

# Can Non-Conviction based (NCB) asset forfeiture be compliant with the Rule of Law?

## Briefing Paper

### Overview

1. Jai Ramaswamy, Chief of the Asset Forfeiture and Money Laundering Section of the US Department of Justice, recently declared in relation to asset forfeiture that:

*"[I]f we want to do this right, it may take some time, but part of what we are trying to promote is the Rule of Law. It doesn't make us do any good [...] if we acquire these goods in a way that violate those basic tenets of fairness, due process, etc. That takes time; it can be frustrating [...] but I also appreciate that there is then public buy-in, there is legitimacy to what we've done; it doesn't look like we're running kangaroo courts [...]"<sup>i</sup>*

2. Ramaswamy's comments are extremely on point. While the world bears witness to various corruption scandals, governments, NGOs and the law enforcement community alike continue exploring mechanisms to recover kleptocratic money and to return ill-gotten gains to their country of origin in an accountable manner. As Ramaswamy's quote suggests, procedures must be followed to bring asset recovery in line with the Rule of Law. His comments also speak to the broader difficulties of fighting corruption in a manner that complies with the Rule of Law. As President Buhari of Nigeria once declared:

*"I am not unaware of the challenges of fighting corruption in a manner consistent with respect for human rights and the Rule of Law".<sup>ii</sup>*

3. Asset recovery – the process by which law enforcement agencies and courts deprive criminals and criminal organizations of their ill-gotten gains through seizure of these assets – raises a number of questions. Specifically, Non-Conviction Based (NCB) asset forfeiture (also known as 'civil forfeiture') galvanises both praise and criticism, with most attention focussing on the constitutional dangers it entails with respect to human rights and due process protections for the defendant.
4. The research upon which this paper is based<sup>iii</sup> provides guidance on how various 'developing country' jurisdictions can implement NCB in a manner that is compliant with due process and the Rule of Law. In the process, it shows that it is possible for countries to minimize prospects for abuse in NCB. The research also contributes to our understanding of how tensions between the need to fight corruption and recover assets while respecting civil and political rights can operate in practice.

### Key Messages

- NCB is a much-maligned asset recovery tool which attracts both praise and criticism. The latter revolves around the lifting of constitutional protections for the defendants, lower procedural safeguards, and the potential for NCB to encroach on human and property rights.

- Rule of Law safeguards – such as independent courts and robust judicial structures which guarantee property rights protection – are a prerequisite to the effective implementation of NCB.
- As experience from various countries demonstrates, NCB can be Rule of Law compliant where certain safeguards are put in place.
- There are, however, challenges to the implementation of these safeguards, including the lack of understanding of incentives/disincentives for reforms; a possible conflict between human rights and anti-corruption commitments; judicial independence (or lack thereof); and the state of property rights regimes.

## Introduction

5. In the world of international development, the large-scale plundering of state resources is particularly problematic because it deprives many governments with resources to invest in health, education and infrastructure. Ongoing transparency campaigns and investigative reports have also demonstrated the transnational nature of corrupt money, whereby a lot of the ill-gotten gains tend to be siphoned off abroad to offshore jurisdictions. The problem is that such funds can seldom be recovered and returned.<sup>iv</sup>
6. Because criminals tend to place greater value on the money and assets rather than time in prison, a well-known law enforcement strategy consists in ‘taking the profit out of crime’. This can be achieved either through domestic criminal prosecution and confiscation, or through Non-Conviction-Based (civil) forfeiture mechanisms (NCB).

## Non-Convictions Based forfeiture mechanisms and due process implications

7. NCB (sometimes called ‘civil forfeiture’) provides a mechanism for freezing criminally tainted assets and their instrumentalities, and then forfeiting these to the states if so decided by the courts. Specifically, NCB refers to the legal process allowing for the “restraint, seizure and forfeiture of stolen assets without the need for a criminal conviction.”<sup>v</sup> NCB targets property, and not a person like in criminal cases.<sup>vi</sup> It uses a civil standard of proof (i.e. on a ‘balance of probabilities’) as the prevailing benchmark<sup>vii</sup>. It also shifts the onus of proof onto the defendant, who must thus prove the lawful origins of his/her assets.<sup>viii</sup> The Box below further elaborates on the NCB process.

### NCB in a nutshell<sup>ix</sup>

NCB typically begins with an investigation to secure the necessary evidence that an asset is either proceeds of unlawful activities or an instrumentality of an offence. This investigation can be conducted separate from or together with criminal procedures. Where investigators/prosecutors are satisfied with the evidence, a Court order is often presented with a motion to freeze the assets (e.g. the cash in a bank or an expensive car that needs to be impounded), which the Court grants (or not), often within a short timeline. This can be done *ex parte* if the defendant fails to meet the deadline and/or fails to appear in Court. The Court ruling will often include the motivation for freezing the assets and identify a respondent/defendant. It may also prescribe a time limit during which the investigators can continue assembling evidence, and/or for the suspect to build his or her defence and prove the licit origins of his or her assets. However, sometimes this is defined in the Statutes. In

South Africa and Namibia, this is known as the ‘preservation’ stage. Following this period, the Court must rule on the case. It will determine whether the assets should be returned back to the defendant or forfeited to the State where it can be shown they are either proceeds of unlawful activities or and instrumentality(ies) of an offence(s). In South Africa and Namibia, this is known as the ‘forfeiture’ stage. However, there are differences in how countries go about these steps, both in terms of who has the authority to undertake it, the role of the courts, and statutory limits. Once the final forfeiture order is granted, the state is normally empowered to use the assets as it sees fit (some countries provide a centralised fund, for example to assist bolstering enforcement agencies).

8. NCB has attracted a fair bit of criticism since it involves lifting due process protections for the accused who can be punished without him/her enjoying the normal due process protections otherwise afforded to all defendants in a criminal case.<sup>x</sup> NCB is viewed by some as an assault on due process which raises serious constitutional concerns, in part because it interferes with property rights of third parties in the absence of a criminal conviction.
9. Despite the criticism, the application of NCB has withstood constitutional scrutiny when challenged in courts, for example in South Africa, Namibia or the Philippines.<sup>xi</sup> South African law, court rulings, along with other proponents, recognize that NCB is a ‘critical’ tool for recovering the proceeds and instrumentalities of corruption since conventional remedies to fight crime have failed.<sup>xii</sup> Law enforcement authorities also tend to argue that NCB provides a swift and efficient way to recover assets, not only because of its broad scope of application, but also since the alternative – criminal confiscation – entails a level of technical complexity that often acts as a deterrent against pursuing corruption cases. Indeed, criminal forfeiture requires tracing the assets back to their origin, which requires technical skills some countries don’t have. Moreover, causality may also be hard to establish in cash-based societies, which qualifies to a lot of developing countries.

## NCB and the Rule of Law: making the connection

10. Why focus specifically on asset forfeiture, NCB, and the Rule of Law? As stated above, without Rule of Law that ensures legal certainty, transparency and accountability and access to justice and rights, NCB forfeiture risks infringing on property and human rights. Thus, the Rule of Law is clearly an enabler where asset forfeiture and NCB are concerned. Little wonder that the UN Convention Against Corruption (UNCAC) also recognise the importance of the Rule of Law and due process of law to adjudicate property rights, both in the preamble and opening articles on preventive measures.<sup>xiii</sup> Moreover, the prosecution of corruption often takes an international dimension, and courts in many jurisdictions can only accept evidence (e.g. gathered in ‘victim’ countries) which meets certain exacting Rule of Law standards. Thus, developing the local investigative, prosecutorial and legal ecosystem in ‘victim’ countries in a manner that is Rule of Law compliant is fundamental.
11. Because of the powers associated with it, NCB can lead to creating significant and arbitrary state powers to interfere with property rights in the absence of a criminal conviction. This overwhelming capacity to do harm is worrying where state capacity is weak and its powers are left unchecked, for example through independent courts. Thus, it is clear that robust judicial structures and rights protection are a *prerequisite* to the effective implementation of NCB. Rule of Law safeguards help prevent corruption and ensure that NCB is not diverted from its original objective. They also help build trust in NCB, thus contributing to their long-term sustainability and effectiveness. Paradoxically, therefore, Rule

of Law can help curb abuse in NCB, but the success of NCB also depends on the stability of Rule of Law institutions.

## Safeguards in Practice

12. The research shows that some developing countries have put in place due process safeguards to address the issues created by the lower standard of proof, and thus that NCB forfeiture can be implemented with good effect in a manner that is consistent with due process, human rights, and the Rule of Law. Even as critics of NCB recognise, when it is compliant with due process, it can be an efficient tool in the fight against corruption.<sup>xiv</sup> The research identified the following safeguards that are implemented in practice across various constituencies:

- a) Lawfulness and proportionality as a means to protect property rights: One way to ensure this infringement on property rights is justified is to ensure it is lawful (i.e. that the interference is authorized by law, which is itself legally certain). Moreover, rights can be curtailed if they are proportionate to the goals sought. In practice, therefore, courts have used proportionality tests to ensure NCB doesn't interfere on individual rights and to address the risk that 'punishment' meted out on the accused through confiscation of proceeds of crime or the instrumentalities isn't too harsh.<sup>xv</sup> The South African approach consists in a two-step judicial test, one focussing on instrumentality, and another on proportionality.
- b) Compensation: Some jurisdictions have established that the interference with property involved in civil forfeiture should be accompanied by compensation when it affects third parties unfairly and unreasonably, or when it may restrict a person's peaceful enjoyment of his/her right. Courts in South Africa and Namibia can vary preservation orders to avoid inflicting undue hardship.
- c) Mitigating the risk of 'reverse onus' provisions: Shifting the onus onto defendants is arguably easier since a defendant is best placed to justify that his property was lawfully acquired, or not acquired directly or indirectly from the commission of an offence, than it is for the authorities to establish the contrary. But reversing the burden of proof is fraught with dangers, as it could undermine the fair trial rights of the accused, which ensure that anyone accused of a crime by the state has the procedural right to a presumption of innocence and a right to a defence.

Lord Bingham, a preeminent UK judge, decided that proportionality tests, which are undertaken to evaluate whether the reversal is justified, provide one way to guard against abuse in reverse onus provisions.<sup>xvi</sup> It remains to be seen how courts in developing countries can effectively apply such a test, however. Moreover, it is worth noting there have been legal challenges against the presumption of innocence in various jurisdictions, but courts have found that reverse onus provisions are lawful on the condition that the presumption is restrictively worded, rebuttable, and reasonable.<sup>xvii</sup>

Another way to address the risk inherent in reverse-onus provisions is to vary the standard of proof throughout the asset forfeiture process. South Africa, for example, places the burden at the *preservation* stage on the National Director of Public Prosecutions (NDPP), which must demonstrate that it has "reasonable grounds" to believe that the property is the proceeds or instrumentality of a crime.<sup>xviii</sup> At the *forfeiture* stage, the burden continues to lie with the NDPP, but the standard is on a balance of probabilities, a higher standard than at the *preservation* stage, though still short of what is required in criminal cases. This two-stage procedure thus brings in additional safety

by ensuring that the state shows that its suspicions are justified and also restricts the state's ability to initiate such proceedings without a certain level of proof. In the Ukraine, a Bill proposes to introduce a 'partially reversed burden of proof'. The Colombian legislation also applies a 'dynamic burden of proof'.

- d) Protections against self-incrimination: A central tenet of criminal justice systems is that any person who is charged with a criminal offense is entitled to be presumed innocent until proven guilty. A corollary right is that the accused is not compelled to give evidence during the trial. This is important, since NCB can often be conducted in parallel to a criminal trial. In such circumstances, it is good practice for the statutes to clarify whether a forfeiture case can proceed alongside a criminal case, but in such a way that compelled information from the asset owner is not used against him/her in a criminal case. However, it should be noted that the South African courts have ruled there is no privilege against self-incrimination because the evidence in civil litigation is not compelled, which, it is argued, means that defendants are much less inclined to contest a case because the statements they make may be used against them in a criminal case.<sup>xix</sup>
- a) Challenging forfeiture orders and right to appeal: Embedded within the NCB process is the right for defendants to appeal decisions. This means that the authorities must not only give notice to all those who may have an interest in a property or asset which is subject to a forfeiture order; but also that a person may challenge that decision within a certain time-frame. In South Africa, the 'innocent owner' must prove, on a balance of probabilities, that the proceeds were acquired legally, for consideration and that he or she has, since the key legislation was introduced<sup>xx</sup>, neither known nor had reasonable grounds to suspect that the property is the proceeds of an unlawful activity or is an instrumentality of an offence (this is known as the 'innocent owner defence').
- b) The right to legal aid: This protection underpins the realization of the abovementioned safeguards, and is a broader principle enshrined in most legal systems. Some countries provide for legal assistance to vulnerable people. But Colombia also proscribes the claimant's use of seized or frozen assets for legal fees or living expenses. South Africa makes an allowance for living expenses from the seized assets, and to cover his defence (within limits). Without such limit, the claimant would have nothing to lose from litigating endlessly until funds have been depleted. Naturally, providing access to legal aid out of frozen funds also presupposes that the seized assets are properly managed in a way that their value does not decrease.
- c) Restricting the value of forfeited assets: In the US, where pushback against NCB has been particularly important due to a tendency by some law enforcement authorities to engage in 'policing for profit', some states have responded to this by placing a threshold beyond which seizure of assets can only happen through criminal, not civil mechanisms.

## Implementation challenges

13. The Stolen Asset Recover (StAR) Initiative has identified a number of conditions that developing countries should put in place to facilitate asset recovery without which the effective recovery of stolen wealth and return of assets could be hampered. This includes, among others: effective laws and institutions, which depend on strong legislative and regulatory frameworks, together with institutions that have operational independence; investigation and pursuit of cases, which in turn, could be said to depend largely on political will; effective interaction among agencies; informal practitioner-to-practitioner cooperation

as well as better international cooperation mechanisms, including through Mutual Legal Assistance (MLA) requests; and development of the capacity of practitioners.<sup>xxi</sup> In addition to this, the research identified various challenges that may affect the implementation of the aforementioned due process safeguards to varying degrees, particularly in a developing country context:

- a) Understanding incentives/disincentives for change and for addressing corruption: It is often held that fighting corruption requires 'political will'. True as that might be, the precise meaning of this term is contested. Instead, it has been suggested that understanding the political economy of change and the incentive/disincentive systems for addressing corruption and tackling asset forfeiture is more fruitful approach. This is a first and necessary stage needed to inform asset recovery reform.
- b) The possible conflict between human rights and anti-corruption commitments: There appears to be a tension that emerges from international laws that grant increased powers of confiscation, and international human rights standards that enshrine due process. But as has been argued in the broader literature, this tension does not appear to be insurmountable.<sup>xxii</sup> The key point is that implementing the due process safeguards essentially helps allay the possibility that the two types of obligations conflict.
- c) Court systems and judicial independence (or lack thereof): Whether and how the various due process safeguards are implemented ultimately depends on the presence of a fair and impartial judiciary. In other words, where there is no judicial review, and where courts are unable to undertake a proportionality analysis, this could severely undermine due process in forfeiture cases. Lack of judicial independence and a weak court system (e.g. court delays) could also hamper the implementation of citizen's and property rights. Measures to strengthen judicial independence and court systems in general can thus have spillover effects on asset forfeiture.
- d) Property rights regimes: Related to the above point, courts have an important role in protecting property rights regime. As already discussed, some countries have constitutionally enshrined property rights protections prescribing that there can be no deprivation of property except in terms of law of general application, and more generally, that no law may permit arbitrary deprivation of property. In practice, however, identifying the actual property owner is challenging, especially where there is no land registry linking property to an owner, or where it is of poor quality. This causes a risk that courts may order expropriation and, in the process, inflict harm to or loss for a third party. In short, where asset forfeiture is concerned, deed registry and strong expropriation laws are important to protect property rights. But so is an independent judiciary which is able to undertake a proportionality analysis, hear appeal processes and ensure the defendant's right to a fair trial.

- i. Jai Ramaswamy, Center for Strategic and International Studies, *Returning Stolen Assets: Current Issues and Future Challenges for the International Community*, Washington D.C. (Oct. 24, 2014).
- ii. His Excellency Muhammadu Buhari, President, Fed. Republic of Nigeria, Keynote Address at The Commonwealth Event: Tackling Corruption Together: A Conference for Civil Society, Business and Government Leaders (May 11, 2016).
- iii. Tromme M, Spring 2019, *Waging War Against Corruption in Developing Countries: How Asset Recovery Can be Compliant with the Rule of Law*, *Duke Journal of Comparative & International Law*, 29(2), <https://scholarship.law.duke.edu/djcil/vol29/iss2/> Countries under review include: South Africa, Namibia, Botswana, the Philippines, Mexico and Colombia
- iv. Phyllis Atkinson, *Introduction to International Centre for Asset Recovery, Tracing Stolen Assets: A Practitioner's Handbook* 19–22 (2009), [https://www.baselgovernance.org/sites/collective.localhost/files/publications/asset-tracing\\_web-version\\_eng.pdf](https://www.baselgovernance.org/sites/collective.localhost/files/publications/asset-tracing_web-version_eng.pdf) and See Kevin M. Stephenson et al., *World Bank & UNODC, Barriers to Asset Recovery: An Analysis of the Key Barriers and Recommendations for Action 3* (2011), <http://documents.worldbank.org/curated/en/204221468338390474/Barriers-to-asset-recovery-an-analysis-of-the-key-barriers-and-recommendations-for-action>
- v. Greenberg et al, *Stolen Asset Recovery Initiative, Stolen Asset Recovery: A Good Practices Guide for Non-Conviction Based Asset Forfeiture* 1, 1 (2009), at xv.
- vi. A distinction is often made between 'in rem', and 'in personam' forfeiture.
- vii. Comparatively, criminal cases require proof to be based 'beyond reasonable doubt'
- viii. NCB usually involves two stages, one where the assets are frozen, and one when they are forfeited. In South Africa, the standard of proof differs.
- ix. This description attempts to generalise the NCB process, however there may be variations from jurisdiction to jurisdiction.
- x. Liberty (The National Council for Civil Liberties), *Proceeds of Crime: Consultation on Draft Legislation* ¶ 5.1 (May 2001), <https://www.libertyhumanrights.org.uk/sites/default/files/jun-proceeds-crime-draft.pdf>
- xi. See *Falk v NDPP* 2012 (1) SACR 265 (CC) (South Africa); *Shalli v. The Attorney-General* [2013] NAHCMD 5 (Namibia); Republic of the Phil. v. Sandiganbayan, G.R. No. 152154 (S.C., Nov. 18, 2003) (Philippines)
- xii. See *NDPP v. Mohamed NO & Others* 2002 (4) SA 843 (CC) (S.Afr.); Prevention of Organised Crime Act 121 of 1998, *supra* note 15.
- xiii. G.A. Res. 58/4, United Nations Convention Against Corruption, UNCAC (Oct. 31, 2003).
- xiv. Martin Collins & Colin King, *The Disruption of Crime in Scotland through Non-Conviction Based Forfeiture*, 16 *Journal of Money Laundering Control* 379 (2013); AJ van der Walt, *Civil Forfeiture of Instrumentalities and Proceeds of Crime and the Constitutional Property Clause*, 16 *South African Journal of human rights* 1 (2000); Colin King, *Using Civil Processes in Pursuit of Criminal Law Objectives: A Case Study of Non-conviction-based Asset Forfeiture*, 16 *International Justice of Evidence & Proof* 337, 337–63 (2012).
- xv. As has been remarked, proportionality tests can only work in jurisdictions where the constitution protects private property against expropriation without compensation, and even then, only in those instances where the courts are willing to treat a disproportionate or excessive regulatory control of the use of property as an expropriation. For more on this and specific examples, see Tromme, M, Note iii
- xvi. *Sheldrake v. Director of Public Prosecutions* [2004] UKHL 43, [20]–[21], ¶ 21 (appeal taken from Eng.).
- xvii. Greenberg et al, Note v, at 61. Reversal of the burden of proof is also encouraged by Article 12(7) of the U.N. Convention Against Transnational Organized Crime, G.A. Res. 55/25, U.N. Doc A/RES/55/25 (Jan. 8, 2015). For legal challenges against the presumption of innocence, see generally *R v. Rezvi* [2002] UKHL 1 (appeal taken from Eng.); *R v. Benjafield* [2002] UKHL 2 (appeal taken from Eng.).
- xviii. Prevention of Organised Crime Act 121 of 1998 § 38(2) (South Africa).
- xix. Willie Hofmeyr, *The Effective Use of Asset Recovery*, 39 *Commonwealth Law Bulletin* 1, 59, 63 (2013).
- xx. Prevention of Organised Crime Act 121 of 1998 (South Africa)
- xxi. Larissa Grey et al., *Stolen Asset Recovery Initiative, Few and Far: The Hard Facts of Stolen Asset Recovery* (2014), at 51–53; Greenberg et al., Note v; Jean-Pierre Brun et al., *World Bank & UNODC, Asset Recovery Handbook: A Guide for Practitioners* (2011), <https://star.worldbank.org/sites/star/files/Asset%20Recovery%20Handbook.pdf>
- xxii. See Tromme, M, Note iii