Institute on Governance153.
[61] Francis Dusabe, 'Reflections on Rwanda's approaches to crime related asset recovery' (2018) 25 (1) Journal of Financial Crime 71.

recovery of offence-related assets and permits their seizure, confiscation and management. The study asserts that the 2015 law promotes international cooperation hence enabling Rwanda to collaborate with foreign states in the recovery of its assets located in foreign jurisdictions. The study observes that the Rwandan law on asset recovery is silent in relation to the applicable standard of proof in asset recovery. The study further observes that the Rwandan law enacted in 2015 only provides for 18 offences that can be subjected to criminal asset recovery.[62]The study however fails to explain the rationale used to identify 18 offences to which asset recovery can apply to the exclusion of other offences as mentioned in Law No. 42/2014.

Francis concludes that the current asset recovery law enacted in 2015 is not all-inclusive on civil recovery.[63]The study opines that this leads to confusion in the justice system on whether civil recovery can be initiated alongside criminal proceedings or whether the same can be initiated after the criminal process has been concluded. The study recommends a comprehensive legislation governing non-conviction –based asset recovery, which legislation should purpose to adopt best practices from other jurisdictions. The findings of the above study will therefore be instrumental in interrogating the shortcomings of existing legislations in Kenya with regard to asset recovery in corruption cases.

In South Africa, Charles Goredema[64] writes on the South African experience on tracing the proceeds of crime. He holds the opinion that strategies and laws made to trace proceeds of crime in South Africa are not enough and that most of the challenges facing the jurisdiction are policy related. Just like in the Kenyan situation, he concedes that one of the reasons for the adoption of

[62] Ibid.
[63] Ibid 76.
[64] Charles Goredema, 'Tracing Proceeds of Crime in Southern Africa: Challenges and Milestones' (*Institute for Security Studies*, June 2006) <https://issafrica.org/chapter-7-tracing-the-proceeds-of-crime-in-southern-africa>accessed 14December 2019.

the Proceeds of Crime Act 2002 in England and Wales was the low level of recovery of proceeds of crime.[65] He places more premium on legislative prohibitions on data sharing which has hindered co-ordination and intelligence exchange between major stakeholders. With respect to cross border asset recovery, he points out that a major challenge is the immunity normally vested in heads of state.

In Nigeria, Ehi Eric Esoimeme[66] sought to give an analysis of frameworks that assist in asset tracing and recovering stolen assets in Nigeria. The study finds the Nigerian regime on asset recovery to be inefficient and argues that Nigeria can learn positive lessons from the experiences of UK and the USA, and emulate the approaches used in the two advanced countries. Under the UK regime, Ehi Eric Esoimeme discusses the efficacy of various processes of recovering assets like the use of investigative orders to trace and identify illicit assets.[67] He further commends the passage of Criminal Finances Bill in 2007 by the UK parliament.

He notes that the bill introduces unexplained wealth orders to help in asset recovery. He concludes that the Nigeria asset recovery scheme can be more effective if Nigeria adopts the approach of the UK and introduces investigative orders to fill the lacuna found in Nigerian anti-corruption legislation.[68]He further makes a case for strengthening the Nigerian asset recovery scheme by enacting comprehensive legislation to provide a domestic legal framework for mutual assistance.

Ehi Eric Esoimeme finds that there are no directives from the Central Bank of Nigeria requiring the financial sector to name the actual owners of companies. The study discovers that the case is

[65] Ibid 43.
[66] Ehi Eric Esoimeme, 'Institutionalising the war against corruption: new approaches to assets tracing and recovery' (2018) Journal of Financial Crime 217.
[67] Ibid 219.
[68] Ibid 220.

however different in the USA where the United States Financial Enforcement Network (FINCEN) requires those in the banking sector to identify the identity of beneficial owners of legal entity customers, as a means of strengthening customer due diligence. The study suggests that such an initiative of identifying beneficial owners of legal entities can be very beneficial when conducting financial investigations.[69]

George Pavlidis in his article on asset recovery details the obstacles faced by countries in initiating international asset recovery procedure and further considers the innovativeness of two legislations enacted in Switzerland to aid in asset recovery proceedings.[70]Pavlidis goes ahead to discuss the federal Law on the Restitution of Assets of Criminal Origin of 2010 (LRAI) which he considers to be the first legislative innovation in Switzerland on asset recovery. He argues that the LRAI was introduced to address some of the impediments that had been experienced in Swiss legal framework while trying to recover the assets of former Haitian president Jean Claude Duvalier. The LRAI's innovativeness is seen in its ability to confiscate illicit wealth by way of an administrative procedure before the Swiss courts.[71]

Furthermore the LRAI places the burden of proof on the holder of illicit asset who is deemed to be corrupt to explain the origin of the assets.[72] Despite the LRAI being progressive in the realm of asset recovery, the author notes that the Act presupposes a prior request of mutual legal assistance which sometimes may prove to be futile due to state structure failure in the requesting country. He asserts that this aspect of the LRAI delays asset recovery procedures especially where the politically exposed persons are still in power.

[69] Ibid 229.
[70] George Pavlidis, 'Asset Recovery: A Swiss Leap Forward?' (2017) 20 (2) Journal of Money Laundering Control 150.
[71] Ibid 151.
[72] Ibid.

Pavlidis further considers the second legislation in Switzerland considered to be progressive in nature than the LRAI. The study reveals that the law on assets of illicit origin adopted on 18th December 2015 addresses assets illegally obtained through corrupt conduct, mismanagement or other crimes.[73] He is of the opinion that the law on assets of illicit origin stands out for two main reasons; firstly it allows the Swiss financial intelligence unit to forward relevant information to other competent authorities in other jurisdictions before the mutual legal assistance procedure is started. Secondly, the law on assets of illicit origin makes provisions for non- conviction based confiscation of assets of illicit origin in administrative proceedings after conforming to the conditions stipulated under the Act.

In conclusion, the review of the available literature demonstrates a gap in literature which this study seeks to fill. Even though few writers have discussed a thing about asset recovery, they have not attempted to explain the efficacy of the Kenya's legal framework in achieving a substantial recovery of looted resources. The most relevant literature examines other jurisdictions like South Africa, Nigeria and Rwanda. Even though their contribution is key to the current study, in the sense that it illuminates on important aspects of any asset recovery regime, the literature says little about the efficacy of EACC and ARA. Importantly, it does not tell us why asset recoveries remain dismal, despite elaborate past legislative reforms which have been introduced with a view to boosting their efficacy.

1.10 Study Hypothesis

The study is based on two hypotheses.

[73] Ibid 153.

1. That the Kenya's legal framework for asset recovery is problematic because the apportionment of responsibilities amongst the stakeholders is intermittent with much overlaps ambiguity and duplication of duties.
2. The unsettled state of the legal framework has occasioned uncertainty in the law implementation and has decelerated relevant state agencies' ability to recover assets acquired through corrupt conduct.

1.11 Chapter Breakdown

Chapter One: Introduction.

The chapter lays out the general structure and overview of the entire study. It comprises the introduction and background of the study which essentially brings that theme of the study into the Kenyan context. It also contains the problem statement which outlines the legal problem under investigation. It further contains the hypothesis of the study, which outlines the fundamental assumptions on which the study is founded. Also, the chapter contains the theoretical framework, which outlines the major legal theories which influence the major arguments being propounded by the study.

Chapter Two: Historical Development of the Law on Asset Recovery in Kenya

It will majorly analyze the international regime on asset recovery and how it has informed or influenced the development of the Kenya's legal framework to its current state. The chapter will chiefly seek to underscore the inefficacy of the legal framework law throughout these different regimes, the reasons for each specific amendment and how these reforms impacted the law on the recovery of assets.

Chapter Three: Kenya's legal framework on Recovery of Assets acquired through corrupt conduct

It will offer a critical analysis of the Kenya's legal, institutional and policy framework on asset recovery, with a view to examining its efficacy in recovering assets acquired through corrupt conduct. It will examine the actual implementation of the law, the functioning of the various institutions and the relationship of the key stakeholders in the entire process, with a special focus to the role of the EACC and the ARA.

Chapter Four: Lessons from the UK's legal framework on Asset Recovery

The chapter offers the justification for the choice of the jurisdiction. It then goes into analyzing the implementation of the law on asset recovery in the two jurisdictions, with a view to identity its positive attributes and any positive lessons which Kenya can emulate from their experiences.

Chapter Five: Conclusion and Recommendations

The chapter offers the conclusion of the study and the recommendations of the study.

CHAPTER TWO

HISTORICAL DEVELOPMENT OF THE LAW ON ASSET RECOVERY IN KENYA

2.1 Introduction

This chapter analyzes the international regime on asset recovery with a view to investigating how it has informed or influenced the development of the Kenya's legal framework. Secondly, it interrogates the historical development of the Kenyan framework since independence to its current state. The interrogation identifies all past legislative reforms, the reasons behind them and how the reforms impacted the law on the recovery of assets.

The chapter has two parts. Part one analyses the development of international and regional instruments on asset recovery. Part two analyses the historical development of Kenya's legal regime in different periods: The period 1950-2002, the period 2003-2007, legal challenges behind the 2007 legislative amendment, the 2007 amendment, the period 2008-2013 and the period 2014-to date.

2.2 Development of International and Regional Instruments on Asset Recovery

At the international level, specific focus on asset recovery can be traced to the 2000 United Nations' resolution to strengthen repatriation of assets. The declaration sought to sanction international cooperation in curbing illegal transfer and facilitating repatriation of illegal funds to their counties of origin.[1] In the same year, the United Nations enacted the Convention of Palermo against transnational organized crime.[2] During the negotiations towards the enactment of an

[1] United Nations, General Assembly, Res. GA 54/205, 27 January 2000.

[2] Convention Against Transnational Organized Crime, adopted in New York on 15 November 2000 and signed during the Palermo Conference, 12-15 December 2000. Document A/55/383.<http://www.uncjin.org/Documents/Conventions/ dcatoc/final_documents/383f.pdf> accessed 14 April 2020.

international convention against corruption, key participants underscored that the issue of asset recovery was a fundamental aspect of the would-be convention.[3] The negotiations culminated to the enactment of the UN Convention against corruption of 2003.

To a large extent, the 2003 Convention against corruption was a major milestone on the establishment of an international framework on asset recovery. The Convention has an entire chapter dedicated to asset recovery.[4] It was the first international convention to ratify the binding principle which requires that illegally acquired assets be returned. It treats asset recovery as a fundamental principle and requires all state parties to offer assistance and cooperation in facilitating restitution of illegally acquired assets.[5] The Convention, which has been ratified by Kenya,[6] obligates state parties to offer technical assistance and international cooperation in preventing corruption and in the recovery of proceeds of crime.[7] Its scope covers freezing, confiscation and seizure of the illegally acquired assets.[8]

Moreover, there has been significant development on the institutional framework on anti-corruption at the international level. One of them is the International Anti-Corruption Coordination Centre which in an international platform bringing together specialist anti-corruption agencies around the world.[9] Its key objectives include offering assistance,

[3] Report of the Ad Hoc Committee for the Negotiation of a Convention Against Corruption on its second session, Vienna, 17-28 June 2002, UN Doc. A/AC.261/7, p. 3.
[4] Leonardo Borlini, 'International Asset Recovery: Origins, Evolution and Current Challenges' (2014) 2 Diritto Del Commercio Internazionale 403.
[5] UN Convention Against corruption, 2005, Article 51(Adopted 31 October 2003, entered into force 14 December 2005).
[6] Kenya was the first country to sign and ratify the UNCAC when the convention was opened for ratification in Merida, Mexico, on 9 December 2003.
[7] UN Convention Against corruption, 2005, Article 1(b) (Adopted 31 October 2003, entered into force 14 December 2005).
[8] Ibid, Article 3 (1).
[9] NCA National Crime Agency, 'International Anti-Corruption Coordination Centre' (*NCA National Crime Agency* 2020)<https://nationalcrimeagency.gov.uk/what-we-do/crime-threats/bribery-corruption-and-sanctions-evasion/international-anti-corruption-centre>Accessed 14 April 2020.

coordination and collaboration in tackling corruption allegations and investigations. Although Kenya is not an active participant, she has nonetheless supported the establishment, and has promised to cooperate and work closely with the centre.[10]

A regional framework for asset recovery with respect to the African continent was established in 2006, with the ratification of the African Union Convention on Preventing and Combating Corruption (AU Convention). The convention, to which Kenya is bound,[11] requires member states to establish, maintain and strengthen independent national anti-corruption agencies.[12] In a very elaborate manner, the convention enumerates corruption related offences including illicit enrichment, bribery, concealment of proceeds and the breach of fiduciary duties.[13] It seeks protection for whistleblowers[14] and requires public officials to declare their wealth.[15]

Sub-regionally, the East Africa regional block has also made commendable strides in the pursuit of an anti-corruption framework. East Africa member states have established the East Africa Association of Anti-Corruption Authorities, which is mandated to enhance the efficacy of state agencies in fighting corruption in the sub-region. In the meantime, the partner states are in the process of finalizing drafting the East African Community Protocol on Preventing and Combating Corruption.[16]

[10] Transparency International UK, 'Commitment Data' (Transparency International UK December 2019) <https://www.anticorruptionpledgetracker.com/commitment-data/> accessed 14April 2020.
[11] Kenya ratified the AU Convention on 3 February 2007.
[12] The African Union Convention on Preventing and Combating Corruption, 2006, Article 5(Adopted 01 July 2003, entered into force August 05 August 2006).
[13] Ibid, Article 4.
[14] Ibid, Article 20 (4).
[15] Ibid, Article 7.
[16] Julie DiMauro, 'East African nations closer to regional anti-graft protocol but divisions remain' (*The FCPA Blog* 2014).<https://fcpablog.com/tag/east-african-community-protocol-on-preve/>accessed 14 April 2020. Although the Draft Protocol has been around for some considerable time since 2014, its signing has been delayed mainly over divisions on whether the respective state agencies should have prosecutorial powers.

These international, regional and sub-regional instruments have greatly informed and influenced the trajectory of the Kenyan legal framework on asset recovery. Scholars have argued that most of anti-corruption laws were enacted since 2003, the very year Kenya signed and ratified the UNCAC.[17] Indeed, the ACECA 2003 and the Public Officer Ethics Act, 2004 were enhancing and promoting the spirit of the UNCAC.

2.3 Historical development of Kenya's legal framework on Asset Recovery

2.3.1 Legislative Interventions in the Period 1950-2002

The history of Kenya's legal framework on anti-corruption can be traced to 1956, when the Prevention of Corruption Act, 1956 (repealed) was enacted. Although the Act remained in force until 2003, its lifetime was faced with serious legal challenges which rendered its objectives a mirage. To begin with, the Act received little compliance during the post-colonial period, as a result of which it was amended in 1991 with a view to enhancing the penalties for corruption related offences. However, even with the amendments, no single prosecution was done under the Act.[18] In 1993, the president constituted the first anti-corruption squad. However, the squad was disbanded two years later in 1995 before making a significant impact.[19]

With time, it was felt that the Act did not establish a sufficient supportive framework to institutionalize the fight against corruption. This necessitated an amendment to the Act in 1997, through which Kenya Anti-Corruption Authority (KACA) was established. However, two years later, KACA's powers were fatally curtailed by the High Court, when it held that the enabling

[17] AfriMAP, 'Effectiveness of Anti-Corruption Agencies in East Africa Kenya, Tanzania and Uganda' (*Open Society Foundations* 2015) 14.
[18] Africog, 'Five Years On: How effective is the KACC in Kenya's Fight against Corruption' (*African Centre for Open Governance*, 2009) 3.
[19] AfriMAP (n 17) 23.

statutory provisions establishing KACA were contravening the constitution.[20] This ruling preceded disbandment of KACA. Subsequently in August 2001, the president through an executive order established the Anti-Corruption Police Unit (ACPU), within the department of criminal investigations.[21]

2.3.2 Legislative Interventions in the Period 2003 – 2007

Other legislative reforms on anti-corruption laws came in 2003, thanks to the National Rainbow Coalition (NARC) which placed high premium on the fight against corruption. The reforms saw the repealing of the 1956 law and the enactment of two substantive statutes. One of them was the ACECA and the other one was the Public Officer Ethics Act. ACECA established the Kenya Anti-Corruption Commission (KACC) with powers to investigate corruption matters.[22] The Public Officer Ethics Act on the other hand sought to regulate the conduct of public officers and offer a framework for declaring their wealth.

KACC had a well-defined agenda with respect to asset recovery and forfeiture. One of its key responsibilities was a restitutionary function under which the commission was mandated to institute civil proceedings for the purposes of recovering public property from within and outside Kenya.[23] In addition, one of its four directorates was the directorate of Legal Services and Asset Recovery.[24]

However, with time, it was evident that KACC had inherent legal challenges which diminished its ability to recover assets in corruption matters. One of the key challenges was that the commission did not have an express constitutional mandate to prosecute corruption cases. In

[20] Stephen Mwai Gachiengo & Albert Muthee Kahuria v. Republic, H. C. Mis Application No. 302 of 2000 (*delivered on 22 December 2000*).
[21] AfriMAP (n 17) 20.
[22] Section 6 of the Original ACECA as it was in 2003.
[23] Anti-Corruption and Economic Crimes, 2003, Act s 7.
[24] Pedro Gomes Pereira, Selvan Lehmann, Anja Roth, Kodjo Attisso, 'South Africa Anti-Corruption Architecture' (2012) Basel Institute on Governance, International Centre for Asset Recovery 68.

addition, ACECA failed to suggest that the commission would have powers to prosecute.[25] This single challenge dealt a major blow to the commission and has been used to explain the inability of the commission to successfully prosecute cases emanating from the Anglo-Leasing and the Goldenberg scandals.[26] Although the commission could initiate investigations into alleged corruption-related crimes, those deserving prosecution were recommended to the AG, who then had the exclusive mandate with respect to the conduct of criminal prosecutions.

In several other aspects, the law did not empower the commission to carry out functions which were incidental to its mandate. For instance, the commission could not carry out lifestyle audits. At the same time, the judiciary had severally questioned the powers of the commission to carry out investigations. At one time, the commission was stopped from investigating Anglo-Leasing contracts.[27] In addition, the law did not ventilate the roles of the AG in the entire process, occasioning cooperation and autonomy challenges. In some cases, the AG would blatantly refuse to prosecute forwarded cases and in other times he would unjustifiably return the files back to the commission for further investigation.[28]

More efforts by the government to enhance the efficacy of the KACC in asset recovery were done in 2006. The efforts saw the restructure of the Department of Public Prosecutions into three sections.[29] One of the sections accommodated economic crimes, anti-corruption cases, asset forfeiture and serious fraud. The restructuring seemed to group together 'like objects'[30]. In the same year, a special Anti-Corruption prosecution section was established within the State Law

[25] James T. Gathii, Kenya's Long Anti-Corruption Agenda – 1952-2010: Prospects and Challenges of the Ethics and Anti- Corruption Commission Under the 2010 Constitution. (2009) Albany Law School, Legal Studies Research Paper Series No. 35 of 2010-2011. 36. <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1718620.>accessed 13 April 2020.
[26] Pedro Gomes Pereira, Selvan Lehmann, Anja Roth, Kodjo Attisso (n 24) 67.
[27] Ibid 70.
[28] Ibid.
[29] Government Printer, Governance Strategy for Building a Prosperous Kenya, November 2006 p. 8.
[30] These measures were made to enhance the investigative capacity of the KACC and the AG.

Office. The function of the unit was to prosecute matters emanating from the Goldenberg Commission and the Commission on Illegal Allocation of Public Lands. With these initiatives, the KACC made significant achievements in preservation of property and money acquired through corrupt conduct.[31]

2.3.3 Legal Challenges behind the 2007 Legislative Amendment

With time, there were concerns that the powers of the director in the investigation process were open to misuse. This criticism was directed on the manner in which he issued notices in contemplation or commencement of investigation. At that time, his powers on issuance of notices were rather basic and the law did not prescribe the contents of the notice. All what the law required was for the director to make an open (and blanket) demand requiring the suspect to explain the ownership details of all his properties.[32]

However, this requirement was considered very general and open to misuse in several aspects. It failed to safeguard proprietary rights of persons against whom complaints had been filed.[33] As a result, it was felt that there was a need to check against arbitrariness and possible misuse of these powers. It was proposed that one way of redressing this challenge was by imposing more obligations on the director with respect to the notices. Members of parliament believed that this could be cured if the director was to specify in the notice the reasons for suspecting and the specific properties subject to the notice.[34]

In addition, there were underlying procedural challenges with the conduct of the commission in obtaining records and property from suspected persons. The commission could issue a notice to

[31] Government Printer, Governance Strategy for Building a Prosperous Kenya, November 2006 p. 10.
[32] Section 26 (1) of the original ACECA in 2003.
[33] Kenya National Assembly Official Record (Hansard) 4 October 2007 p. 4368.
[34] Ibid.

any person requiring them to provide or supply specified information and records.[35] However, it was being felt that the provision did not provide enough safeguards against abuse and was operating against the rules of natural justice.[36] It was reasoned that issuing such a crucial notice without adequate involvement of the person was equivalent to condemning the suspects unheard.[37] To incorporate more transparency, it was felt that the commission should be required to obtain an appropriate court order, with notice to the affected parties.

At the same time, there were legal huddles on how to handle associates of suspected persons. It had been observed that looters rarely registered properties in their names but instead through associates. The law required the commission to issue a written notice to the associate requesting them to supply certain information within a specified period of time.[38] With time, this position had become a real challenge. Practice had proved that such notices were doing more harm to asset recovery attempts since the associates were taking that time to hide or manipulate evidence.[39] Legislators believed that this could be addressed by permitting the commission to obtain *ex parte* court orders requiring an associate to provide such information.

In addition, there were issues on whether information given by a suspect in the response to a notice could be used as evidence against them in other proceedings. The law then provided that such evidence could be used in other criminal proceedings.[40] And just then, a court had ruled against the use of the evidence in criminal cases on grounds that it violated the presumption of innocence, the right against self-incrimination and the right to silence.[41] Law makers felt that

[35] Section 28 (1) (a) of the Original ACECA in 2003.
[36] Kenya National Assembly Official Record (Hansard) 4 October 2007 p. 4372.
[37] Kenya National Assembly Official Record (Hansard) 4 October 2007 p. 4372.
[38] Section 27 (1) of the Original ACECA in 2003.
[39] Kenya National Assembly Official Record (Hansard) 4 October 2007 p. 4370.
[40] Section 30 of the Original ACECA 2003.
[41] Kenya National Assembly Official Record (Hansard) 4 October 2007 p. 4375.

such evidence should be used in civil proceedings but not in criminal proceedings. They also held a view that disallowing the use of such evidence in civil proceedings would negate the KACC's function of tracing and recovery of assets.

However, the Committee on Administration of Justice and Leal Affairs held a contrary opinion. It reasoned that an express provision allowing the use of the evidence in civil proceedings was contrary to best practices from Ireland and South Africa, both of which did not admit such evidence in civil proceedings. In essence, the committee sought an express prohibition on using the evidence in criminal proceedings while maintaining silence on whether the evidence could be used in civil proceedings.[42]

Moreover, it was also felt that there were transparency issues surrounding the appointment of the receiver. It was felt that the director's free hand in choosing the receiver left out the views of other interested persons. With this challenge, the legislators proposed to install procedures under which the appointment would be done in a more transparent manner. Members of parliament preferred an infrastructure under which the commission would be required to approach the court for appropriate orders.[43]

With time, the government found that the asset forfeiture provisions could not be used to target past corruption conduct. The AG made proposals with a view to making it possible for the KACC to pursue proceeds of past corruption scandals through the forfeiture procedure. In this respect, the legislators proposed to amend the law with a view to making the forfeiture

[42] Kenya National Assembly Official Record (Hansard) 4 October 2007 p. 4374.
[43] Kenya National Assembly Official Record (Hansard) 4 October 2007 p. 4378.

provisions have retroactive application.[44] The retroactive approach was to be restricted to the civil forfeiture of unexplained assets.

Furthermore, stakeholders had issues with the commissions' unfettered powers with respect to cessation of investigations. The law empowered the commission to decline or terminate ongoing investigations when it deemed fit by simply informing the complainant of the corrupt conduct.[45] It became a concern that these powers were open to misuse in that they sidelined the role and the interests of the AG and other key stakeholders in the anti-corruption agenda.

There was also the need to facilitate asset recovery by incorporating ADR mechanisms in the recovery process. The law did not provide avenues through which the commission would make out of court settlements with respect to civil proceedings.[46] It was felt that the commission should be given powers to negotiate matters before instituting them in court as well as powers to settle ongoing matters.[47]

2.3.4 Legislative Amendments of 2007

All these legal challenges accompanied by their proposals ended up with the Miscellaneous Amendment Statute 2007. The law was eventually amended to address these challenges. The commission could obtain ex parte orders against the associate requiring them to supply some information.[48]Where the commission needed to obtain an order on production of records and property, it was now required to make the application with notice to affected parties.[49] Further, the provisions on forfeiture of unexplained assets could apply retroactively and cover past

[44] Kenya National Assembly Official Record (Hansard) 12 September 2007 p. 3915.
[45] Section 25 of the Original ACECA 2003.
[46] Indeed, the original ACECA did not have provisions for negotiation or mediation in the course of asset recovery.
[47] Kenya National Assembly Official Record (Hansard) 13 September 2007 p. 3924.
[48] ACECA, 2003, s 27.
[49] ACECA, 2003, s 28.

corrupt conduct.[50] With respect to cessation of investigations, the Commission was now required to consult with the AG, the relevant Minister as well as other interested persons.[51]

With respect to the appointment of a receiver, the process was more transparent as the commission had to obtain the leave of the court before making such appointment.[52] Also, the amendments imposed more obligations to the secretary with respect to issuance of notices during investigations. The secretary was now required to specify the reasons for suspecting and the properties in respect of which the notice was issued.[53] The commission could also settle civil proceedings outside court.[54] Finally, statements and records supplied by a suspect in response to a notice could not be used as evidence in criminal proceedings.[55]

The same legislative intervention saw the amendment of ACECA to introduce the controversial 'Amnesty Clause.' The clause empowered the AG, KACC and the Minister to determine whether continue or terminate investigations on already instituted cases.[56] From the KACC's point of view, the amendment significantly curtailed the commission's investigative process. It is noteworthy that KACC faulted the entire amendment process on the grounds that the amendment was merely sneaked in without proper scrutiny and consultation.[57]

2.3.5 Legal reforms in the period 2008-2013

By 2008, Kenya was facing novel challenges with respect to curbing money laundering. The legislators felt that the civil forfeiture remedy which was then anchored on the Anti- Corruption

[50] ACECA, 2003, s 55 (2) (9).
[51] ACECA, 2003, s 25A (1).
[52] ACECA, 2003, s 56A.
[53] ACECA, 2003, s 26.
[54] ACECA, 2003, s 56B.
[55] ACECA, 2003, s 30.
[56] ACECA, 2003, s 25A.
[57] Ayodeji Gafar, 'Assessing the Strategies of the Defunct Kenya's Anti-Corruption Commission (KACC): Lessons for the Ethics and Anti-Corruption Commission (EACC)' (August 1, 2015) 15.

and Economic Crimes Act was not efficacious in redressing money laundering and that it was prudent to introduce a similar procedure specifically designed to curb money laundering.[58] Consequently, there was an urgent need to strengthen the legal and institutional framework on money laundering. The law makers proposed a regime under which state agencies could freeze and confiscate the instrumentalities of crime through civil forfeiture and confiscation, as well as elaborate procedures for conducting search and seizure.[59]

The enactment of the POCAMLA was a culmination of an elaborate consultative process which brought together various actors in the financial sector. Developments in international instruments on asset recovery were also an underlying rationale for the enactment for the Act.[60] It all started in 2003 when the Minister for Finance constituted the National Task Force on Money Laundering and Combating Finance of Terrorism (NTFMLCFT).[61] The taskforce involved various stakeholders and it held consultative workshops with a view to achieving a fine-tuned piece of legislation.[62]

Besides, the parliament exhibited laxity in the enactment of the anti-money laundering law. Although the legislative process kicked off in October 2006, the bill took three years to be enacted to law.[63] To some extent, the laxity could be attributed to the fear of the unknown and observations from other jurisdictions. Members of parliament criticized the utility of the Bill in the Kenyan context, on the premise that it was not home-grown.[64] Some quarters were

[58] Kenya National Assembly Official Record (Hansard) 8 May 2008 p. 943.
[59] Kenya National Assembly Official Record (Hansard) 8 May 2008 p. 943.
[60] Constance Gikonyo, 'The Kenyan Civil Forfeiture Regime: Nature, Challenges and Possible Solutions' (2020) 64(1) Journal of African Law p.28.
[61] Kenya National Assembly Official Record (Hansard) 8 May 2008 p. 945.
[62] The workshops were held in 2004, 2005 and 2007.
[63] May 8 2008. 945. It was first published in October 2006 and tabled in parliament the following month, November 2006. As fate would have it, the bill lapsed in 2006 and 2007. At the end, it was brought to the house the third time on 8th May 2008.
[64] Kenya National Assembly Official Record (Hansard) 8 May 2008 p. 947.

apprehensive that the act would create problems, similar to those which had been caused by similar laws in the USA.[65]

The enactment of the anti-money laundering law sent shockwaves in the financial sector, and soon regulatory authorities enacted guidelines to enhance compliance with the law. Three supervisory institutions; The Insurance Regulatory Authority (IRA),[66] the Central Bank of Kenya (CBK)[67] and the Capital Markets Authority (CMA)[68] came up with guidelines which essentially placed the responsibility to the board of directors.

Just before the promulgation of the Constitution in 2010, there was a general agreement amongst stakeholders that an overhaul on the powers of the KACC was long overdue. Recent events had been a source of concern for the welfare and the future of the Commission. In 2009, a bill had been presented in parliament threatening to disband the commission.[69] To counter such an eventuality in the future, it was felt that the Commission should be established under the constitution and that it should be granted constitutional powers and independence from the executive.

In addition, stakeholders were bothered by the recent conduct of the AG in the exercise of the prosecution powers. The AG had been selective and discriminatory in the manner in which he delegated his prosecution powers. For instance, although the AG had previously delegated his prosecution powers to the police and the KRA, he was not willing to extent a similar treatment to

[65] The USA laws were the Patriotic Act and the International Money Laundering Abetment and Anti-Terrorism Financing Act of 2001.
[66] The Insurance Regulatory Authority Guidelines to the Insurance Industry on Implementation of the Proceeds of Crime and Anti-Money Laundering Act, 2011.
[67] The Central Bank of Kenya National Payment System (Anti-Money Laundering Guidelines for The Provision of Mobile Payment Services) Guidelines, 2013.
[68] The Capital Markets Authority Guidelines on the Prevention of Money Laundering and Terrorism Financing in the Capital Markets, 2015.
[69] Africog, 'Five Years On: How effective is the KACC in Kenya's Fight against Corruption' (*African Centre for Open Governance*, 2009)14.

KACC.[70] As a result, it was being proposed that the commission should be empowered to prosecute the crimes it investigated.

The other recommendations related to the challenges of ensuring declaration of wealth by senior public officials. The process was unstructured, it did not effectively target the senior officials and the declarations were not accessible by the public. To this end, stakeholders made proposals which essentially sought to streamline the then wealth declaration system. It was felt that the function of administering the declarations should be reserved for the KACC and that the wealth declarations be made accessible to the members of the public for scrutiny.[71]

All these concerns were also canvassed before the Commission for the Review of the Constitution of Kenya. Kenyans were articulate that all they needed was an independent anti-corruption commission anchored in the Constitution.[72] The promulgation of the constitution in 2010 brought to an end the agitation for a sound anti-corruption regime. The Constitution established EACC as a constitutional body, thereby replacing the KACC, which lacked such constitutional backing.

In 2010, parliamentarians raised concerns on the safety of the assets and funds recovered by the commission. Although the commission could recovery assets and funds, the law was silent on how the commission was to deal with the recoveries.[73] In a bid to protect the funds and the assets, it was felt that the funds should be remitted to the Consolidated Fund and while the assets

[70] Ibid.
[71] Ibid.
[72] Government Printer, 'The Final Report of the Constitution of Kenya Review Commission' 323. The Report had been approved for issue at the 95th Plenary Meeting of the Constitution of Kenya Review Commission held on 10th February 2005.
[73] Kenya National Assembly Official Record (Hansard) 10 June 2010 p. 27.

surrendered to the permanent secretary, Treasury.[74] These concerns saw the amendment of ACECA in 2010. Through the amendment, the commission was now required to pay funds recovered to the Consolidated Fund.[75]In addition, the commission was now required to surrender assets and properties recovered to the Permanent Secretary to the Treasury.

2.3.6 Legislative reforms in the Period 2014-to date

The promulgation of the constitution kick started significant legislative reforms with respect to the Kenyan anti-corruption regime. Some minor changes followed in 2014, which saw change of terminologies from the 'director' to the 'secretary.' The law provided that the director of KACC was the chief executive officer in charge of its management and direction.[76] However, this was bound to change when the Ethics and Anti-Corruption Act 2011 placed these duties on the secretary to EACC in accordance with the constitution.[77] This meant that all the administrative duties previously reserved for the director were now exercisable by the secretary to EACC.[78]

More legal challenges facing the EACC were revealed by a taskforce which had been formed to review the legal framework for anti-corruption in Kenya. The taskforce,[79] whose membership was drawn from all key stakeholders, found that there were duplication of mandates of the relevant agencies, there was no proper coordination amongst the state agencies.[80] In response to these findings, the president through a presidential directive established a Multi-Agency Team

[74] Ibid.
[75] Anti-Corruption and Economic Crimes Act s 56C. It was brought about by section 78 of the Finance Act, No. 10 of 2010.
[76] Section 8 of the Original ACECA in 2003.
[77] Article 250 (12) of the Constitution of Kenya 2010.
[78] The Statute Law (Miscellaneous Amendments) Act, 2014 (No. 18 of 2014) Schedule on the amendments relation to ACECA.
[79] Government Printer, Task Force on the Review of the Legal, Policy and Institutional Framework for Fighting Corruption in Kenya (2015), see *Gazette Notice* No. 2118 of 30th March 2015.
[80] Caroline Nyaga, 'Enhancing Synergies: The Multi-Agency experience in Fighting Corruption in Kenya' 20th UNAFEI UNCAC Training Programme Participant's Papers 110.

whose mandate was to implement the report of the taskforce.[81]The team draws its membership from the key players in the anti-corruption regime.[82]

From the face of it, the Multi-Agency Team has been effective in redressing unnecessary friction between state agencies responsible for asset recovery and forfeiture. The new arrangement, though not anchored in law, requires the EACC and the DCI to carry out investigations, the police to arrest and KRA to pursue revenue and taxes. With respect to tracing, identifying and freezing, preserving or recovering assets, the team reserves these functions to both the EACC and ARA.[83]

To some extent, the multi-agency approach seems to have made major contribution in the efficacy of the Kenyan framework on asset recovery. By October 2016, 3 billion shillings had been preserved or recovered.[84] The team was behind the formation of the Anti-Corruption and Economic Crimes division of the High Court.[85] Other successful initiatives of the team are the appointment of more special magistrates to handle cases involving corruption and economic crimes as well as establishing a centralized data platform.[86]

Other legislative intervention was the enactment of the POCAMLA in 2010. The Act mainly creates the offence of money laundering and it introduces elaborate procedures and measures for identifying and confiscating proceeds of crime.[87]With time, however, there was a realization that the Act had some inadequacies, which had slowed down the anti-money laundering agenda. For

[81] Government Printer, Report of the Task Force on the Review of the Legal, Policy and Institutional Framework for Fighting Corruption in Kenya (2015).
[82] EACC, ODPP, DCI, NIS, FRC, ARA, KRA and Office of the President.
[83] Caroline Nyaga (n 80) 112.
[84] These achievements were reported by MAT during the National Governance and Accountability Summit at the State House, Nairobi on 18th October 2016.
[85] The establishment was through *Gazette* Notice No. 136 of 11th December 2015.
[86] Caroline Nyaga (n 80) 115.
[87] The Proceeds of Crime and Anti-Money Laundering Act, Cap 59B, Laws of Kenya.

instance, even though the law established the Financial Reporting Centre, there was a strong belief that the Centre was not adequately empowered to discharge its role.[88] For instance, the centre was merely an institution for receiving reports from financial institutions. As such, it had no supervisory roles. And what was more was that even in cases where it cited irregularities in the reports, it had no powers to enforce its recommendations. Thus, the best it could do was to forward its findings to other state agencies for action.[89]

All these concerns were reflected in the Proceeds of Crime and Anti-Money Laundering (Amendment) Act of 2017. With respect to asset recovery, the amendment conferred exclusive mandate on the Asset Recovery Agency to handle all matters involving recovery of proceeds of crime or benefits derived from a money laundering offence.[90] The amendment conferred more powers to the FRC. With these new powers, FRC could supervise the implementation of its findings with respect to unsatisfactory reports. It could issue orders to competent authorities requiring them to suspend or revoke a license of a particular reporting entity.[91] In addition, the centre could now issue directions and warnings to reporting institutions as well as barring certain people from securing employment with reporting entities.[92] These powers are helpful in the fight to recover proceeds of corruption in that they empower and boost FRC's ability to discharge its role.

2.4 The role of the Historical Development

The analysis of the historical development is important for various reasons. It colors the historical context of the existing laws, and it's an appreciation of the past advancements. The

[88] Mark Ochieng, 'Proceeds of Crime and Anti-Money Laundering (Amendment) Act, 2017' (*Cytonn Investments*, September 2017) 2.
[89] Such State agencies were the EACC and the KRA.
[90] The Proceeds of Crime and Anti-Money Laundering (Amendment) Act, 2017 s 21.
[91] The Proceeds of Crime and Anti-Money Laundering (Amendment) Act, 2017 s 4.(Introducing s 24B).
[92] The Proceeds of Crime and Anti-Money Laundering (Amendment) Act, 2017 s 4.(Introducing s.24C).

chapter demonstrates that history has a hand in the current challenges facing asset recovery agencies. This is because some of the current legal challenges are historical in nature, since they have persisted and lived through all successive regimes.

The historical development contributes to the dismal performance of the institutions in recovering assets lost to corruption. Historical mistakes committed in the enactment of anti-corruption laws continue to affect the existing regime. Some of the mistakes involved direct transplantation of legal regimes from other jurisdictions, without considering the Kenya's special socio-economic context. The POCAMLA is not home-grown, thus impairing its utility in the Kenyan context.[93] In addition, even before its enactment in 2010, it was expected that the Act would create problems, because a similar law was already causing problems in the USA.[94] In addition, the enactment of POCAMLA was as a result of pressure from international community, and was not really a felt necessity of the time for Kenyans.[95] The legal implantation did not highlight salient contextual differences which would impact implementation of borrowed laws.

In addition, the problem of political patronage is common and cuts across the successive regimes. All through Kenyan history, political patronage has maimed anti-corruption institutions. It accounts for the disbandment of ACS in 1995, removal of KACA director John Harun Mwau in 1998, disbandment of KACA in 2000 and removal of KACC directors in 2009.[96] The historical culture of political patronage still persists despite changes in times and legal regimes.[97] Even with the 2010 constitutional order, EACC is not yet free from political patronage and it is

[93] Kenya National Assembly Official Record (Hansard) 8 May 2008 p. 947.
[94] The USA laws were the Patriotic Act and the International Money Laundering Abetment and Anti-Terrorism Financing Act of 2001.
[95] Constance Gikonyo, 'The Kenyan Civil Forfeiture Regime: Nature, Challenges and Possible Solutions' (2020) 64(1) Journal of African Law p.28.
[96] AfriMAP, 'Effectiveness of Anti-Corruption Agencies in East Africa: Kenya, Tanzania and Uganda' (Open Society Foundations, 2015) 23.
[97] Njuguna Humphrey, 'Political Patronage on the Operationalization of Public Procurement Laws in Kenya' (PhD Thesis, University of Nairobi 2017) 89.

constantly accused of discriminative enforcement of the law.[98] It accounts for high rate of turnover of the EACC's top leadership, and the unceremonial removal of John Mwau, Haron Ringera, PLO Lumumba, Mumo Matemu and Philip Kinisu.[99]

2.5 Conclusion

The chapter reveals that legislative reforms on asset recovery are crisis-driven. All the significant legislative amendments were made in response to legal challenges facing the sector at the different times. It also demonstrates a gradual evolution and development of the framework from a very basic regime to a robust constitutionally-sanctioned legal framework. It underscores the parliament's constant attempt to amend the law with a view to responding to the felt necessities of the time as well as improving the national framework to keep it at par with international developments on asset recovery. This evolution notwithstanding, the sector is facing a fresh current crisis: the fact that EACC and ARA have not been efficacious in recovering a significant portion of the reported loot.

The next chapter will offer an analysis of the existing legal, institutional and policy framework on asset recovery in Kenya, with a view to examining its efficacy in recovering assets acquired through corrupt conduct. It will examine the actual implementation of the existing law, the functioning of the various institutions and the relationship of the key stakeholders in the entire process, with a special focus to the role of the EACC and the ARA.

[98] Kenneth Bundi and John Kariuki, 'Study on Perceptions and Experiences of Corruption in the Public Service in Kenya, 2017' National Crime Research Centre 41.
[99] Kamau Muthoni, 'Tale of EACC chairman's seat jinxed from the beginning' *Standard Media* (Nairobi, 29 April 2016) 8.

CHAPTER THREE

KENYA'S LEGAL FRAMEWORK ON ASSET RECOVERY

3.1 Introduction

The chapter offers an analysis of the existing legal, institutional and policy framework on asset recovery in Kenya, with a view to examining its efficacy in recovering assets acquired through corrupt conduct. It also investigates the extent to which EACC and ARA conform to the theoretical model articulated in chapter one. It examines the actual implementation of the existing law and the functioning of the EACC, the ARA and FRC. At first, it discusses processes of asset recovery under EACC. Secondly, it discusses processes of asset recovery under ARA. Thereafter, it investigates the legal challenges which impede the two institutions from attaining optimal performance and recovering a substantial proportion of the reported loot.

3.2 Asset recovery processes under the EACC

The jurisdiction of the EACC to forfeit unexplained assets is well defined under the ACECA. EACC can exercise these powers against persons who have unexplained assets and who cannot satisfactorily explain the disproportion between their known legitimate source of income and the assets in question.[1] The forfeiture proceedings are instituted at the High Court through originating summons.[2] At the initial stages of the proceedings, EACC bears the burden of proof to demonstrate that the defendant has unexplained assets. If the court is satisfied on the balance of probabilities that the defendant has unexplained assets, the burden of proof shifts to the defendant to demonstrate he acquired the assets otherwise than as the result of corrupt conduct.[3]

[1] ACECA, 2003, s 55 (2).
[2] ACECA, 2003, s 55(3).
[3] *Ethics and Anti-Corruption Commission (The legal successor of Kenya Anti - Corruption Commission) v Stanley Mombo Amuti* [2015] eKLR **(**2 October 2015**).**

Section 55 of the ACECA therefore allows for the recovery of proceeds of corruption without the requirement of obtaining a criminal conviction. Civil forfeiture which is devoid of a criminal conviction is progressively being preferred by many countries.[4]

Also related to forfeiture proceedings are preservation orders, which are incidental and form integral part of EACC's asset recovery activities. The EACC can obtain an order preserving a defendant's property where it has reasons to suspect that the assets were acquired as a result of corrupt conduct. The effect of the order is to prohibit the disposal or transfer of the asset in question.[5] A preservation order is obtained from the High Court through an ex parte application and has a six-month lifespan after which EACC can seek extension.[6] However, the defendant can challenge the order within fifteen days in which he can request for a discharge or variation of the order.[7]

3.3 Efficacy of asset recovery processes under the EACC

The jurisdiction of the EACC covers a wide scope of assets to prevent defendants from frustrating the asset recovery process through improper transfers. The law seeks to remedy situations where a defendant might irregularly transfer properties to other persons with a view to circumventing the law. The powers of the commission extend to assets which are primarily held by other persons, other than the defendant. This includes assets held in trust for the defendant or on his behalf. It also covers assets acquired from the defendant as a gift or loan without adequate consideration.[8]

[4] Stefan D. Cassella, 'Choose your weapon: Is civil forfeiture really necessary, or is it an undesirable shortcut to real law enforcement?' (2018) 21 (3) Journal of Money Laundering Control 340.
[5] ACECA, 2003, s 56 (1).
[6] Ibid, s 56 (3).
[7] Ibid, s 56 (4).
[8] ACECA, 2003, s 55 (7).

To a large extent, the civil forfeiture procedure and criminal forfeiture proceedings underscore the right to fair hearing. Throughout the EACC forfeiture procedures, the defendant is presented reasonable opportunities to be heard. During the investigation stage and before the EACC proceeds to court, the defendant is afforded a reasonable opportunity to explain the disproportion between the unexplained assets and his known legitimate sources of income.[9] During the court proceedings, the defendant has an opportunity to cross-examine EACC witnesses.[10] Even after the court is satisfied on the balance of probabilities that the defendant has unexplained assets, the court grants the defendant yet another opportunity to explain the disproportion.[11]

The legal framework enjoins EACC to enhance and promote ADR in asset recovery processes. EACC can negotiate and enter an out of court settlement with a defendant or any person against whom it intends to bring a civil claim. And what is more is that the powers to apply ADR have been prescribed in a manner which insulates them against abuse by both the EACC and the defendants. Out of court settlements in this respect must be registered in court.[12] As for the defendants, they have to give a full and true disclosure of all material facts concerning the corrupt conduct in question. They are also required to voluntarily pay, deposit or refund properties acquired as a result of the corrupt conduct. Lastly, the defendants are bound to pay all losses to public property caused by their corrupt conduct.[13]

The Kenyan regime is at best a balance between the right to own property and government's agenda to curb acquisition of property through corrupt conduct. While on one hand the law seeks stick to the government's agenda, it on the other hand strives to protect and preserve the

[9] Ibid, s 55 (2).
[10] Ibid, s 55 (4).
[11] Ibid, s 55 (5).
[12] Ibid, s 56B (4).
[13] ACECA, 2003, s 55B (3).

defendants' proprietary interests and their rights to own property as envisaged in the constitution.[14] If the defendant is aggrieved by the appointment of a receiver, he can request EACC to set aside the appointment and in consideration deposit a reasonable security. Alternatively, the defendant can request the High Court to set aside or vary the appointment.[15] The appointment of a receiver can only be done with the leave of the court.

In addition, the law prevents arbitrary deprivation of one's property. The regime grants the defendant a fair opportunity to challenge the decisions of the EACC with respect to possession and management of the assets in question. Even though preservation orders are obtained *ex parte*, the defendant has a room to challenge the order within fifteen days during which the court conducts *inter-parte* hearing.[16] If the defendant is unhappy with the appointment of a receiver, he can request the EACC to set aside the appointment and in consideration offer some form of reasonable security.[17] And what is more is that should the EACC decline or refuse to take his offer of a security, the defendant has recourse in the courts. Lastly, if the defendant challenges the appointment of a receiver in court, the matter is heard *inter parte*.[18]

3.4 Asset recovery processes under ARA

In addition to the EACC, ARA has a statutory mandate to recover proceeds of crime. Noteworthy and in comparison with the EACC, the jurisdiction of the ARA is very unique in a material respect. While as the EACC only deals with recovery of assets from corruption, ARA has a more general mandate because it can recover assets acquired from any crimes declared under Kenyan law. Consequently, the asset recovery mandate of the ARA is broader than that of

[14] Constitution of Kenya, 2010, art. 40.
[15] ACECA, 2003, s 55A (9).
[16] Ibid, s 56 (4).
[17] Ibid, s 56A (9).
[18] ACECA, 2003, s 56A (10).

the EACC since it is not confined to corruption proceeds only. Simply, the ARA can also target the proceeds of corruption and any other crime. Thus, this general mandate confers ARA powers to recover assets acquired through corrupt conduct. Further, the two institutions are established under different regimes; ARA is established under POCAMLA[19] while EACC is established under ACECA[20] and the EACC Act.[21]

The ARA has jurisdiction to carry out criminal and civil forfeiture. Ordinarily, criminal forfeiture demands a criminal conviction against the defendant and the final order of confiscation is usually a part of the sentence.[22] For the ARA to conduct criminal forfeiture, the following three conditions must be satisfied. Firstly, the defendant must be found guilty of an offence. Secondly, the court convicting the defendant must sentence him by making a confiscation order against him. Lastly, the conviction in respect of the offence has not been set aside on review or appeal.[23] A confiscation order is a court order made against the defendant requiring him to pay to the Government a certain amount as the court deems fit.

Also integral to the Kenya's regime for criminal forfeiture are restraint orders, which basically preserve the property during the trial and before a confiscation order is made. The order, which is obtained *ex parte*, prohibits the defendant from dealing with the specified property in any manner.[24] Courts will issue a temporary restraint order where criminal investigations have been commenced against the defendant or where the court believes that the defendant leads a criminal

[19] POCAMLA, Chapter 59B, Laws of Kenya.
[20] ACECA, No. 3 of 2003, Laws of Kenya.
[21] Ethics and Anti-Corruption Commission Act, No. 22 of 2011, Laws of Kenya.
[22] The World Bank Group, 'Module 5: Asset Recovery Process and Avenues for Recovering Assets' (*StAR Initiative*, June 2018) 6. <http://pubdocs.worldbank.org/en/824561427730120107/AML-Module-5.pdf>accessed 17 March 2020.
[23] POCAMLA, No.9 of 2009, s 60.
[24] Ibid, s 68 (1).

lifestyle and has benefited from the criminal conduct.[25] Mostly, restraint orders are accompanied by an order for seizure which authorizes seizure of movable properties.[26] Perhaps in a bid to ensure safety of the property, a restraint order and an order for seizure remains in force pending any appeal challenging the making of a confiscation order.[27]

The making of a confiscation order is preceded by a court-based inquiry into any benefit which the defendant might have derived from the offence. The inquiry is conducted on the application of the AG, the Agency Director or at the court's own motion.[28] The order is made where the court finds that defendant did indeed benefit from the offence. Usually, a confiscation order is made at the sentencing stage and in addition other punishments. In special occasions, however, the court might pass the sentence and hold the inquiry at a later stage. One of the occasions is where the court is satisfied that the inquiry will unreasonably delay the sentencing of the defendant. The other occasion is where the AG requests the court to first sentence the defendant and the court is satisfied that it is justifiable and reasonable to do so in the circumstances.[29]

In addition to the criminal forfeiture, ARA has extensive powers to carry out civil forfeiture. The Agency Director starts the process by obtaining a preservation order with respect to a certain property, where the Director believes that the property has been used or is intended for use in the commission of an offence or that the property is proceeds of crime.[30] The order, which is obtained *ex parte*, essentially prohibits a person from dealing with the specific property in any manner except as specified in the order.[31] A preservation order is followed by a forfeiture order,

[25] Ibid, s 68 (3) (a) and (b).
[26] Ibid, s 68 (7).
[27] Ibid, s 70.
[28] Ibid, s 61.
[29] POCAMLA, No.9 of 2009, s 61 (3).
[30] Ibid, s 82 (2).
[31] Ibid, s 82 (1).

through which the property subject to the preservation order is forfeited to the Government.[32] Application for a forfeiture order is made to the High Court by the Agency Director.

In addition to the civil forfeiture, ARA can also carry out administrative forfeiture. This kind of forfeiture applies where no persons have come forward to challenge the Director's application for a forfeiture order. The procedure requires the Agency Director to apply for a forfeiture order by default. The High Court will grant the order if it is satisfied that two conditions are met. Firstly, that no person appeared during the hearing of the application for a forfeiture order. And secondly that interested persons who had initially given notice to oppose the making of the order are aware that they can still challenge the application any time before the judgment on the application is granted.[33] In these circumstances, the court is empowered to make any order it deems appropriate.[34]

3.5 Efficacy of asset recovery processes under Asset Recovery Agency

Seemingly, the regime on criminal forfeiture offers a wide scope of benefits recoverable through a confiscation order especially benefits derived from related offences. The amount to be recovered under a confiscation order is not limited to the benefits derived from a single offence but rather can include benefits derived from other offences tried in the same trial. Primarily, a court will make a confiscation order to recover benefits derived from the main offence for which the defendant is being convicted.[35] In addition, the court can also recover benefits derived from any other offence of which the defendant has been convicted at the same trial.[36] Lastly, the court

[32] Ibid, s 90 (1).
[33] POCAMLA, No.9 of 2009, s 95 (1).
[34] Ibid.
[35] POCAMLA, No.9 of 2009, s 61 (1) (a).
[36] POCAMLA, No.9 of 2009, s 61 (1) (b).

can recover benefits derived from any criminal activity which the court finds to be sufficiently related to that offence.[37]

Civil forfeiture by ARA has in-built mechanisms preventing arbitrary deprivation of personal property. For starters, a person affected by a preservation order can request the court to rescind or vary the order where it causes undue hardship for him and the hardship outweighs the risk that the property might be transferred, concealed, damaged, or destroyed.[38] This right to seek variation also applies to persons aggrieved by a seizure order made to prevent property from being removed or disposed of contrary to a preservation order.[39] More still, a person aggrieved by an order appointing a manager with respect to a preservation order has a right to apply for the rescission or variation of the order, variation of the terms of the appointment or discharge of the manager.[40]

In addition, a preservation order is not an order in perpetuity as it expires ninety days after its publication in the *Gazette*. Similar inherent mechanisms are also evident in the process of obtaining forfeiture orders. Even before a forfeiture order is made, persons with interests in the property are granted an opportunity to oppose the making of the order or in the alternative to apply for an order excluding their interests in the property.[41] And what is more is that the regime extends this protection to innocent third parties who have since acquired interest in the property. The court will offer protection to third parties who were not involved in the commission of the

[37] POCAMLA, No. 9 of 2009, s 61 (1) (c).
[38] POCAMLA, No.9 of 2009, s 89 (1) (a).
[39] Ibid.
[40] POCAMLA, No. 9 of 2009, s 89 (3).
[41] Ibid, s 83 (3).

offence, and who acquired interest in the property for sufficient consideration and without notice that the property was tainted property.[42]

Through various mechanisms, the law incorporates transparency in the making of preservation and forfeiture orders. Even though the Director will at first obtain a preservation order ex parte, he is required to notify all persons with interest in the property within twenty-one days.[43] The Director is also mandated to publish a notice of the preservation order in the *Gazette*. During the application for a forfeiture order, the Agency Director is required to issue fourteen days' notice of the application to interested persons.[44] In addition, after the court has made the forfeiture order, the Registrar is required to publish a notice to that effect in the Gazette as soon as it is practicable but within thirty days of the order.[45]

Importantly, civil forfeiture proceedings can be initiated simultaneously with criminal proceedings against the defendant. Essentially, the grant of forfeiture orders against a certain property is not affected by the outcome of the criminal proceedings against the defendant.[46] It has been distinguished that civil forfeiture proceedings are proceedings *in rem* (against the property) made to determine the criminal origins of the property unlike criminal prosecution which are against the defendant.[47] Courts have held that the parallel conduct of these matters does not violate the right of the defendant to presumption of innocence.[48] By extension, ARA does not have to wait until ongoing criminal proceedings against a defendant are extinguished for it to initiate applications for forfeiture orders.

[42] Ibid, s 93 (1).
[43] Ibid, s 83 (1).
[44] Ibid, s 90 (2).
[45] Ibid, s 92 (5).
[46] *The Assets Recovery Agency v Quorandum Limited & 2 others* [2018] eKLR
[47] *Assets recovery Agency & Others –vs- Audrene Samantha Rowe & Others Civil division* claim No 2012 HCV 02120.
[48] *The Assets Recovery Agency v Quorandum Limited & 2 others* [2018] eKLRpara **106 (**delivered on 21September 2018).

In addition to the ARA and the EACC, the financial reporting centre (FRC) plays a central role in the Kenya's asset recovery regime. Basically, FRC seeks to curb information asymmetry among supervisory bodies, investigating authorities and stage agencies. It offers assistance when identifying proceeds of crime by collecting information and making it available to supervisory bodies and investigating authorities.[49] Its mandate includes mutual cooperation and exchange of information with its counterparts in other countries with a view to curbing money laundering and related offences.[50] It is also mandated ensure that Kenya complies with and that she is at par with international standards and best practices with respect to curbing money laundering.[51]

3.6 Challenges impeding the efficacy of EACC

3.6.1 Cross Border and International Asset Recoveries

Locally, the Kenyan legal framework does not expressly outline the role of the EACC in international recoveries with respect to receiving and providing enforcement cooperation. EACC is not authorized to provide or receive direct law enforcement cooperation from foreign agencies.[52] Even though the EACC had such powers in the past, the powers were subsequently withdrawn via a legislative amendment. Such powers were provided for under section 12 of ACECA but were done away with by the Ethics and Anti-Corruption Act of 2011.[53] Thus, the role of EACC in international recoveries is informed and based on goodwill and informal

[49] Proceeds of Crime and Anti-Money Laundering Act, No.9 of 2009, s 23 (2).
[50] Ibid, s 23 (2) (b).
[51] Ibid, s 23 (2) (c).
[52] UNODC, 'Country Review Report of Kenya' *Review by Cabo Verde and Papua New Guinea of the implementation by Kenya of articles 15 – 42 of Chapter III. "Criminalization and law enforcement" and articles 44 – 50 of Chapter IV. "International cooperation" of the United Nations Convention against Corruption for the review cycle 2010 - 2015* 230.
[53] Ethics and Anti-Corruption Act, 2011 (No. 22 of 2011).

arrangements, both of which breed uncertainty on the nature and processes of recovering monies confiscated in other countries.[54]

Furthermore, EACC suffers from legal and administrative challenges sprouting from its relationship with other state agencies and its counterparts from EAC member states. The EACC is required to work, collaborate and cooperate with so many state agencies that it is inevitably exposed to potential conflicts especially where its mandates overlap with those of the partner agencies. Some of the agencies with which EACC corroborates include the ODPP, Integrated Public Complaints Referral Mechanism (IPCRM),[55] FRC, ARA, the East African Association of Anti-Corruption Authorities (EAAACA) and the Stolen Assets Recovery Initiative (StAR).[56] Law researchers have termed this as 'over collaborating.'[57]

In addition, the EACC is yet to achieve a structured and well-coordinated framework for conducting international asset recoveries. While the EACC has to some extent made significant achievements in recovering assets hidden in other jurisdictions, including the Windward Trading case,[58] experts opine that EACC's ability has been impaired by a host of challenges. These include the absence of a structured partnership, lack of understanding the procedures and systems of the corresponding jurisdiction and inadequate communication and information asymmetry between requesting and requested states.[59] And what is more about cross-border asset recoveries

[54] United Nations office on Drugs and Crime, 'Digest of asset recovery cases' 230 <https://www.unodc.org/documents/corruption/Publications/2015/15-05350_Ebook.pdf> accessed on 10th February 2020.
[55] A collaboration by Kenyan oversight agencies namely, KNCHR, NACSC, CAJ and TI-Kenya.
[56] Its purpose is to improve efficacy in addressing corruption- related complaints.
[57] Donnet Rose Adhiambo Odhiambo, 'The Ethics and Anti-Corruption Commission of Kenya: A Critical Study' (Master of Law Thesis, 2016 University of the Western Cape) 55.
[58] In the Windward Trading case, assets confiscated in Jersey were to be returned to Kenya.
[59] Basel Institute on Governance, 'Partnership key to asset recovery, say experts from Jersey, Kenya, Nigeria and UK' <https://baselgovernance.org/partnership-key-asset-recovery-say-experts-jersey-kenya-nigeria-and-uk> accessed 25 March 2021.

is that it involves complex technical and legal issues, which are directly influenced by domestic politics and international diplomacy.[60]

3.6.2 Shared Mandates and Overlaps

Seemingly, the ability of the EACC to co-operate and collaborate with the partner agencies in the country has been hindered by turf wars amongst the institutions. To a large extent, the turf wars have been caused by overlapping mandates and the failure of the legal and administrative framework to create clear demarcations with respect to the mandates of the respective institutions.[61] The most manifest example is the relationship between the EACC and the DCI, both of which have jurisdiction to investigate economic crimes. The result of this shared mandate has been two fold; occasional overlaps in several probes conducted by the EACC and the DCI and the discontentment over their funding.[62] In the past, the two entities have received almost equal budgets.[63]

The discontent over funding of the two state agencies is informed by the seemingly large differences between their mandates and scopes. While the mandate of the EACC is articulated under a single statute,[64] the mandate of the DCI is rather extensive and is anchored on several statutes.[65] In addition, while the EACC's sole mandate is to handle corruption and economic crimes, the DCI has an obviously larger mandate which in addition to corruption and economic crimes includes investigating other crimes like narcotics, human trafficking, and murder. The DCI has not made peace with the fact that it gets almost an equal budget with the EACC despite

[60] Ibid.
[61] Report of the Task Force on the Review of the Legal, Policy and Institutional Framework for Fighting Corruption in Kenya (2015) 102.
[62] John Kamau, 'EACC, DCI clash of egos imperils graft fight' *Daily Nation* (Nairobi, 18 March 2020) 12.
[63] In the financial year 2018/19, the EACC's budget stood at Sh2.7 billion against DCI's Sh2.8 billion.
[64] Anti-Corruption and Economic Crimes Act, 2003.
[65] Anti-Corruption and Economic Crimes Act, 2003; the Proceeds of Crime and Anti-Money Laundering Act, 2009; the Prevention of Organized Crimes Act, 2010; the Penal Code; the Public Procurement and Asset Disposal Act, 2015; and the Public Finance Management Act, 2012.

it doing most of the work.[66]These two have been associated with occasioning bungling of cases and investigation delays.[67]

Discussions on bungling of investigations have been at the centre of many consultative forums. In one of the forums, the Council of Governors criticized the EACC and the DCI for conducting parallel investigations on a single matter.[68] The two bodies have not synchronized investigations; it is common for the two bodies to separately summon persons to their offices to answer questions on the same case.[69] In addition, the efficacy of the institutions has been impaired by publicity and political motives, especially where the agencies are competing for credit with respect to certain positive achievements in the fight against corruption.[70]

The architecture of the Kenyan regime has to some extent occasioned antagonism and sibling rivalry between the EACC and the ARA. This is prevalent where the two institutions share mandates and in instances of overlap. There are no adequate procedures clarifying the functions and the mandate of ARA with a view to avoiding overlap with other agencies and bodies.[71] Even though there are current initiatives to curb this, the framework is yet to capitalize on coordination mechanisms in the nature of inter-agency procedures or agreements.[72] This institutional overlap explains why the two institutions sometimes end up as parties in the same suit.[73]This impairs the efficacy of the two institutions since it is a waste of time and financial resources.[74]

[66] John Kamau, 'EACC, DCI clash of egos imperils graft fight' *Daily Nation* (Nairobi, 18 March 2020) 12.
[67] Ibid.
[68] George Murage, 'Stop DCI, EACC parallel probes, governors say' *The Star* (Nairobi, 3 November 2019) 5.
[69] Ibid.
[70] Task Force Report (2015) (n 61) 102.
[71] UNODC, 'Country Review Report of Kenya' 9.
[72] Ibid.
[73] Paul Mwangi, 'Success of Kenya's anti-graft war is in asset recovery' *Daily Nation* (21 April 2019) 4.
[74] Ibid.

3.6.3 Political Patronage

The EACC is yet to achieve full insulation against political patronage. In many occasions in the past, it has been the target of major destabilization from the political elite, especially when the commission is making progress on politically sensitive cases.[75] The instability of its predecessors was more pronounced in pre-2010 era and was marked by disbandment of ACS in 1995, removal of KACA director John Harun Mwau in 1998, disbandment of KACA in 2000 and removal of KACC directors in 2009.[76]Although these historical instances revolved around security of tenure and independence of the commission, both of which were later remedied by the Constitution 2010, it would be naïve to rule out that EACC is fully free from politically-instigated instability.

Political patronage has by extension prejudiced the stability of the EACC and its jurisprudence. Seemingly, EACC and its predecessors have never had an opportunity to work freely. In fact, none of the past EACC chairpersons has ever exited gracefully.[77] This is a common trend which runs through the removal of John Mwau, Haron Ringera, PLO Lumumba, Mumo Matemu and Philip Kinisu: they all left unceremoniously.[78] Scholars have argued that the turnover rate of the EACC's top leadership has eaten into its ability to discharge its constitutional mandate and generate a formidable jurisprudence.[79]As a result, the law enforcement agencies have in some occasions been accused of discriminative enforcement of the law.[80]

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[75] AfriMAP, 'Effectiveness of Anti-Corruption Agencies in East Africa: Kenya, Tanzania and Uganda' (Open Society Foundations, 2015) 8.
[76] Ibid 23.
[77] Njuguna Humphrey, James Otieno and Attiya Waris, 'The Influence of Political Patronage on the Legal and Institutional Framework in Public Procurement Sector' (2016) 2 (9) Imperial Journal of Interdisciplinary Research 103, 110.
[78] Kamau Muthoni, 'Tale of EACC chairman's seat jinxed from the beginning' *Standard Media* (Nairobi, 29 April 2016) 8.
[79] Njuguna Humphrey, 'Political Patronage on the Operationalization of Public Procurement Laws in Kenya' (PhD Thesis, University of Nairobi 2017) 89.
[80] Kenneth Bundi and John Kariuki, 'Study on Perceptions and Experiences of Corruption in the Public Service in Kenya, 2017' National Crime Research Centre 41.

3.6.4 Independence and Autonomy of the EACC

Even though it is a constitutional commission properly operationalized by an act of parliament, much needs to be done to achieve actual independence and autonomy. It has been argued that EACC is susceptible to political undue influence and lacks sufficient powers to efficaciously discharge her mandate.[81] Key stakeholders and members of the public are of the view that the commission is yet to achieve adequate autonomy and independence.[82] In addition, corruption-related investigations arouse high political interests which by extension hinder effective operation of the commission.[83]

Also associated with the dismal performance is the absence of prosecutorial powers. Even though the EACC has powers to file civil cases for recovery of corruptly acquired assets, both the EACC and ARA do not have prosecutorial powers. Thus, once the commission receives complaints from the members of the public, it analyses the complaint, conduct investigations, and the finalized files are submitted to the DPP for action.[84] While this could be justified by the constitutional order which reserves the prosecutorial powers to the DPP, total exclusion of the EACC in prosecution of corruption and economic crimes clamps its ability to achieve optimal performance. Even though EACC has in the past sought prosecutorial powers, this is yet to be achieved. As a result, it has been argued that the DPP does frustrate the efforts of the commission, especially where the DPP fails to prosecute matters forwarded for action.[85]

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[81] Mukunyi Catherine Wangui, 'Impediments to effective investigation and prosecution of corruption cases in Kenya: The case of the Ethics and Anti-Corruption Commission' (Master of Arts Thesis, University of Nairobi 2014) 66.
[82] Ibid 67.
[83] Grace Kaome and Catherine Ngahu, 'Challenges Faced By the Kenya Ethics and Anticorruption Commission in Implementing the Strategies Recommended By United Nation Convention against Corruption in Kenya' (2016) 1 (1) (1) European Journal of Business and Strategic Management 88, 94.
[84] EACC, Report of Activities and Financial Statements for the Financial Year 2015/2016 14.
[85] KACC Corruption Perception Report of 2009 which indicated that the Attorney General had declined to prosecute majority of the cases forwarded to him citing lack of evidence contrary to the position taken by the Commission.

3.6.5 Obtaining crucial documents and Interference with Investigation

To some extent, the Kenyan regime does not enhance efficacy with respect to the obtaining of crucial documents for investigative purposes. The regime lacks streamlined procedures for obtaining access to financial and bank records. The procedures for obtaining warrants do not meet the UNCAC threshold with regards to effectiveness and expediency.[86] The position is that EACC is not authorized to access financial and bank records administratively, as it is required to apply to court for a warrant to search specified bank accounts.[87]In this way, Kenya lags behind several developed jurisdictions which sanction access to financial records administratively.[88]

The efficacy of the EACC has also been undermined by mishandling and destruction of crucial financial documents. Kenya has witnessed incessant fire outbreaks in several county offices during which crucial financial documents have been destroyed.[89] By March 2020, these periodic fire outbreaks had consumed finances offices for five counties namely Busia,[90] Homa Bay, Kisumu,[91] Kitui[92] and Migori.[93] However, given that the existing legal framework requires County governments to put in place a risk management framework,[94] it would be expected that such fire outbreaks should not deal a blow to financial accountability and transparency at the county governments.

While controversy remains over whether the fires are accidental or a mischief, there is every indication that it is a mischief and it has much to do with corruption in the counties. The fire

[86] Article 31, para 7.
[87] ACECA s 23 (4).
[88] UNODC (n 71) 113.
[89] Kenya Senate Debates Official Record (Hansard) 3 March 2020 p. 7.Statement from the Standing Committee on Devolution and Intergovernmental Relations regarding the incessant fire outbreaks in several country offices.
[90] Gaitano Pessa, 'Fire guts Busia County finance offices' *Daily Nation* (25 September 2019) 6.
[91] Allan Obiero, 'Pending bills documents burnt as fire razes Kisumu County Finance offices' *Citizen Digital* (10 February 2020) 11.
[92] Kitavi Mutua, 'Records destroyed as fire burns Kitui County finance offices' *Daily Nation* (18 March 2020) 4.
[93] Lynet Igadwah, 'Fire leaves Migori without Sh 1.5bn receipts, says Ouko' *Business Daily* (25 March 2019) 6.
[94] The Public Finance Management Act, No 18 of 2012 s 155.

outbreaks occur any time there is a visit by EACC or the DCI and they only target finance offices and financial records.[95]In Migori for instance, the fire happened few weeks after the Auditor General raised questions over the expenditure of Sh1.5 billion.[96] In all the five instances, the infernos occur at night and during weekends.[97] In Busia, the offices burnt down were only fifty meters from a newly purchased firefighting engine.[98] Based on this background, it has been argued that the fires are pre-planned to conceal evidence and cover up corruption.[99]

But what makes fire outbreaks a serious threat is the failure of the EACC and DCI to fully enforce the existing law on safety of county financial records. County governments are required to back up their financial records and failure to back them up constitutes an offence.[100] The DCI and the EACC have done little to prosecute the officers responsible for backing up county data as there are no reported successful prosecutions. This way, the EACC cannot trace crucial financial records for financial auditing and investigations. The danger of this route is that corrupt governors and County Executive Committee (CEC) Members for Treasury or Finance will show up before the DCI or County Public Accounts and Investments Committee (CPAIC) and say: "Our records were burnt; give us the benefit of doubt."[101]

3.6.6 The problem of Culture and Conceptualization

Alongside the legal challenges impeding the efficacy of the EACC, culture has is also to blame. It has been argued that the problem of corruption in Kenya is not one of law but rather social ills.

[95] Kenya Senate Debates Official Record (Hansard) 3 March 2020 p. 8.
[96] Kitavi Mutua, Ruth Mbula, George Odiwour and Gaitana Pessa, 'County cash offices fires leave more queries than ashes' *Daily Nation* (2 March 2020) 11.
[97] Ibid.
[98] Juma Kennedy, 'Busia County Finance Offices Reduced to Ashes 50 Meters From Fire Fighting Engine' *Soko Directory* (28 September 2019) 10.
[99] Julius Otieno, 'Blame corrupt officials for county finance office fires- Senators' *The Star* (20 March 2020) 6.
[100] The Public Finance Management (PFM) Act s 149.
[101] Kenya Senate Debates Official Record (Hansard) 3 March 2020 p. 10.

There is a strong argument that Kenyans have made peace with corruption, they tolerate it, and it has become a social ill which cannot be solved by law.[102]

It has been argued that the inefficacy of the anti-corruption and asset recovery laws has nothing to do with the efficacy of the penalties but rather it has more to do with culture.[103] To some extent, this explains why Kenya continues to grapple with corruption in all sectors,[104] and why she is yet to make substantial asset recoveries,[105] in spite of having a whole regime of anti-corruption laws and institutions. This collaborates earlier studies which have linked the inefficacy of anti-corruption laws to culture and the value system in the Kenyan society.[106]

The instability facing the EACC as an institution has been occasioned by conceptual confusion around its formation, its role and the mandates of its top leadership. Legislators believe the role of those appointed to the EACC is still conceptually unclear.[107] Such clarity is manifest on the terms of their appointment. At first, persons appointed to the EACC were to serve full-time. After sometime, however, they were changed to part-time. That was later changed to reflect the current position under which they serve full-time.[108] In addition, the debate is not yet settled as to whether the number of commissioners should be three, seven or nine.[109] Furthermore, there is no general agreement on the role of the CEO, leaving Kenyans unsure as to who between the CEO and the chairman should control the body.[110]

[102] Kenya National Assembly Official Record (Hansard) 2 October 2019 p. 27.
[103] Kenya National Assembly Official Record (Hansard) 2 October 2019 p. 18.
[104] John Maylord, 'Country Loses Sh. 800 Billion Annually to Graft' *Kenya News Agency* (Nairobi, 14June 2019) 11.
[105] Duncan Miriri, 'Third of Kenyan budget lost to corruption: anti-graft chief' (*Reuters*, 10 March 2016) 4.
[106] Njuguna Humphrey, 'Political Patronage on the Operationalization of Public Procurement Laws in Kenya' (PhD Thesis, University of Nairobi 2017) 26.
[107] Kenya National Assembly Official Record (Hansard) 2 October 2019 p. 28.
[108] Kenya National Assembly Official Record (Hansard) 2 October 2019 p. 28.
[109] Kenya National Assembly Official Record (Hansard) 2 October 2019 p. 28.
[110] Kenya National Assembly Official Record (Hansard) 2 October 2019 p. 28.

In addition, the efficacy of the EACC has been impaired by a conceptual problem with respect to the Kenya's approach to handling corruption. There is a belief that the Kenyan legal framework has not been consistent in the manner of curbing corruption.[111] The first anti-corruption body was established via administrative fiat,[112] which later evolved into a statutory body, the KACA, and which finally graduated into a constitutional body, the EACC. And what is more is that according to the current practice, it appears that history could be repeating itself on this matter. Of concern is the current practice whereby the focus has now been shifted from the EACC. Instead, the fight against corruption is now being fought more through the DCI, which is neither statutory nor constitutional. In this way, it has been argued that Kenya has gone back to where she started, the past days when anti-corruption laws were being enforced through the police.[113]

3.6.7 Controversy over the Ultimate Custodian of the Recovered Assets

Seemingly, the Kenyan regime is transparent as to the supposed custodian of assets recovered by EACC. In the event that the defendant is unsuccessful in his explanation, the court might require him to pay to the Government an amount equal to the value of the unexplained assets.[114] If the recovered assets are funds, they are payable to the Consolidated Fund. With respect to other forms of assets, they are to be surrendered to the Permanent Secretary to the Treasury.[115] During the recovery proceedings, income generating assets are placed under a receiver, whose appointment is done in writing and with the leave of the court. The receiver has powers to

[111] Kenya National Assembly Official Record (Hansard) 2 October 2019 p. 28.
[112] AfriMAP, 'Effectiveness of Anti-Corruption Agencies in East Africa Kenya, Tanzania and Uganda' (*Open Society Foundations* 2015) 23.
[113] Kenya National Assembly Official Record (Hansard) 2 October 2019 p. 28.
[114] ACECA, 2003, s 55 (6).
[115] ACECA, 2003, ss 55C (1) and (2).

manage, possess and control the specified property and he is mandated to keep proper books of account and submit quarterly reports to EACC.[116]

However, a look at the two distinct regimes reveals that the law is not clear on the ultimate custodian of the assets recovered by the two agencies. The two regimes establishing these entities seem not have consensus on where the recovered funds should be destined. The regime establishing EACC stipulates that the recovered funds should be paid to the Consolidated Fund and recovered property should be surrendered to the Permanent Secretary to the Treasury.[117]

However, the regime establishing ARA provides for an entirely different custodian for the recovered property. It establishes a Criminal Asset Recovery Fund which consists of monies and properties recovered by way of confiscation and forfeiture orders. Of concern is that the Fund also consists of monies and properties recovered under the Anti-Corruption and Economic Crimes Act, 2003.[118] Even though it is desirable that all recovered property is brought together under one common fund, the enabling provision under ACECA should be amended to read the same thing with POCAMLA, with regards to the ultimate custody of the recovered funds.

3.6.8 Slow Judicial Processes and Case Backlog

In addition, prolonged court processes have also contributed to the decelerated efficacy of the EACC. Much of this slow adjudication of corruption cases has been attributed to the role played by advocates, who are key players in asset recovery. It has been argued that advocates employ various legal tools and mechanisms to delay cases. In particular, they seek frequent adjournments and make numerous judicial review applications and constitutional references.[119] By extension,

[116] ACECA, 2003, ss 55A (3) and (8).
[117] ACECA, 2003, ss 55C (1) and (2).
[118] POCAMLA, s 110 (f).
[119] EACC Annual Report (2014/2015) 75.

this conduct occasions case backlog at the judiciary and workload at the commission, both of which have ripple effects on the efficacy of the commission.[120] In collaboration, earlier studies have singled out slow judicial processes as a key challenge to the efficacy of the EACC.[121]

3.7 Conformity to the Theoretical Model

Kenya's institutional framework does not conform to the theoretical model advanced in chapter one. Kenyan institutions do not satisfy the model's requirement that agencies must have sufficient information about the relevant data for making any decision.[122] This is due to the systematic information asymmetries between EACC, ARA, FRC and the DCI. The institutional framework does not offer sound information-sharing structures amongst the three institutions, hence hindering their ability to make rational choices. The EACC faces information asymmetry at the international levels, thus prejudicing her ability to conduct international recoveries.[123]

In addition, Kenyan institutions do not conform to the model's requirement that actors must make own rational choice and preference. The institutions are in many instances influenced by politics and other external factors, which prejudice their ability to make rational choices as per the theoretical model. They have challenges with their independence and autonomy, and are

[120] Donnet Rose Adhiambo Odhiambo, 'Ethics and Anti-Corruption Commission of Kenya: A Critical Study' (Master of Laws Thesis, 2016 University of the Western Cape) 56.
[121] Grace Kaome and Catherine Ngahu, 'Challenges Faced By the Kenya Ethics and Anticorruption Commission in Implementing the Strategies Recommended By United Nation Convention against Corruption in Kenya' (2016) 1 (1) (1) European Journal of Business and Strategic Management 88, 94.
[122] Elinor Ostrom, 'Rational Choice Theory and Institutional Analysis: Toward Complementarity' (1991) 85 (1) The American Political Science Review 241.
[123] Basel Institute on Governance, 'Partnership key to asset recovery, say experts from Jersey, Kenya, Nigeria and UK' <https://baselgovernance.org/partnership-key-asset-recovery-say-experts-jersey-kenya-nigeria-and-uk> accessed 17 October 2021.

highly susceptible to political influence.[124] These external factors hamper logical decision-making process and prevent weighing of available options against each other.[125]

Moreover, the Kenya regime does not satisfy the model's requirement that rational choices ought to have 'consistency.'[126] The jurisprudence emanating from anti-corruption agencies is in some respects unsettled and intermittent. There is the problem of conceptualization with respect to Kenya's approach to handling corruption, as well as conceptual confusion around the formation of the EACC, its role and the mandates of its top leadership, all of which have occasioned instability at the EACC as an institution.[127] In addition, the high rate of turnover of the EACC's top leadership has eaten into its ability to discharge its constitutional mandate and generate a formidable jurisprudence.[128]

In addition, the Kenya's framework fairly conforms to the theoretical model advanced by Robert Nozick's theory of justice. The model requires repossession of unjustly acquired economic goods by employing channels that have minimal interference with the rights of its citizens.[129] To some extent, Kenya's framework conforms to Robert's model. The framework observes human rights by ensuring fair hearing in forfeiture proceedings[130] and it has in-built mechanisms preventing arbitrary deprivation of personal property.[131] Also, the framework is a good balance between the

[124] Mukunyi Catherine Wangui, 'Impediments to effective investigation and prosecution of corruption cases in Kenya: The case of the Ethics and Anti-Corruption Commission' (Master of Arts Thesis, University of Nairobi 2014) 66.
[125] Akhilesh Ganti, 'Rational Choice Theory' (*Investopedia*, July2021) <https://www.investopedia.com/terms/r/rational-choice-theory.asp>accessed 17 October 2021.
[126] Lise Rakner, 'Rational Choice and the Problem of Institutions: A Discussion of Rational Choice Institutionalism and Its Application by Robert Bates' (1996) 6 Working Paper, Chr. Michelsen Institute 4.
[127] Kenya National Assembly Official Record (Hansard) 2 October 2019 p. 28.
[128] Njuguna Humphrey, 'Political Patronage on the Operationalization of Public Procurement Laws in Kenya' (PhD Thesis, University of Nairobi 2017) 89.
[129] Van der Veen RJ and Van Parijs P, "Entitlement Theories of Justice: From Nozick to Roemer and Beyond" (1985) 1 Economics and Philosophy 69.
[130] Anti-Corruption and Economic Crimes Act, 2003, s 55 (2).
[131] Proceeds of Crime and Anti-Money Laundering Act, No.9 of 2009, s 89 (1) (a).

right to own property and government's agenda to curb acquisition of property through corrupt conduct.

3.8 Conclusion

The study reveals that Kenya has a relatively robust legal framework on asset recovery, chiefly administered by the EACC and ARA. It shows that the recovery proceedings under both regimes underscore the right to fair hearing, they enhance ADR in asset recovery processes, they prevent arbitrary deprivation of one's property and it is at best a balance between the right to own property and government's agenda to cur acquisition of property through corrupt conduct. However, the study reveals that there are legal challenges which impede the efficacy of EACC and ARA. These challenges include inadequate framework for cross border and international asset recoveries, institutional overlaps occasioned by shared mandates, political patronage, independence and autonomy challenges, challenges in obtaining crucial documents during investigations, the problem of culture and conceptualization and slow judicial processes.

The next chapter will offer a critical analysis of asset recovery in the UK. It will analyze the implementation of the law on asset recovery in the UK, with a view to identifying positive attributes and any positive lessons which Kenya can emulate from her experience.

CHAPTER FOUR

AN ANALYSIS OF THE UK'S LEGAL FRAMEWORK ON ASSET RECOVERY

4.1 Introduction

The chapter offers an analysis of the UK's legal, institutional and policy framework on asset recovery, with a view to identifying positive attributes and any positive lessons which Kenya can emulate from her experience. It also examines the extent to which UK's experience conforms to the theoretical model established in chapter one. It starts by offering a justification for the choice of the UK for the study. It then offers a discussion on the two major tools of asset recovery namely criminal confiscation and civil forfeiture as well as the nature of UK's restraint orders. This is followed by a discussion on the efficacy of the UK's legal, institutional and policy framework on asset recovery. It ends with a conclusion containing the findings of the chapter.

4.1.1 The Suitability of the UK's legal framework

The choice of the UK jurisdiction for the current study is based on principle. For starters, the UK is a common law jurisdiction like Kenya. The two jurisdictions share a history in that Kenya is a former British Colony on the basis of which she has adopted the English common law system and Kenyan courts still refer to English decisions as persuasive jurisprudence.[1]The UK's legal framework has been applauded for offering optimal mechanisms for recovering assets acquired through corrupt conduct. It has been argued that by introducing Unexplained Wealth Orders (UWOs), the UK set a strong example for other jurisdictions and established the most preferable

[1] Constance Gikonyo, 'The Kenyan Civil Forfeiture Regime: Nature, Challenges and Possible Solutions' (2020) 64 (1) Journal of African Law 27, 30.

mechanisms of recovering assets acquired through corrupt conduct and other serious crimes.[2] Florence Keen opines that UWOs are the best tool for targeting persons posing a high risk of corruption especially politicians and their associates.[3] Extensive reports have established that UK's criminal confiscation procedure is substantially effective and that UK's response to enhance asset recoveries is the best when compared with other jurisdictions.[4]

The UK's legal framework demonstrates incremental change and gradual evolution of its asset recovery regime. The country has in the recent past reformed the law with a view to enhancing her ability to recover illegally acquired assets from corrupt officials and serious criminals in the UK.[5] The most significant legislative enactment was the Criminal Finances Act, 2017 which to a large extent sought to cure the inadequacies and shortcomings of the Proceeds of Crime Act (POCA), 2002.[6] Essentially, the Criminal Finances Act extends the country's non-conviction-based asset recovery regime established under POCA by introducing a more efficient asset recovery tool namely, the Unexplained Wealth Orders (UWOs).

UK's institutional framework on asset recovery comprises several state agencies whose major task is to identify and apply for the freezing and confiscation of illegally acquired assets. They include the Serious Fraud Office (SFO), Serious Organised Crime Agency (SOCA), Asset

[2] Florence Keen, 'Unexplained Wealth Orders: Global Lessons for the UK Ahead of Implementation' Occasional Paper (Royal United Services Institute for Defence and Security Studies) 2.
[3] Ibid 8.
[4] FATF (2018), *Anti-money laundering and counter-terrorist financing measures – United Kingdom, Fourth Round Mutual Evaluation Report* (*FATF*, Paris) p. 71.<http://www.fatf-gafi.org/publications/mutualevaluations/documents/mer-united-kingdom2018.html>accessed 21 August 2020.
[5] Florence Keen, 'Unexplained Wealth Orders: Global Lessons for the UK Ahead of Implementation' Occasional Paper (Royal United Services Institute for Defence and Security Studies) Executive Summary.
[6] The Criminal Finances Act, 2017. The Act received Royal Assent on 27th April 2017.

Recovery Agency (ARA), the National Crime Agency (NCA) and the UK's prosecuting authorities.[7]

4.1.2 Criminal Confiscation in the UK

The UK's asset recovery regime employs various recovery tools and mechanisms similar to those applicable in the Kenyan context. The tools comprise criminal confiscation, civil forfeiture and restraint orders. Unlike the Kenya's position where the asset recovery regime is based on several statutes, the UK's civil forfeiture and criminal confiscation mechanisms are provided less than one statute, namely, POCA.[8] POCA has been argued to be a very potent tool for law enforcement by making confiscation part of criminal conviction.[9]The UK's criminal confiscation occurs after conviction but is initiated prior to sentencing.[10]It is similar to the Kenya's in that it is conviction based, the judicial officer must determine the extent to which the defendant has profited from the proceeds of the crime, and the end product is a confiscation order.[11]And what is more in the case of the UK is that the confiscation order operates against the person and not against the property and hence does not confer property rights.[12]

Unlike the UK's position, the Kenya's position on the effect of a confiscation order with respect to conferment of property rights is less clear cut. Although the Kenyan statutes generally provide that a confiscation order is an order against the defendant, they are not clear as to whether or not

[7] Crown Prosecution Service (CPS) in England and Wales, Crown Office and Procurator Fiscal in Scotland and the Public Prosecution Service for Northern Ireland (PPS) in Northern Ireland.
[8] Florence Keen (n 2) 4.
[9] Sittlington, S., Harvey, J, Prevention of money laundering and the role of asset recovery (2018)70 Crime Law Soc Change 422.
[10] Home Office, 'Asset Recovery Action Plan' (July 2019) 4.
[11] Gary Balch, Crown Prosecution Service (Organised Crime Division) 3.
[12] The Crown Prosecution Service (UK), Confiscation and Ancillary Orders pre-POOCA: Proceeds of Crime Guidance (*The Crown Prosecution Service*, June 2019) <https://www.cps.gov.uk/legal-guidance/confiscation-and-ancillary-orders-pre-poca-proceeds-crime-guidance>accessed 16 August 2020.

the order does confer any property rights.[13]The most the statute provides for is that a confiscation order has the effect of a civil judgment.[14]

The UK's criminal confiscation mechanism has been designed to ensure minimal interruptions from third parties interested in the property in question. Persons with proprietary interest in the targeted property have no right to be heard during the confiscation hearing. Claims by such persons are only entertained later during the enforcement stage when the court is making an order to realize the property.[15]

4.1.3 Restraint Orders in the UK

Another similarity between the UK and the Kenya's regime is that the UK's criminal confiscation mechanisms works hand in hand with restraint orders. The efficacy of the restraint orders is that they are obtained without the notice to the accused person or third parties. However, there are sufficient avenues to ensure that obtaining a restraint order ex parte does not prejudice the proprietary interests of accused persons or interested parties. Once the court has made the order, any person affected by the order can approach the court to vary or discharge the order.[16]

The scope of UK's restraint orders is relatively extensive when compared to the Kenya's. Primarily, restraint orders target properties in which the defendant has an interest. And what is more is that the prosecutor does not have to show that the property has been acquired through proceeds of the offence under investigation.[17] It also covers properties held jointly by the defendant and a third party. Furthermore, the framework curbs the temptation by defendants to

[13] Proceeds of Crime and Anti-money laundering Act, s 61 (1).
[14] Proceeds of Crime and Anti-money laundering Act, s 66.
[15] Gary Balch (n 11) 6.
[16] Proceeds of Crime Act, 2002 (UK) s 42.
[17] Gary Balch (n 11) 7.

transfer their properties with a view to circumventing or frustrating recovery attempts. Towards this end, it covers properties held by a third party where the property appears to be a tainted gift from the defendant.[18]

4.1.4 Non-Conviction Based Asset Recovery in the UK

The UK's criminal recovery regime is supplemented by a robust civil recovery mechanism which is non-conviction based. Prosecutors opt for this avenue in circumstances where criminal confiscation is not possible. A conviction is not a pre-requisite for their commencement and what is more is that they can be instituted against a defendant who has been acquitted.[19]And like the Kenya's position, the civil actions are taken against the property and the law enforcement agency is required on the balance of probabilities to establish the asset has been obtained through unlawful conduct.[20]If the agency achieves this, the burden shifts to the defendant to explain and demonstrate otherwise.[21] Even though the legality of the civil recovery procedure has been contentious and has been challenged on grounds of human rights, the process has been upheld by the High Court, the European Court of Human Rights (ECHR) and the House of Lords.[22]

The efficacy of the UK's non-conviction based regime was significantly boosted in 2017 by the introduction of the UWOs. By all standards, this enhanced the UK's ability to curb corruption and money laundering as well as to recover proceeds of crime from those involved in serious crime or grand corruption. The UWOs tool requires a defendant to explain the source of their

[18] Ibid.
[19] The Proceeds of Crime Act, 2002 (UK) s 240.
[20] The Proceeds of Crime Act, 2002 (UK) Part 5.
[21] Colin King, 'Using Civil Processes in Pursuit of Criminal Law Objectives: A Case Study of Non-Conviction Based Asset Forfeiture' (2012) 16 (4) International Journal of Evidence and Proof.
[22] *Gale and Another vs Serious Organised Crime Agency*, UKSC 49 (2011), 'Judgment of the Supreme Court' para 119<https://www.supremecourt.uk/cases/docs/uksc-2010-0190-judgment.pdf>accessed 21 August 2020. Also see *Cecil v Director of the Assets Recovery Agency KERC5186* (2005) NICA 6. <https://judiciaryni.uk/sites/judiciary/files/decisions/Cecil%20Walsh%20v%20Director%20of%20the%20Assets%20Recovery%20Agency.pdf>accessed 21 August 2020.

wealth if there are reasonable grounds for suspecting that there is a discrepancy between their known income and the assets on display.[23]

And what is more is that the granting of these orders is a well-guarded tool based on three parameters with a view to fostering certainty and minimizing possible abuse. The order will only be granted against politically exposed persons (PEP)[24] or where the defendant is being suspected of being involved in a serious crime. Secondly, the defendant's known income must be insufficient to acquire the property in question and lastly the value of the property must be more than 50, 000 pounds.[25] The requirements for making of UWOs were further elaborated in the UK Court of Appeal in the case of Zamira Hajiyeva v National Crime Agency.[26]

4.2 Efficacy of the Legal, Institutional and Policy Framework

4.2.1 Institutional Overlap, Shared Mandates and Parallel Investigations

The efficacy of the UK's institutional framework has been enhanced by the careful allocation of duties amongst key institutions, which minimizes institutional overlap, and chances of shared mandates and parallel investigations. If it is a request for execution, UKCA might assign that task to SFO or the CPS. If the request is seeking assistance in conducting investigation, it will be assigned to the NCA or the police. Requests touching on non-conviction based confiscation cases are assigned to the NCA.[27]Lastly, requests seeking assistance in tracing of assets are handled by the NCA.[28]NCA conducts the tracing of stolen assets through its specialized sub-agency- the UK Financial Intelligence Unit (UKFIU). The regime has inbuilt mechanisms which require NCA to

[23] The Proceeds of Crime 2002, s 362B (3).
[24] The Proceeds of Crime Act 2002, s 362B (7).
[25] The Proceeds of Crime 2002, s 362B (2), (3) and (4).*See also* Rachel Davies, 'Unexplained Wealth Orders: A Brief Guide' Transparency International UK, 30 May 2017.
[26] *Zamira Hajiyeva v National Crime Agency* EWCA Civ 108 (2020) (*Delivered on 5 February 2020*).
[27] The Proceeds of Crime 2002, s 362B (2), (3) and (4).
[28] UK, Obtaining Assistance from the UK in Asset Recovery: A Guide for International Partners (Dec 2017) 7.

work and liaise with the SFO, the CPS and the UKCA among other law enforcement partners with a view to ensuring that requestors get efficient and effective service.[29]

The UK's legal framework comprises comprehensive rules and regulations outlining a clear apportionment of duties and responsibilities amongst the various actors in the recovery regime. Although asset recovery processes and procedures are generally provided for under several statutes,[30] the UK has come up with comprehensive rules to direct and guide the relationship between the various actors established under the various regimes. A good example is the Code of Practice on Investigations,[31]which outlines and coordinates the investigative roles of different agencies with regards to investigations under POCA.[32] Even though the code is not authoritative source of law, its significance cannot be overemphasized.

The code identifies the officers responsible and draws a clear demarcation with regards to their scope of intervention and jurisdiction. The investigation process involves the Director General of the NCA, Accredited Financial Investigators (AFIs), officers of Revenue and Customs, constables, immigration officers and NCA officers.[33] To some extent, the framework underscores a clear apportionment of rights amongst the relevant state officers especially on issues of who can obtain appropriate court orders. A disclosure order with regard to civil recovery can only be obtained by an officer of NCA. On the other hand, a disclosure order relating to civil recovery investigations can only be obtained by the director of the Serious Fraud Office or the director of

[29] Ibid.
[30] Criminal Justice and Police Act 2001, the Police and Criminal Evidence Act 1984, the Proceeds of Crime Act 2002 and Serious Crime Act 2015.
[31] The UK (March 2016), Code of Practice Issued Under Section 377 of the Proceeds of Crime Act 2002.
[32] The UK (March 2016), Code of Practice Issued Under Section 377 of the Proceeds of Crime Act 2002, p. 1.
[33] Ibid 2.

Public Prosecutions.[34] In addition, the right to obtain disclosure orders relating to confiscation investigation is reserved for a prosecutor in the Crown Court.

The UK's legal framework has inbuilt mechanisms designed to achieve order in carrying out investigations and minimizing instances of parallel investigations. Enforcement officers seeking to obtain a court order with regard to any investigations must first obtain approval from other departments higher in the hierarchy. The approvals are mandatory when one is seeking customer information orders and disclosure orders.[35] A NCA officer seeking a disclosure order in civil recovery must first obtain approval of a senior officer at NCA. Also, any officer wishing to obtain a disclosure order in relation to confiscation investigation can only do so through a prosecutor by making a request.[36]Lastly, authorization of a senior officer is also necessary when seeking customer information orders.[37]

Towards the end of 2018, the UK took extensive administrative measures to improve her response to economic crime. The NCA established a multi-agency centre to spearhead proactive asset recovery.[38] It also established other forums to enhance sharing of intelligence across agencies.[39]

The NCA assists in ensuring the efficacy of asset recovery by coordinating and fostering smooth working relationships amongst UK agencies and between UK agencies and their international

[34] The Proceeds of Crime Act, 2002 (UK) s 449 and 449A.
[35] The Proceeds of Crime Act, 2002 (UK) s 378.
[36] The Proceeds of Crime Act, 2002 (UK) s 357. Needless to say, the officer making the request must first seek the internal approval of a senior appropriate officer.
[37] The Proceeds of Crime Act, 2002 (UK) s 378 and 369 (7).
[38] National Economic Crime Centre (NECC). NECC brings together law enforcement and justice agencies, government departments, regulatory bodies and the private sector with a shared objective of driving down serious organized economic crime. See also National Crime Agency, 'National Economic Crime Centre' (*National Crime Agency*, June 2019) <https://www.nationalcrimeagency.gov.uk/what-we-do/national-economic-crime-centre>accessed 21 August 2020.
[39] The National Data Exploration Capacity and the National Assessment Centre.

counterparts. With respect to fostering international relations, NCA plays the role of a single reference point for all international requests for tracing proceeds of crime and stolen assets.[40]in cooperation with international and domestic partners with a view to tackling money laundering at the global level.[41] In addition, it proactively fights illicit finance by denying assets of corrupt elites and PEPs of various jurisdictions.[42] This can be deduced given the aggressiveness with which NCA has enforcing the law on asset confiscation and forfeiture. In 2019, NCA recovered $10, 097, 000, which was 41% more than what it recovered in 2018 and 37% more than it has recovered in 2016.[43]

In addition, the NCA enhances efficacy of asset recovery by facilitating innovative and collaborative working environment amongst UK agencies as well as building capacity for its personnel. It hosts the Joint Financial Analysis Centre (JFAC), which brings together special personnel from four key agencies[44] with a view to enriching the intelligence, skills and the analytical capability of the centre.[45] Similarly, NCA owns and controls the Joint Asset Recovery Database (JARD),[46] which enables the UK asset recovery community to assess and record the efficiency of the recovery and confiscation process.[47] During international requests, NCA liaises with relevant UK authorities with a view to ensuring that requestors receive efficient and

[40] UK Financial Intelligence, 'Obtaining Assistance from the UK in Asset Recovery: A Guide for International Partners' (UK Financial Intelligence Unit, December 2017) 7. <https://star.worldbank.org/sites/star/files/ar_guide_uk_updated_dec_2017.pdf>accessed 10 January 2021.
[41] National Crime Agency, 'Money laundering and illicit finance' (*National Crime Agency*, June 2019) <https://www.nationalcrimeagency.gov.uk/what-we-do/crime-threats/money-laundering-and-illicit-finance>accessed 10 January 2021.
[42] Ibid.
[43]Wilmer Cutler, 'Annual return-UK National Crime Agency reports' (*Wilmer Hale W.I.R.E. UK*, August 2020) <https://www.lexology.com/library/detail.aspx?g=c3608eaf-8a8e-4d32-aef2-c173aa429e41>accessed 10 January 2021.
[44] Namely the SFO, the FCA, Her Majesty's Revenue and Customs and the NCA.
[45] National Crime Agency, 'Money laundering and illicit finance'
[46] It is a central repository of information relating to seizure of the proceeds of crime by a number of authorities and institutional agencies in the UK.
[47] Yulia Chistyakova, David Wall and Stefano Bonino, 'The Back-Door Governance of Crime: Confiscating Criminal Assets in the UK' (2009) European Journal on Criminal Policy and Research 4.

effective service.[48]Furthermore, NCA conducts specialized training programmes for financial investigators with a view to keeping their practice and conduct at par with new statutes and other legislative advancements.[49]

4.2.2 Policy-Based Evolution of the Law on Asset Recovery

The efficacy of the UK's legal framework has been enhanced by extensive policies and government reports, which elucidate legal challenges and the felt necessities of the time. The enactment of the Serious Crime Act 2015 and the Criminal Finances Improvement Plan of 2014 were informed by extensive research and audits conducted by the National Audit Office (NAO). In 2013, the National Audit Office conducted an audit whose aim was to assess the efficacy of confiscation orders. The audit revealed that the regime lacked agreed success parameters and a coherent strategy.[50] It also revealed that the then existing regime on restraint orders was not good enough to guarantee swift recovery of the assets before they could be hidden, spent or disposed.[51]The audit necessitated amendment of POCA 2002, which amendment was effected via the Serious Crime Act 2015. Principally, the amendments sought to simplify the process of obtaining a restraint order with a view to enhancing quicker restraint and efficacy in confiscation proceedings.[52]

In addition, the NAO's 2013 audits reports are responsible for the establishment of the Criminal Finances Improvement Plan in 2014. The plan operates as the UK's yardstick with which to measure the success of her asset recovery mechanisms. It outlines four objective parameters to

[48] UK Financial Intelligence (n 40) 7.
[49] UK Home Office, 'Asset Recovery Action Plan' (UK Government, July 2019) 5. <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/815900/20190709_Asset_Recovery_Action_Plan_FINAL_Clean.pdf >accessed 10 January 2021.
[50] George Arnett, 'Why confiscation orders aren't working' *The Guardian* (17 December 2013) 6.
[51] Yulia Chistyakoa, David Wall and Stefano Bonino (n 47) 4.
[52] Serious Crime Act, 2015 (UK) ss 5, 6, 7, 8, 9 and 10.

be used to gauge the success or progress of the asset recovery regime. The parameters include the extent to which the agencies have enforced and cleared backlog of unenforced orders, the extent to which they have recovered assets hidden overseas, the extent to which they have employed financial investigation skills to disrupt organized and serious criminals, and the extent to which asset recovery incentivisation scheme (ARIS) has worked.[53]

The introduction of the UWOs in 2017 was as a response to previous reports and studies which had hinted the inefficiency of the law in handling serious crime and corruption. A NAO's audit in 2016 showed that several legal challenges still persisted even after the legislative improvements in 2015. In general, the audit revealed that confiscation orders were yet to become a priority for enforcement agencies. The audit also showed a reduction in the number of confiscation and restraint orders granted as well as inadequacy of requisite personnel, especially financial investigators.[54] Against this background, POCA 2002 was amended through the Criminal Finances Act, through which amendment further powers were introduced with a view to improving the confiscation mechanism.[55] Although the amendment chiefly introduced the UWOs orders, it also introduced discovery orders as well as enhancing forfeiture powers and civil recovery.[56]

4.2.3 Public consultation, Transparency and Accountability

In addition, the efficacy of the UK's framework has been enhanced by the cordial relationship amongst key institutions, which enhances consultation, transparency and accountability in the manner of carrying out investigations. The code of practice is readily accessible for reference by the members of the public, as its copies are available at relevant government departments and

[53] Yulia Chistyakova (n 47) 4.
[54] Ibid.
[55] The Criminal Finances Act, 2017 (UK).
[56] The Criminal Finances Act, 2017 (UK) ss 1.

police premises.[57] Law enforcement agencies and the civil society have a working relationship characterized by transparency and consultative participation. The two meet on regular basis and have maintained constructive engagement.[58] There is a mutual understanding between the civil society, SFO and the NCA on information sharing especially on the progress of matters reported by the civil society.[59]

4.2.4 Accreditation of Financial Investigators

The efficacy of the UK's regime has also been enhanced by elaborate accreditation programmes, which involves specialized training and ensures enough supply of qualified personnel. It has a sound institutional framework on training and accreditation of financial investigators.[60] The accreditation programme is administered by the NCA, and it only admits persons employed by state agencies with investigation mandates under POCA, 2002.[61] The employees to be trained must be employed on permanent basis and does not cover those employed on contractual basis.[62]Upon the enactment of the Criminal Finances Act in 2017, at least 3, 500 financial investigators were trained on the provisions of the Act.[63]

In addition, the regime has monitoring and review mechanisms through which NCA can monitor the performance of the accredited investigators. NCA achieves this objective through liaising

[57] The UK (March 2016), Code of Practice Issued Under Section 377 of the Proceeds of Crime Act 2002, p. 4.
[58] Transparency International UK, 'Asset Recovery Overview: UK' (UNCA Coalition, June 2019)<https://uncaccoalition.org/files/Asset-Recovery-UK-Summary.pdf>accessed 4 September 2020.
[59] Ibid.
[60] Home Office, *Explanatory memorandum to the Proceeds of Crime Act 2002 (References to Financial Investigators) (Amendment) Order 2017* (2017 No. 74) 1.
[61] National Crime Agency, 'Financial investigation training courses' (*National Crime Agency*, June 2020) <https://www.nationalcrimeagency.gov.uk/what-we-do/how-we-work/investigating-and-disrupting-the-highest-risk-serious-and-organised-criminals/criminal-asset-denial/financial-investigation-training-courses>accessed 3 September 2020.
[62] Ibid. The NCA took over the accreditation role from the National Policing Improvement Agency following its abolition on 1 October 2013.
[63] Home Office, Asset Recovery Action Plan (July 2019) 5 <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/815900/20190709_Asset_Recovery_Action_Plan_FINAL_Clean.pdf.>accessed 21 August 2020.

with respective regulatory authorities, conducting bi-monthly activities and receiving submissions through its financial investigation professional register.[64]

4.3 The Economics of Asset Recovery

Furthermore, the efficacy of the UK's regime has been enhanced by the UK's responsiveness to the economics of asset recovery, which has made the country capitalize on economically sustainable asset recovery agencies. In the past, the country has abolished or restructured state agencies where it is shown that the amount of assets recovered by the agency is not commensurate to its operation cost. A good example is the Asset Recovery Agency which though established in 2003 was later abolished and its functions transferred to SOCA. The agency could not meet most of its targets.[65] Importantly, for the three years it had been operational, the agency recovered assets worth $23 million against its $65 million operation costs.[66] By August 2006, most of the cases it had initiated in 2003 were still ongoing.[67] In addition, although the agency had missed its initial plan of being self-financing by 2006, there was a real concern that the agency would still not have attained self-financing by 2010.[68]

And what is more about the UK's strategy is that it places high premiums on the economics of asset recovery. The underlying objective is that the costs of asset recovery should be proportionate to the society and the economy.[69] The implementation and enforcement of the UK's asset recovery tools is guided by three overriding principles. The first principle focuses on the efficacy of the mechanism, by requiring that the chosen recovery mechanism must make the

[64] Home Office, *Explanatory memorandum to the Proceeds of Crime Act 2002 (References to Financial Investigators) (Amendment) Order 2017* (2017 No. 74) 5.
[65] Claudia Irigoyen, 'The Assets Recovery Agency in the UK' (*Centre for Public Impact*, August 2017) <https://www.centreforpublicimpact.org/case-study/assets-recovery-agency/>accessed 30 August 2020.
[66] Ibid.
[67] National Audit Office, *The Asset Recovery Agency*, Report by the Comptroller and Auditor General, HC 253 Session 2006-2007(21 February 2007)17.
[68] Ibid 5.
[69] The Financial Challenge to Crime and Terrorism (London: HM Treasury, 2007) 3.

maximum possible impact.[70] The second principle is concerned with the appropriateness of the chosen mechanism, with respect to cost implications. The principle requires that the costs of the chosen mechanism ought to be proportionate so that its benefits outweigh its cost implications.[71] The last principle seeks to sanction necessary collaboration amongst related stakeholders with a view to securing successful engagement and partnership in the course of the recovery.[72]

4.4 Conscious Political Will and Government's Commitment

Moreover, the efficacy of the UK's regime has been enhanced by the government's conscious political will and commitment, which ensures that the government prioritizes asset recovery initiatives. To some extent, the success of UK's framework can be attributed to her asset recovery strategy, whose theme interweaves and runs across all her asset recovery tools. As early as 2007, the UK government had launched an over-arching strategy on how it would use asset recovery tools to fight terrorism and corruption.[73] The objective of the strategy is three-fold: to deter crime, to detect crime when it happens and to prosecute those responsible.[74]

The UK government places high premiums on improving the efficacy of her asset recovery mechanisms and the strength of her framework is at the top of her priority list. In 2013, the UK planned to strengthen POCA with a view to enhancing its efficacy in recovering hidden assets.[75] In 2014, the UK government acknowledged the need to strengthen her law enforcement and its efficacy in pursuing those engaged in money laundering and corruption.[76] This agenda also featured in 2015, where the UK committed herself to introducing more measures to curb

[70] Theodore Greenberg, Linda Samuel, Wingate Grant and Larissa Gray, *Stolen Asset Recovery: A Good Practices Guide for Non-Conviction Based Asset Forfeiture* (The World Bank, 2009) 135.
[71] Ibid 136.
[72] Ibid.
[73] The Financial Challenge to Crime and Terrorism (London: HM Treasury, 2007) 3.
[74] Theodore Greenberg, Linda Samuel, Wingate Grant and Larissa Gray, *Stolen Asset Recovery: A Good Practices Guide for Non-Conviction Based Asset Forfeiture* (The World Bank, 2009) 135.
[75] HM Government, *Serious and Organised Crime Strategy*, Cm8715 (London: The Stationery Office, 2013).
[76] HM Government, *UK Anti-Corruption Plan* (London: The Stationery Office, 2014) 8.

corruption and money laundering.[77]Lastly in 2016, the UK government conducted a thorough assessment of the appropriateness of exploring UWOs.[78]

The UK government has demonstrated political will to support international anti-money laundering initiatives as well as protect her economy from illicit wealth. In 2014, the UK government declared her intentions to crack down corruption and accelerate recovery of stolen assets.[79]In 2016, the UK hosted the global Anti-Corruption Summit as a result of which Global Declaration Against Corruption (GFAR) was made and signed.[80] In addition, the UK has launched the International Anti-Corruption Coordination Centre (IACCC) whose major objective is to tackle grand corruption by bringing together specialist law enforcement officers from various law enforcement agencies around the globe.[81]

There is every indication that the UK has made a conscious commitment to fulfill her international obligations towards effective freezing, seizing and repatriation of assets acquired through corrupt conduct. For starters, it has met, and in some instances surpassed, international standards for fighting money laundering.[82] Further, it has regularly submitted herself for review as per the OECD Anti-Bribery Convention to which she is a signatory. And what is more is that

[77] HM Government, *National Security Strategy and Strategic Defence and Security Review 2015: A Secure and Prosperous United Kingdom*, Cm9161 (London: The Stationery Office, 2015) 42.
[78] Home Office and HM Treasury, *Action Plan for Anti-Money Laundering and Counter-Terrorist Finance* (London: The Stationery Office, 2016)
[79] Theresa May, 'Home Secretary speech at Ukraine Forum on Asset Recovery' (*Government of UK*, 29 April 2014) <https://www.gov.uk/government/speeches/home-secretary-speech-at-ukraine-forum-on-asset-recovery>accessed 21 August 2020.
[80] Cabinet Office and Prime Minister's Office, 'Global Declaration Against Corruption', Policy Paper (9 December 2016). <https://www.gov.uk/government/publications/global-declaration-against-corruption/global-declaration-against-corruption>accessed 21 August 2020.
[81] National Crime Agency, 'International Anti-Corruption Coordination Centre' (National Crime Agency, June 2020) <https://www.nationalcrimeagency.gov.uk/what-we-do/crime-threats/bribery-corruption-and-sanctions-evasion/international-anti-corruption-centre>accessed 21 August 2020.It is a specialist law enforcement body, whose membership comprises the UK, Australia, Canada, New Zealand, Singapore and the USA.
[82] Transparency International UK (n 58) 360.

all the past OECD reports agree that the UK has been active in enforcing its foreign briery laws.[83]

The UK's legal framework on anti-corruption and recovery of assets has been informed by international treaties and conventions to which she is a signatory. These include the OECD Anti-Bribery Convention, the European Council Criminal Law Convention on Corruption and the United Nations' Convention Against Corruption.[84] The ratification of these international instruments necessitated an overhaul of the UK's then existing legal framework on anti-corruption which comprised of three statutes.[85] In order to align the UK with the international framework, as well as cure identified deficiencies, the three statutes were repealed in 2010 with the introduction of the Bribery Act.[86] Similarly, the introduction of the POCA in 2002 was a legislative response to international instruments which had been enacted during the 1990s and 1980s. The most significant instruments enacted then were the United Nations' convention on narcotic drugs[87] and the European Union's treaty on recovering proceeds of crime.[88]

Furthermore, the UK's commitment to anti-corruption internationally and domestically forms part of her strategic goals. By 2022, the UK plans to attain greater transparency over ownership and the control of legal entities, especially companies.[89] It has also planned to enhance international transparency with regard to the real owner of properties. To achieve this, the

[83] Ibid, 362. See also OECD, 2019a.
[84] The UK became a signatory to the OECD Anti-Bribery Convention in 1997, ratified the European Council Criminal Law Convention on Corruption in 2002, and the UNCAC in February 2006.
[85] The Public Bodies Corrupt Practices Act 1889, the Prevention of Corruption Act 1906 and the Prevention of Corruption Act 1916.
[86] Jackie Harvey, 'Tracking the international proceeds of corruption and the challenges of national boundaries and national agencies: the UK example' (2020) 40 (5) Public Money & Management 360, 361.
[87] United Nations Office on Drugs and Crime, 'United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1988,' 18 December 1988.
[88] Council of Europe, 'Convention on Laundering, Search, Seizure and Confiscation of the Proceeds of Crime', European Treaty Series 141, 8 November 1990.
[89] UK, *The Anti-Corruption Strategy* (2017–2022) 8.

government plans to introduce public beneficial ownership register for assets owned by overseas legal entities and companies.[90] However, since the beneficial ownership register will only record legal ownership, the UK government plans to go a step further and create a register for the People with Significant Control (PSC).[91]

4.5 Participation Incentives

Further, the efficacy of the UK's regime has been enhanced by the introduction of participation-enticements, which incentivize meaningful participation from key players in asset recovery initiatives. The most notable of these is the Asset Recovery Incentivisation Scheme (ARIS) whose major objective is to give key partners economic incentives to pursue and zealously participate in asset recovery. It does this by sharing the value of assets recovered between operational partners and the Home Office.[92]Generally, the Home Office receives a 50% of the recovered amount while the other 50% is channeled to the scheme.[93] For instance in 2014, the net sum of recovered assets was $158, 983, 064.78 out of which operational partners received $ 78, 983, 064.78 with the remainder being retained by the Home Office.[94]The ARIS funds are shared out amongst the operational partners depending on their respective contribution towards recovery of the amount.[95]The operational partners utilize these funds to finance community projects, specialist teams and financial investigators.[96]

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[90] Ibid. <https://researchbriefings.parliament.uk/ResearchBriefing/Summary/CBP-8259> accessed 12 August 2020.
[91] Jackie Harvey (n 86) 362.
[92] Home Office, Asset Recovery Incentivisation Scheme Review (February 2015) 2.<http://data.parliament.uk/DepositedPapers/Files/DEP2015-0223/ARIS_Review_Report_unmarked.pdf>accessed 30 August 2020.
[93] Jenny Birch and ACC Meir, 'Proceeds of Crime Act' Strategic Policing and Crime Board Agenda Item 9 (18 February 2020) 9.
[94] Home Office, Asset Recovery Incentivisation Scheme Review (February 2015) 2.
[95] Home Office, Asset Recovery Action Plan (July 2019) 27.<https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/815900/20190709_Asset_Recovery_Action_Plan_FINAL_Clean.pdf >accessed 30 August 2020. For cash seizures, where a single agency can seize, detain and apply for forfeiture of the cash, that agency retains the 50% operational share in

4.6 Cross-Border and International Recoveries

The efficacy of the UK's framework has also been enhanced by her robust legal framework on cross-border and international recoveries, which secures assistance in the context of international recoveries. The framework outlines how other jurisdictions can obtain mutual legal assistance from the UK in cases where assets to be recovered are situated in the UK. Noteworthy, the UK does not require reciprocity to offer the assistance and thus requests for legal assistance must not be based on a multilateral convention or a bilateral treaty.[97] Countries seeking mutual legal assistance from the UK are required to make an application to the UK Central Authority (UKCA). The authority's sole mandate is to review incoming requests, decide on the most appropriate way to execute the requests and decide on which agency to carry out the execution.[98]

The UK has also benefited from vibrant regional bodies which have eased cross-border asset recoveries within the member states. The IACCC has played a crucial role in enhancing repatriation of assets as well as minimizing duplication of roles amongst state agencies. The IACCC's mandate include receiving and responding to requests from victim states and coordinating investigation 'police to police' across the member states with a view to minimizing duplication of investigation activities.[99]The police-to-police enquiries require police from the requesting state to liaise with their UK counterparts through mechanisms established by Interpol.[100] The UK's law enforcement authorities have been applauded for having excellent

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its entirety. In the case of a confiscation, 18.75% is allocated to each of the investigating (the police or NCA) and prosecuting agencies (CPS), with the remaining 12.5% allocated to HM Courts and Tribunals Service (HMCTS) as the enforcement authority.

[96] Comptroller and Auditor General, *Confiscation Orders*, National Audit Office, December 2013 22.<https://www.nao.org.uk/wp-content/uploads/2013/12/10318-001-Confiscation-Book.pdf>accessed 30 August 2020.

[97] UK, Obtaining Assistance from the UK in Asset Recovery: A Guide for International Partners 3.

[98] Ibid 5.

[99] Jackie Harvey (n 86) 361.

[100] Gary Balch, *The UK Asset Recovery Regime*, Crown Prosecution Service (Organised Crime Division) 14.

working relationships with their counterparts from other states, thus easing cross-border asset recoveries and coordination initiatives.[101]

4.7 Conformity to Theoretical Model

The UK's experience largely conforms to the theoretical model. For starters, the UK experience conforms to the model's requirement that the entity must have information about the relevant data for making any decision. The UK regime has elaborate structures on information sharing between key stakeholders.[102]In addition, it is founded on public consultation, transparency and accountability all of which minimize chances of information asymmetry amongst governing agencies.[103]

In addition, the UK experience conforms to the model's requirement that the institution ought to have autonomy and freedom to exercise rational choice. Regulatory institutions like UKCA, SFO and CPS are independent from each other.[104] Each has specially allocated duties, which minimize institutional overlap and chances of shared mandates.[105] The institution's autonomy is boosted by the involvement of financial investigators, who enhance the institution's ability to make autonomous decisions.[106]

Moreover, the UK experience conforms to the model's requirement that there the rational choices made by the individual must have 'consistency' and predictability. Asset recovery in the UK is well founded on policy and legal frameworks, which generate a constant jurisprudence on

[101] Ibid 15.
[102] Transparency International UK, 'Asset Recovery Overview: UK' (UNCA Coalition, June 2019)<https://uncaccoalition.org/files/Asset-Recovery-UK-Summary.pdf>accessed 17 October 2021.
[103] Ibid.
[104] UK, Obtaining Assistance from the UK in Asset Recovery: A Guide for International Partners (Dec 2017) 7.
[105] The Proceeds of Crime 2002, s 362B (2), (3) and (4).
[106] National Crime Agency, 'Financial investigation training courses' (*National Crime Agency*, June 2020) <https://www.nationalcrimeagency.gov.uk/what-we-do/how-we-work/investigating-and-disrupting-the-highest-risk-serious-and-organised-criminals/criminal-asset-denial/financial-investigation-training-courses>accessed 17 October 2021.

asset forfeiture procedures. The framework has inbuilt mechanisms designed to achieve order in carrying out investigations and minimizing instances of parallel investigations.[107]

4.8 Conclusion

The chapter confirms that the UK's experience conforms to the theoretical model established in chapter one. It also reveals that Kenya has much to learn from the UK's experiences. The UK's framework provides for clear demarcation on the roles of various players minimizing instances of shared mandates and unnecessary overlap. It also has introduced ARIS to incentivize meaningful participation from key players in the asset recovery initiatives. The UK's regime is responsive to the economics of asset recovery, with the country capitalizing on economically sustainable asset recovery agencies. It has a more robust non-conviction based recovery regime following the introduction of the UWOs in 2017.

In addition, the UK government has made a conscious commitment to fulfill her international obligations towards effective freezing, seizing and repatriation of assets acquired through corrupt conduct. She has demonstrated political will to improve the efficacy of her asset recovery mechanisms. And what is more is that the incremental change and evolution of her legal framework is based on extensive policy and government reports. Lastly, the trajectory of her legal framework shows a government which has constantly amended the law to enhance the efficacy of her regime and meet the felt necessities of the time.

[107] The Proceeds of Crime Act, 2002 (UK) s 378.

CHAPTER FIVE

FINDINGS, CONCLUSIONS AND RECOMMENDATIONS

5.1 Introduction

The study sought to investigate the efficacy of the Kenya's legal framework in enhancing recovery of assets acquired through corrupt conduct. Through the POCAMLA and the ACECA, the regime establishes various institutions including the EACC and the ARA, and bestows upon them powers to preserve, recover and forfeit unexplained assets and assets acquired through corrupt conduct. Although it was expected that this legal and institutional framework would be efficacious in enhancing asset recovery, there is every indication that this vision is still a mirage. Evidence suggests that the amount of the recoveries being reported constitute an insignificant portion of the real loot.

Against this background, the study sought to investigate and determine why the legal framework has not been efficient in recovering a significant portion of the reported loot. In particular, the study sought to determine the legal challenges that impede EACC and ARA from achieving significant recoveries of assets acquired through corrupt conduct. It also sought to examine the extent to which the UK's experiences on asset recovery provide lessons which Kenya can emulate. Lastly, the study sought to propose the necessary reforms on the Kenyan legal framework with a view to achieving an efficacious asset recovery regime.

The study was based on two hypotheses. First, it postulated that the Kenya's legal framework for asset recovery is at best problematic because the apportionment of responsibilities amongst the stakeholders is intermittent with much overlaps, ambiguity and duplication of duties. Secondly, the study hypothesized that this unsettled state of the legal framework has occasioned uncertainty

in the law implementation and has decelerated ARA's and EACC's ability to recover assets acquired through corrupt conduct. The study utilized a host of research methodologies including doctrinal, historical and qualitative research methodologies. It also analyzed the UK's experience on asset recovery with a view to identifying any positive lessons which Kenya can learn.

5.2 Findings

Generally, the study confirmed and proved the two hypotheses. It verified that the Kenya's legal framework for asset recovery is at best problematic because the apportionment of responsibilities amongst the stakeholders is intermittent with much overlaps, ambiguity and duplication of duties. Secondly, the study established that this unsettled state of the legal framework has occasioned uncertainty in the law implementation and has decelerated ARA's and EACC's ability to recover assets acquired through corrupt conduct.

From a historical perspective, the study revealed that the Kenya's existing legal framework on asset recovery is the culmination of several historical events which color her special socio-political context. First, it revealed that past legislative reforms on asset recovery were crisis-driven. Secondly, it demonstrated that the regime has undergone gradual evolution and development from a very basic regime to a robust constitutionally-sanctioned legal framework. Also, the study showed that parliament has been constantly making attempts to amend the law with a view to responding to the felt necessities of the time as well as improving the national framework to keep it at par with international developments on asset recovery. Lastly, the study revealed that international, regional and sub-regional instruments have greatly informed and influenced the trajectory of the Kenya's legal framework on asset recovery.

With respect to the research objectives, the study revealed that Kenya's legal framework on asset recovery has several positive attributes which underpin rule of law and respect for human rights. Recovery proceedings under ACECA and POCAMLA underscore the right to fair hearing, they enhance ADR in asset recovery processes, they prevent arbitrary deprivation of one's property and it is at best a balance between the right to own property and government's agenda to cure acquisition of property through corrupt conduct.

In addition, the study revealed the legal challenges which impede the EACC's and ARA's efficacy in recovering a significant portion of the reported loot. One of the challenges is inadequate legal framework for cross border and international asset recoveries, rendering problematic the role of the EACC in international recoveries with respect to receiving and providing enforcement cooperation. In addition, there is lack of clear demarcation of mandates between EACC and ARA, as well as instances of shared mandates both of which have occasioned institutional overlaps, antagonism, sibling rivalry, and parallel investigations. Moreover, the EACC is yet to achieve full insulation against political patronage which has by extension prejudiced its stability and its jurisprudence. EACC's lack of autonomy and independence has also been aggravated by the absence of prosecutorial powers.

Furthermore, the Kenyan regime does not enhance efficacy with respect to the obtaining of crucial documents for investigative purposes. The study also revealed non-legal challenges which impair the efficacy of the Kenya's legal framework. One of them is the problem of culture and the value system in the Kenyan society since it appears that Kenyans have made peace with corruption and they tolerate it. In addition, there is the problem of conceptualization with respect to Kenya's approach to handling corruption, as well as conceptual confusion around the formation of the EACC, its role and the mandates of its top leadership, both of which have

occasioned instability at the EACC as an institution. Another problem is mishandling and destruction of crucial financial documents and the failure or reluctance of the EACC and DCI to fully enforce the existing law on safety of county financial records.

Furthermore, the study has identified positive attributes of the UK's legal framework, and lessons which Kenya can learn from her experience on asset recovery. The UK's institutional framework is characterized by a careful allocation of duties amongst key institutions, which minimizes institutional overlap, chances of shared mandates and parallel investigations. Besides, the institutions operate against the backdrop of inter-departmental agreements which facilitate innovative and collaborative working environment amongst themselves. In addition, the legal framework is founded on extensive policies and government reports, which elucidate legal challenges and the felt necessities of the time.

Further, implementation of the framework has been propelled by the cordial relationship amongst key national institutions, which enhances consultation, transparency and accountability in the manner of carrying out investigations. Moreover, the UK has elaborate accreditation programmes, through which they offer specialized training for financial investigators as well as ensure enough supply of qualified personnel. Additionally, the UK is very responsive to the economics of asset recovery, making the country capitalize on economically sustainable asset recovery agencies. And what is more is the government's conscious political will and commitment, which ensures that the government prioritizes asset recovery initiatives.

Further, the efficacy of the UK's regime has been enhanced by the introduction of participation-enticements, which incentivize meaningful participation from key players in asset recovery initiatives. Also, the UK has a robust legal framework on cross-border and international

recoveries, which secures assistance in the context of international recoveries. International recoveries have also been made less problematic by elaborate administrative and diplomatic arrangements which coordinate and foster smooth working relationships between UK agencies and their international counterparts.

5.3 Conclusion

Although Kenya's legal framework establishes the EACC and the ARA, and bestows upon them powers to preserve, recover and forfeit unexplained assets and assets acquired through corrupt conduct, nonetheless the amount of the recoveries being reported constitute an insignificant portion of the real loot. I sought to investigate and determine why the legal framework has not been efficient in recovering a significant portion of the reported loot. I analyzed the implementation of the enabling statutes, namely POCAMLA and the ACECA, as well as the historical development of the legal and institutional framework on asset recovery in Kenya. My analysis showed that there is lack of clear demarcation of mandates between EACC and ARA, as well as instances of shared mandates. I argue that the lack of clear demarcation prejudices the efficacy of the two institutions because it occasions institutional overlaps, antagonism, sibling rivalry, and parallel investigations.

My analysis also established inadequacy of Kenya's legal framework for cross border and international asset recoveries. I argue that the inadequacy decelerates the efficacy of the EACC because it does not illuminate on the role of the EACC in international recoveries with respect to receiving and providing enforcement cooperation. I also found that the EACC is yet to achieve autonomy and independence and full insulation against political patronage. I argue that these factors impede her efficacy because they compromise her stability and her jurisprudence. Lastly, my analysis established the problem of culture and the value system since it appears that

Kenyans have made peace with corruption and they tolerate it. I argue that the problem of culture impairs the efficacy of the institutions because it is responsible for conceptualization challenges with respect to Kenya's approach to handling corruption and conceptual confusion around the formation of the EACC.

The study is limited in that it dealt majorly on the EACC, and did not focus on other institutions which the study admits are equally important in implementing the law on asset recovery. Again, the study did not engage key informants by way of interviews and questionnaires, as the study majorly focused on already published data. The research fills the gap in literature on the efficacy of the EACC in recovering assets acquired through corrupt conduct, and its findings will assist policy makers and legislators in identifying the most appropriate legislative reforms. The results of the study could lead to changes in practices such as the introduction of participation incentives and accreditation of financial investigators as some of the best practices identified in the UK.

5.4 Recommendations

The study makes several recommendations which can be classified loosely into two classes; those that require administrative actions and those that require legislative amendments.

Recommendations which require legislative amendments

1. **Providing for the role of the EACC in international recoveries**

The law should be amended to expressly outline the role of the EACC in international recoveries with respect to receiving and providing enforcement cooperation. In particular, ACECA should be amended to authorize EACC to provide or receive direct law enforcement cooperation from foreign agencies. This will cure uncertainty on the nature and processes of recovering monies confiscated in other countries.

2. **Providing clear apportionment of mandates amongst state agencies**

The enabling statutes, POCAMLA and ACECA should be amended to provide a clear demarcation and apportionment of mandates amongst key state agencies namely EACC, ARA and DCI. This will cure instances of shared mandates, institutional overlaps, turf wars amongst the agencies, parallel investigations and bungling of cases.

3. **Providing prosecutorial powers for EACC and ARA**

The law should be amended to grant prosecutorial powers to both the EACC and ARA. The DPP should donate and delegate some of his constitutional mandate to the EACC and ARA, especially on matters relating to asset recovery. The DPP should be empowered to gazette few of EACC's and ARA's advocates as prosecutors but still working by virtue of his powers, so that where ARA and EACC find these criminal matters they can by themselves prosecute in the name of the DPP. Even though the DPP will still have control, the EACC will be able to fast track the cases and by extension the recovery process.

4. **Enacting a policy framework on Asset Recovery**

The government in consultation with key stakeholders should come up with a comprehensive policy on asset recovery. The policy should outline the government's strategic goals on asset recovery, set out the spirit of the law and the perspective from which the law on asset recovery should be implemented and enforced. This will cure the problem of conceptualization troubling the EACC with respect to jurisprudence and approach to fighting corruption.

5. Clarifying on the ultimate custodian of the recovered assets

ACECA should be amended to read the same thing with POCAMLA with regards to the ultimate custody of the recovered funds. The amendment should do away with the Criminal Asset Recovery Fund under POCAMLA, so that all monies received are paid to the Consolidated Fund as it is provided for under ACECA. This will ensure that monies recovered are not idle as it was witnessed in the past where the President announced that USD 19 million in recovered assets would be used in the fight against covid-19.

6. Introduction of qui-tam actions in Kenya

Kenya can improve her performance on asset recovery by introducing qui-tam actions. A qui-tam action allows a private citizen to institute a claim against contractors for fraudulent claims against the state.[108] The action is brought on behalf of the government, and the plaintiff gets a share of the recovered damages. The actions are predominantly used in the US, and have helped in recovery of billions of dollars.[109] Their success story in the USA is attributed to a number of factors. One of the factors is that attorneys are permitted to work on a contingency fee basis, thus addressing possible challenges of funding such claims.[110] Kenya has learnt from the USA's experience and she is in the process[111] of adopting a framework similar to the one under the USA's False Claims Act.[112] Consequently, this will necessitate few legislative reforms with a

[108] Government Printers (2015) Report of the Task Force on the Review of the Legal, Policy and Institutional Framework for Fighting Corruption in Kenya 84.
[109] The United States Government (2015), Justice Department Recovers Over $3.5 Billion From False Claims Act Cases in Fiscal Year 2015 (Justice News, December 2015) <https://www.justice.gov/opa/pr/justice-department-recovers-over-35-billion-false-claims-act-cases-fiscal-year-2015>accessed 16 October 2021.
[110] Nathan Sandals, 'What a Difference a Year Makes… or Does It? Revisiting Kenya's Anticorruption Task Force and Assessing its Legislative Proposals' (*The Global Anticorruption*, May 2016) <https://globalanticorruptionblog.com/2016/05/27/what-a-difference-a-year-makes-or-does-it-revisiting-kenyas-anticorruption-task-force-and-assessing-its-legislative-proposals/>accessed 16 October 2021.
[111] Samuel Kisika, 'Bill proposes to pay whistleblowers 10% of recovered loot' *The Star* (Nairobi, October 24 2018) 5.
[112] False Claims Act, 31 USC No. 3729 (also known as the Lincoln Law).

view to boosting the utilization of the proposed law in the Kenyan context. One of such reforms is relaxation of the rules on contingency agreements, since the existing laws do not allow advocates to enter into such agreements.[113]

Recommendations which require administrative actions

1. **Sensitization and civic education to address the problem of culture**

The government in association with non-governmental organs should carry out extensive continuous sensitization initiatives though which it should demoralize corruption and change the Kenyan's tolerance towards the social ill.

2. **Accreditation of Financial investigators**

The government should establish a centre for training and accrediting financial investigators. The centre should only admit persons employed by state agencies on permanent basis and not those employed on contractual basis. This will ensure enough supply of qualified personnel.

3. **Introduction of Participation Incentives**

The government should give key partners economic incentives to pursue and zealously participate in asset recovery. This can be achieved by sharing the value of assets recovered between operational partners and the national treasury. An ideal arrangement would see the national treasury receive 50% of the recovered amount while the other 50% is channeled to a Fund or scheme, which would apportion to respective partners proportionally to their contribution in the particular recovery.

[113] Advocates Act, s 46.

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