UNIVERSITY OF NAIROBI

INSTITUTE OF DIPLOMACY AND INTERNATIONAL STUDIES

Assessing the Effectiveness of Recovering Unexplained Wealth in Combating Corruption in the Public Sector: A Focused Comparison of Select Countries in Africa and Europe

By

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Declaration

I declare that this project is my original work and has not been presented to any other university or institution for an academic award. No part of this research should reproduced without the author's authority or the University of Nairobi

…… ……

Lena Chepkosgei Date

R52/35183/2019

This research project has been prepared under my guidance and has been submitted for examination with my approval.

…… ……

Dr. Mumo Nzau, PhD. Date

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Dedication

This research project is dedicated to members of my family Oscar, Thamani and Fadhili for the support that they have given me throughout my studies and especially during the project writing phase.

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List of Abbreviations

ACECA	Anticorruption and Economic Crimes Act
ARA	Asset Recovery Authority
DCI	Directorate of Criminal Investigations
EACC	Ethics and Anti-Corruption Commission
ODPP	Office of the Director of Public Prosecutions
UK	United Kingdom
UNCAC	United Nations Convention Against Corruption
UWO	Unexplained Wealth Order
IACAC	Inter-American Convention Against Corruption
USA	United States of America
AUCPCC	African Union Convention on Preventing and Combating Corruption
ECOWAS	Economic Community of West African States
EU	European Commission
ICPC	Independent Corrupt Practices and Other Related Offences Commission
EFCC	Economic and Financial Crimes Commission
SPSS	Statistical Package for Social Science
NACOSTI	National Council for Science Technology and Innovation
IEBC	Independent Electoral and Boundaries Commission
KNEC	Kenya National Examination Council
SFO	Serious Fraud Office
SOCA	Serious Organized Crime Agency
PPRA	Public Procumbent Regulatory Authority
UNDP	United Nations Development Programme

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Abstract

The diversion of public resources by public officers for personal gain continues to deny or vary the quantity and quality of goods and services intended for public good. Officials in public institutions have collaborated with their colleagues and private entities in committing acts of corruption. As a result of corruption, people whose incomes are well known end up amassing wealth whose sources they cannot account for. To combat corruption in the public sector, countries have come up with various legal and policy regimes such as the confiscation of unexplained wealth in an effort at fighting the vice, yielding varied results across the world. This study sought to assess the efficiency of recovering unexplained wealth in combating corruption in the public sector by comparing countries in Europe and Africa. The study specifically endeavoured to establish the theoretical, legal and policy background in respect of recovery of unexplained wealth by comparing and contrasting the experiences of the sampled states as well as examining the effectiveness of the recovery efforts in the participating countries. To achieve this, a descriptive study design and the rational choice theory were used to anchor the study. Additionally, a mix or primary and secondary data was used in the research, where the primary data was obtained from a sample of 61 respondents using questionnaires and interview schedules. The emerging quantitative data was analysed using descriptive statistics while the content of the qualitative data was analysed to generate the output. The data was presented using tables, charts and verbatim quotes. In terms of the theoretical, legal and policy backgrounds of the study, it was established that all the participating countries had robust legal and policy frameworks that had evolved over time and which they were using to recover unexplained wealth held by public servants, either through criminal or civil proceedings. The concept of recovery of unexplained wealth was found to be in existence in the UK, Lithuania, Nigeria and Kenya, although its incorporation into the anticorruption legal regimes was fairly recent. Instructively, all four countries had specialized agencies that were charged with the responsibility of investigating and tracking wealth held by serving or former public servants which was beyond their declared incomes while they held office. The study further established that corruption was a matter of choice where individuals weighted the cost benefit implications prior to engaging in it. In countries like the UK and Lithuania where law enforcement and investigative capacity was robust, the cases of corruption were found to be on the decline compared to Nigeria where there was limited investigative capacity and unfavourable laws that appeared to shield public officers from corruption investigations while in office. The dynamics in Kenya were complicated by the existence of many actors wherein the investigator was not the prosecutor and holders of unexplained wealth used their legit wealth and that of their proxies to delay recovery of the unexplained wealth through litigations. In terms of effectiveness the civil approach was found to be more effective than the criminal approach to the recovery of unexplained wealth. The data demonstrated an increase in the volume of unexplained wealth recovered via the civil negotiations over a relatively shorter period of time compared to the litigation process. The study identified duplication of roles, under resourcing and the inadequacy of the relevant capacity to drive the recovery of unexplained wealth as key challenges the institutions leading the fight against corruption must contend with, especially in Kenya and Nigeria. This study recommends the collapse of the many institutions into one that is well resourced and empowered by the law to investigate and prosecute corruption cases to speed up the processes. The special courts for trying corruption should also be well resourced and dedicated for that purpose to aid the anti-corruption efforts.

CHAPTER ONE

1.1 Introduction and Background to the study

Prior to the adoption of the United Nations Convention Against Corruption (UNCAC) in October 2003, most countries did not have a comprehensive framework for the recovery of proceeds of corruption. However, with increased cases of corrupt leaders acquiring public funds for personal gain, it became necessary to establish a regime that provides for the recovery of proceeds of corruption. According to a report by the World Bank, each year about 40 Billion is stolen by corrupt leaders of poor countries.[1] Nigeria's former president the late Abacha was found to have looted approximately 3-5 Billion USD between the year 1933 and 1998 when he was President.[2] Similarly, Peru's public official Vladimiro was convicted for stealing USD 185 million between the years 1990 and 2000; while the Philippine's former President Ferdinand Marcos was found to have stolen up to 10 billion USD during his tenure between the years 1965 and 1986.[3]

UNCAC was thus adopted to address the trans-boundary nature of corruption and provide guidelines on the recovery of assets derived from corruption.[4] The said Convention recommends that states parties shall enact laws to criminalize excessive accumulation of assets by a public servant which cannot be explained through the lawful income made by the individual.[5]

The rationale of criminalizing illicit enrichment is that in most cases the only evidence of corruption is the exchange of money between a public official and their partner in the criminal activity. Hence, recovering the benefit derived from corrupt dealings removes the driving force for

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[1] Pinto Brian,*Stolen Asset Recovery Initiative (StAR): Challenges, Opportunities, and Action Plan*, World Bank 2007 accessed 11th May, 2021 available at www.unodc.org/pdf/Star_Report.pdf

[2] Jimu, Ignasio. "Managing Proceeds of Asset Recovery: The Case of Nigeria, Peru, the Philippines and Kazakhstan." *Basel Institute on Governance Working Paper Series* 6 (2009).,7

[3] Ibid, pp.11-12

[4] UN, *United Nations Convention Against Corruption (2003)* Article 1 accessed on 11th May, 2021 available at https://www.unodc.org/documents/brussels/UN_Convention_Against_Corruption.pdf

[5] Ibid, Article 20

engaging in corruption.[6] For most states that ratified the said Convention, the offence of illicit enrichment was enacted to strengthen the fight against corruption and assist in the recovery of assets acquired through corruption.

The offense of illegitimate acquisition of assets has also been incorporated in two other international conventions against corruption. The Inter-American Convention Against Corruption (IACAC) incorporated illicit enrichment as a mandatory offence. However, Canada and United States of America (USA) when ratifying the convention stated that criminalizing illicit enrichment was incompatible with the presumption of innocence and was thus inconsistent with their constitutional and human rights principles.[7]In Africa, the African Union Convention on Preventing and Combating Corruption (AUCPCC) included illicit enrichment at its article 8. The Economic Community of West African States (ECOWAS) Protocol on the Fight against Corruption, similarly introduced a provision on illicit enrichment.

Some countries however opted not to criminalize illicit enrichment but instead provided for a civil procedure for the recovery of unexplained wealth from corrupt public officials. In the civil forfeiture regime, the agency dealing with corruption is given the power to demand an explanation from any person who is found to be in possession of assets beyond their known legitimate sources of income.[8] If the explanation given is not satisfactory, the agency moves to court to obtain an order forfeiting the said assets to the state.

[6] Muzila *et al On the Take: Criminalizing Illicit Enrichment to Fight Corruption*, 5-7, Washington, DC: World Bank accessed on 11th May,2021 available at *https://openknowledge.worldbank.org/handle/10986/13090*
[7] Ibid, 7
[8] Kenya Law Review, *Anti- Corruption and Economic Crimes Act (2003)* Section 55 accessed on 12th May 2021 at http://kenyalaw.org/kl/fileadmin/pdfdownloads/bills/2019/Anti-CorruptionandEconomicCrimes_Amendment_Bill_2019.PDF

This paper will examine the effectiveness of the recovery of unexplained wealth in combating corruption through the criminal as well as the civil process and makes recommendations on the way forward.

1.2 Statement of the Problem

Corruption is a global challenge and has marred even the best economies in the world. It is estimated that about $1.26 trillion per year is lost by developing countries through corruption and other illicit financial flows of money. According to the EU Commissioner for Home Affairs,[9]the European Union loses about $132 billion through corruption every year. In Africa, corruption has continued to hinder economic growth and development. Most African countries have vast natural resources yet they have very low or negative economic growth. The problem has been narrowed down to corruption. Corruption is very rampant in the public sector[10] . It is manifested through bribes, kickbacks and other forms of self-dealing. It has led to massive loss of public funds, has diminished the value of hard work and undermined the rule of law[11].

Prosecution of corruption offenders has to an extent aided in deterring corruption. However, since economic and material gain is the main motivation for corruption, the vice continues unabated despite these prosecutions. This paper seeks to determine why corruption subsists despite an increase in the prosecution of offenders. The paper will assess the effectiveness of recovering unexplained wealth in combating corruption in the 21st century international system. It will compare and contrast select country experiences in Europe and Africa and make recommendations on effective ways of tackling corruption through the recovery of unexplained wealth.

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[9] Kitenge, Seleman Yusuph. "The Global Challenges of Illicit Financial Flows." (2020), 1-10

[10] Buscaglia, Edgardo. "Controlling organized crime and corruption in the public sector." In *Forum on crime and society*, vol. 3, no. 1/2. 2003:1-32

[11] Wrage, Alexandra Addison. *Bribery and extortion: undermining business, governments, and security*. Greenwood Publishing Group, 2007: 49-95

1.3 Research Questions

1. What is the theoretical, legal, policy and institutional background of the recovery of unexplained wealth in combating public sector corruption?
2. What do we learn from the experiences of select African and European countries that utilize the recovery of unexplained wealth in combating public sector corruption?
3. Is the recovery of unexplained wealth effective in combating public sector corruption in the 21st Century international system?

1.4 Research Objectives

General objective

The main aim of this study is assessing the effectiveness of recovering unexplained wealth in combating corruption in the public Sector: a focused comparison of select country experiences in Africa and Europe.

The specific objectives of the study will be:

1. To assess the theoretical, legal, policy and institutional background of the recovery of unexplained wealth in combating public sector corruption.
2. To compare and contrast experiences with recovery of unexplained wealth in combating public sector corruption in select African and European countries.
3. To critically evaluate the effectiveness of recovery of unexplained wealth in combating public sector corruption in the 21st Century international system.

1.5 Justification

1.5.1 Academic justification

By assessing the effectiveness of recovering unexplained wealth in combating public sector corruption, this paper will provide significant information which will prove critical to scholars

who are trying to recommend ways of fighting corruption. The study will revive scholarly interests in corruption and as a result, provoke scholars to conduct further research on the use of the recovery of unexplained wealth in combating public sector corruption. In addition, the research will compare and contrast experiences of recovery of unexplained wealth in combating public sector corruption in select African and European countries. The study will make recommendations on effective strategies of recovering unexplained wealth in curbing public sector corruption which will be useful to future researchers.

1.5.2 Policy Justification

The study will provide relevant information on different issues related to recovery of unexplained wealth including deterrent measures employed by different jurisdictions and the effectiveness of such strategies. This research will be important to policy makers who formulate policies in the fight against corruption. In addition, the research will provide critical information touching on policies applied by different countries on unexplained wealth as a means to curbing corruption. This research will assist governments and policy makers in formulating strategies to fight against public sector corruption.

In addition, Non-Governmental Organizations may use the findings of the study to lobby for policy changes by governments on matters corruption.

1.6 Literature Review

This study has been inspired by various authors and researchers on the issues of corruption across the globe. The research will therefore review the available literature on the theoretical, legal, policy and institutional background of the recovery of unexplained wealth in combating public sector corruption. It will also compare and contrast available literature on the recovery of unexplained wealth in combating public sector corruption in select African and European countries. Lastly, it

will evaluate literature on the effectiveness of recovering of unexplained wealth in combating public sector corruption in the 21st Century international system. While there is a wide of range of literature that explains the causes and effects of corruption, there is very little literature on why corruption persists even after increased prosecution of the perpetrators of this offence.

1.6.1 On the theoretical, legal, policy and institutional background of the recovery of unexplained wealth in combating public sector corruption

The recovery of unexplained wealth is founded on the premise that asset forfeiture takes the profit out of a crime.[12] For a long time, the international system did not pay attention to the economic gains from corruption. However, the material gain resulting from corruption has proved to be the main motivation for corruption.[13] This reality is what led to the inclusion of asset recovery under part V of UNCAC. Recovery of unexplained wealth is therefore one of the ways to counter corruption since it takes away the benefit derived from the corrupt activity.

From a theoretical standpoint, individuals acting on their own or in collaboration with organizations often times plan to engage in corrupt activities, with a view to benefiting the individuals or the organization in question. In other words, the decision to engage in graft is not an accidental one but rather a conscious one in which the actors do a rational analysis in terms of the attendant costs and benefits[14]. Where benefits outweigh the costs, the actors execute the plan to siphon the public resources for private gain. This study concurs with scholars of the rational choice theory that the drive towards corruption by an individual is given impetus by the existence

[12] McCaw, Catherine E. "Asset forfeiture as a form of punishment: a case for integrating asset forfeiture into criminal sentencing." *Am. J. Crim. L.* 38 (2010): 181.
[13] Foreword by the Prime Minister Tony Blair cited in King, Colin, and Clive Walker. *Dirty Assets : Emerging Issues in the Regulation of Criminal and Terrorist Assets*, Routledge, 2014
[14] Dimant, Eugen, and Thorben Schulte. "The nature of corruption: An interdisciplinary perspective." *German Law Journal* 17, no. 1 (2016): 53-72.

of a culture of corruption which then triggers the prisoner's dilemma[15] thinking in the mind of a new entrant – everybody else is doing it, why not me! The flipside of this argument is that, if the cost of corruption outweighs the expected benefits, then graft will lose its *raison d'etre*. This flipped argument is the very basis upon which measures such as the recovery of unexplained wealth is grounded. To a rational person, there will be no point in holding illicit wealth which will eventually be tracked and taken away since he or she has no plausible explanation to defend it. The study argues that successful recovery of unexplained wealth will play a pivotal role in combating corruption and especially in the public sector.

As earlier alluded to, the UNCAC remains the foundational global legal framework that anchors the fight against corruption. The treaty has been ratified by over 181 United Nations member states as at the end of 2020, implying that corruption is a real issue across the globe. Some of the treaty's provisions call upon signatories to collaborate and offer each other mutual assistance particularly in cases of transnational nature or involving actors from different countries. Illicit enrichment which is covered as corruption is defined in Article 20 of the treaty as 'being in possession of assets that are beyond a person's known legitimate sources of income'.[16] This offence is one of the non- mandatory offences under the Convention. Owing to this liberal wording of this Article, some of the countries that ratified the Convention opted to criminalize the offence of illicit enrichment, while others opted for a civil forfeiture procedure referred to as 'Unexplained wealth procedures.'[17] The municipal laws enacted by some of the signatories to UNCAC make for specific provisions that address those countries' specific contexts or issues that may not have been

[15] Köbis, Nils C., Daniel Iragorri-Carter, and Christopher Starke. "A social psychological view on the social norms of corruption." In *Corruption and norms*, pp. 31-52. Palgrave Macmillan, Cham, 2018.
[16] Article 20 of the UNCAC
[17] Julien, Rita, *Unexplained Wealth Orders (UWOs) Under the UK's Criminal Finances Act 2017* (February 21, 2018), para 12, Available at http://dx.doi.org/10.2139/ssrn.3151969 accessed on 12th May,2021

adequately addressed by the treaty. Importantly, such local laws have been made to complement and give life to the general provisions of the treaty rather than contradict them. For instance, some of the countries that opted for criminalization of the offence are Argentina, China, El Salvador, Peru and Zimbabwe. Thus, their criminal codes have provision for charging individuals with wealth that they can't explain which is punishable through various fines or jail term sentences. On the other hand, the United Kingdom, Australia, Ireland and South Africa opted to adopt a civil forfeiture regime to deal with unexplained wealth.[18]

Regarding the purpose of asset recovery, Gray et al. [19] state that recovery of assets acquired by corrupt leaders has three purposes. First, repatriation of recovered assets back to developing countries can provides access to more resources which aid in the development of the nation[20]. Second, it reduces the rates of corruption as it shows that there are repercussions for engaging in corrupt practices and money gained from corruption cannot be hidden. Finally, asset recovery is a pointer that justice has been done.[21] Legislative innovations within the municipal laws enacted by individual states have been used in following and tracing of assets to fight this crime of illicit enrichment by recovering the proceeds thereof. Specific laws that deal with corruption and are tied to other crimes include money laundering, drug trafficking, among others.

In terms of enforcement of the law, available literature indicates that while UNCAC requires states to cooperate in dealing with criminal cases, there is no such requirement for civil cases. It would

[18] Serby, Tom. "Follow the money: confiscation of unexplained wealth laws and sport's fixing crisis." *Sweet & Maxwell International Sports Law Review* 13, no. 1 (2013): 2-8.
[19] Gray, Larissa, Kjetil Hansen, Pranvera Recica-Kirkbride, and Linnea Mills. *Few and Far: the hard facts on stolen asset recovery*. The World Bank, 2014. Available at *https://openknowledge.worldbank.org/handle/10986/20002* accessed on 5th May,2021:5-71
[20] Ibid,18
[21] Leasure, Peter. "Asset recovery in corruption cases: Comparative analysis identifies serious flaws in US tracing procedure." Journal of Money Laundering Control 19, no. 1 (2016): 4-20.

thus appear as though the spirit of UNCAC was criminalization of the corruption only, an approach that is tedious and takes too long for justice to be served. This limitation perhaps informs the reason why many states are moving towards civil forfeiture to supplement the potential inadequacies of the criminal procedure. To ensure the law is enforced, states have put in place institutions to enforce the law. Countries like the UK, Kenya, Nigeria have created specific institutions to deal with corruption related issues, outside the mainstream criminal investigation units. In the case of the UK, there is established the Serious Fraud Office (SFO)[22] while Kenya has the Ethics and Anti-Corruption Commission (EACC).[23] Nigeria too has an anticorruption commission which specifically deals with cases of corruption, including prosecuting them. Other countries such as Lithuania have for the longest period been reliant on the criminal process but have recently begun shifting towards civil procedure as extensively reported by Bikelis Skirmantas.[24] At this stage, the study argues that the structure of the institutional framework put in place in various countries and especially those analysed later in this study differ in various ways including but not limited to staffing, extend of their mandate as well as resourcing. As such, their performance are likely to differ as will be explored later under objective three. Overall, the theoretical, legal and institutional framework which underpins the recovery of unexplained wealth differs from country to country, but there are broad areas of convergence informed by the overriding principle to combat corruption.

[22] Establishment and functions of the https://www.sfo.gov.uk/ accessed on 28th September 2021
[23] Establishment and functions of the EACC https://eacc.go.ke/default/downloads-page/legislation/ accessed on 28th September 2021
[24] Bikelis Skirmantas is a prolific author of dozens of articles on the fight against corruption in Lithuania, including comparative pieces on the efficacy of the criminal and civil procedures of recovering corruptly acquired wealth.

1.6.2 Unexplained wealth in combating public sector corruption in Africa and Europe

Countries in Europe and Africa have handled the issue of unexplained wealth differently. Some of the notable countries in the fight against unexplained wealth in Europe are the United Kingdom, Switzerland, Ireland and Lithuania. In Africa, a number of countries have established the unexplained wealth regimes are Nigeria, South Africa, Kenya and Zimbabwe among others.

In Europe some of the countries that opted for a criminal procedure for dealing with unexplained wealth is Lithuania. Skirmantas Bikelis[25] examines the experience in Lithuania and argues that Lithuania is one of the first countries in Europe to criminalize illicit enrichment. According to the author the criminalization of illicit enrichment poses two constitutional issues; that of the presumption that one is innocent until proven guilty and that of the right to remain silent. The author points out that out of 145 illicit enrichment cases in Lithuania only 15 have been successful. Prosecution of these cases is challenging since some people register their property in the names of third parties. The author concludes by proposing the pursuit of a civil forfeiture regime in dealing with unexplained wealth.

The asset recovery regime in Europe has evolved over the years .[26] Boucht places the use of the unexplained wealth regime at the fourth generation stage in the evolution of asset forfeiture. The other forms of asset forfeiture he identifies are criminal confiscation upon conviction of an offence, extended criminal confiscation and non-conviction based forfeiture. The author suggests that the

[25] Skirmantas Bikelis, (2017) "Prosecution for illicit enrichment: the Lithuanian perspective", Journal of Money Laundering Control, Vol. 20 Issue: 2, pp.203-214, https://doi.org/10.1108/JMLC-07-2016-0029 accessed on 10th May,2021

[26] John Boucht, 'Asset confiscation in Europe-past, present and future challenges' (2019) 26(2) *Journal of Financial Crime.526-548* available at https*://doi.org/10.1108/JFC-04-2018-0043* accessed on 12th May,2021

proficiency of asset recovery should be examined from the investigative phase where intelligence is received all through the preservation stage, to the point where the courts grant confiscation orders. The author identifies that the challenges facing effective recovery of proceeds of crime as both evidential and constitutional. The author suggests that confiscation of assets is an effective tool of dealing with crime but its main hindrance is the tension between the rights of individuals and the need to deal with the motivations of crimes.

In Switzerland, the authorities have made progress in trying to protect their country from being a safe haven for stashing proceeds of corruption .George Pavlidis[27], analyses the Swiss Restitution of Assets of Criminal Origin of 2010 and law on assets of illicit origin. The author examines how these laws operate and their relationship with human rights of individuals. It identifies a gap in international regimes since they don't provide for repatriation of assets of illicit origin to failed states.

In Nigeria, the country has taken various steps in curbing corruption. However, there are, inefficiencies in the existing Nigerian asset recovery regime.[28] Esoimeme proposes that the country should incorporate a number of aspects from the UK and USA regime. He particularly identifies the UK's use of investigative orders to trace illegitimate assets that can aid in the investigation of proceeds of crime. He concludes that the Nigerian asset recovery scheme is likely to be more effective if Nigeria adopts the approach of the UK and USA. He proposes that Nigerian asset recovery be strengthened by introduction of a mutual legal assistance scheme.

[27] George Pavlidis, 'Asset Recovery: A Swiss Leap Forward?' (2017) 20(2) *Journal of Money Laundering Control*: 150-158

[28] Ehi Eric Esoimeme 'Institutionalising the war against corruption: new approaches to assets tracing and recovery' (2018) *Journal of Financial Crime:*217-230

Another challenge faced in the fight against corruption is how corruption among political elites and heads of states can be controlled. David[29] discusses how the recovery of corruptly acquired assets by the former Philippines head of state Marcos, posed various challenges. He identifies weaknesses in the systems of some countries where former government officials opt to transfer funds to other countries such as Switzerland in Marcos' case. He identifies the principles of immunity, act of state doctrine and property belonging to third parties as some of the main hindrances to the recovery of money held by political elites and heads of state and governments.

Countries such as Ireland and Australia have moved to strengthen their civil forfeiture regimes by developing laws to compel suspects to account for unexplained wealth. This is achieved by way of application to the High Court for an Unexplained Wealth Order (UWO). If the High Court grants a UWO, the affected party must provide a statement explaining the nature and extent of his or her interest in the property, and how he or she obtained it. In the event that he or she cannot prove that the property is legitimate then it will be seized by the authorities. The Irish regime, in particular, boasts a 100% success rate in civil-based asset seizure proceedings[30].

In the United Kingdom, the Criminal Finances Act, 2017 gives law enforcement agencies the power to call for an explanation from a person regarding the ownership and manner of acquisition of the property. This power is exercised by way of an application to High Court for the grant of an Unexplained Wealth Order (UWO). In the context of UWO, it is presumed that the claims can be refuted if the individual provides a legitimate source of their property. Generally, UWOs are

[29] Chaikin, David A. "Controlling Corruption by Heads of Government and Political élites." In *Corruption and Anti-Corruption*, edited by Larmour Peter and Wolanin Nick, 97-118. ANU Press, 2013. Accessed May 10, 2021. http://www.jstor.org/stable/j.ctt2tt19f.9.

[30] Dominic Thomas,*Unexplained Wealth Orders: Thoughts on scope and effect in the UK* Briefing Papers White Collar Crime Centre,2017 accessed on 9th May ,2021 available at https://brightlinelaw.co.uk/wp-content/uploads/2019/07/Unexplained_Wealth_Order_-_Briefing_Papers_Final.pdf

concerned about lifestyles and incomes which are inconsistent with the individual's documented source of income and their wealth. The UWO then becomes the foundation for civil asset forfeiture proceedings.

In Kenya the recovery of unexplained wealth is provided for under the ACECA. The Ethics and Anti-Corruption Commission Act gives the Commission the mandate to initiate court proceedings targeted at recovering and protecting public funds and the preservation and seizure of assets acquired through corruption, restitution of property, or other deterrent measures.[31] Kenya finalized its first ever case on unexplained wealth in 2017. In the case of *EACC v James Mwathethe Mulewa and Another*[32] the court found that the defendant had not explained how he acquired wealth worth Ksh. 73M and ordered the same to be forfeited to the state. A similar holding was held in the case of *Kenya Anti-Corruption Commission v Stanley Mombo Amuti* [33] where the defendant was ordered to forfeit Kshs. 42M which he had not explained.

1.6.3 On the effectiveness of recovery of unexplained wealth in combating public sector corruption in the 21st Century international system

There has been a debate on whether civil confiscation is a necessary pathway in fighting crime or whether it is a shortcut to prosecution .[34] Most authors supported the view that that civil recovery is an essential tool that can be used by agencies enforcing the law. When civil recovery is used appropriately it can save money and time. Recovery of property obtained from criminal activity is equally very efficient in combating crime.

[31] *Ethics and Anti-Corruption Commission Act(2011)s.11*
[32] Kenya Anti-corruption Commission vs James Mulewa {2017}eKLR
[33] Kenya Anti-corruption Commission vs Stanley Mombo Amuti [2017]eKLR
[34]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

The balance between human rights and recovery of illegally acquired wealth is critical in examining the effectiveness of recovering illicitly acquired wealth.[35] A critical aspect in this is the right to be presumed innocent until proven guilty. When dealing with the corrupt by way of asset recovery, it is necessary to also respect the right to property and the property of third parties. Therefore, there is a need to balance between the rights of perpetrators of corruption with those of victims and a respect of human rights.

The International regime plays a very pertinent role in cross-border asset recovery and its effectiveness.[36]Dealing with financial crimes involves both national and cross-border solutions. There are a number of law enforcement challenges when it comes to international cooperation in cross-border financial crimes. Olatunde gives an example of Nigeria that has experienced challenges in recovering illegitimate wealth stored in other countries. He proposes that an international body be created to help ensure countries corporate when it comes to fighting cross-border crimes. He argues that the World Bank and IMF as financial institutions are not enough ensure compliance.

An attractive aspect of recovering proceeds of corruption is the compensation that accrues to the public as a victim of corruption. Simon N.M. Young[37], compares how victims of crime seek compensation for loss, to how victims of corruption such as governments ought to be compensated by recovery of illegally acquired public wealth. He argues that proceeds of corruption can however

[35] Kodjo Attisso, 'The Recovery of Stolen Assets: Seeking to balance fundamental human rights at stake' *International Centre for Asset Recovery* Working Paper Series No. 8: 7-14 accessed on 10th May,2021 available at https://www.baselgovernance.org/sites/default/files/2019-06/biog_working_paper_08_EN.pdf

[36] Olatunde Julius Otusanya, 'An investigation of the financial criminal practices of the elite in developing countries' (2012) 19 (2) *Journal of Financial Crime*:194.

[37] Simon N.M. Young, 'Why Civil Actions Against Corruption?'(2009) 16(2) *Journal of Financial Crime*: 144-159 accessed on 10th May,2021 available at https://tripod.brynmawr.edu/discovery/fulldisplay?docid=cdi_proquest_journals_235991110&context=PC&vid=01TRI_INST:BMC&lang=en&search_scope=BMC_All&adaptor=Primo%20Central&tab=Everything&query=null%2C%2CB17..%20Court%20and%20Litigation%20Documents%2C%20p.%2024%2CAND&mode=advanced

be stashed in various jurisdictions. The paper also examines why victims of corruption may opt not to recover proceeds of corruption. The paper also examines ways of conducting this civil actions for recovery of illegally acquired wealth.

Another issue affecting the effectiveness of the recovery of unexplained wealth is how to deal with politically exposed persons. Abdullahi Y. Shehu,[38] examines how Nigeria deals with the issue of possession of wealth beyond known legitimate sources of income especially by politically exposed persons. The paper explains how Economic and Financial Crimes Commission Act (2004) empowers law enforcement to investigate and recover unexplained wealth. He argues that this regime is based on a civil action and law enforcement need not rely on reports of suspicious transactions for them to undertake investigations. The author argues that the Nigerian system is effective when it comes to money laundering activities from fraud cases but is rarely effective for politically exposed persons.

1.6.4 Gaps in the literature

From the literature reviewed, it emerged that there is a divergence in the manner in which countries in Europe and Africa were implementing the provisions of Article 20 of UNCAC relating to corruption. Whereas some were using the penal code, implying their criminalization of acquiring assets beyond one's sources, others were pursuing civil proceedings to recover the illicitly obtained wealth. However, there still remained grey areas with regard to the distinction between corruption as a crime and corruption as an illicit enrichment, and particularly the enforcement of these two approaches where the assets under review were located in different jurisdictions with varying legal

[38] Abdullahi Y. Shehu, 'Key Legal Issues and Challenges in the Recovery of the Proceeds of Crime: Lessons from Nigeria' (2014) 3(1) *International Law Research:* 186

regimes. The subject of multiple actors in investigations and trial of corruption cases has not been adequately attended to, particularly in light of whether such entities created synergy or discord in the whole process aimed at making corruption costly and unattractive. Another gap in the literature is the lack of an explanation on the differences in outcomes where the countries under review used similar approaches, hence the need for this research to plug such gaps. Finally, the reviewed literature fell short in terms of espousing the extend of effectiveness of recovery of unexplained wealth as means to combating corruption in the public sector. All these dimensions are critical in determining whether efforts aimed at fighting corruption in the public sector stand any chance of success and hence the need for this research.

1.7 Theoretical Framework

This study backs an existing theory and approach in its elucidation of the motivations of and ways of combating corruption. This research will thus explore the rational choice theory.

1.7.1 Rational Choice Theory

The rational choice theory can be traced back to the work of Gary S. Becker [39]. According to Becker people commit crimes (including white collar crimes like corruption and tax evasion) based on a crime cost-benefit analysis. The rational choice informing whether or not an individual will be engaged in corruption is based on the benefit they will derive as compared to the risk involved.[40] One of the proponents of the rational choice theory is Rose-Ackerman[41]. Central to her argument is that public officials are corrupt because the prospective benefits of corruption exceed the costs

[39] Gary S. Becker, Crime and Punishment: An Economic Approach, *Journal of Political Economy*.(1968) Vol.76, No. 2: 169-217 accessed on 10th May,2021 available at https://www.jstor.org/stable/1830482
[40] Dimant, Eugen and Thorben Schulte. "The Nature of Corruption: An Interdisciplinary Perspective." *German Law Journal* 17, no 1 (2016), 53–72
[41] Rose-Ackerman, S.Corruption: A Study in Political Economy.(New York: Academic Press,1978): 249

of participating in corruption. A public official will calculate the expected gains as against the potential threats, considerations which will then inform their decision to engage in corruption.

Klitgaard[42] states that a person will be corrupt if reward from corruption is greater that the moral cost as well as the likelihood of being caught and the consequences thereon. In this theory, the public official's decision to be corrupt is informed by a rational, conscious and considered decision taking into account considerations like trust i.e. trust minimizes the probability of being caught. The rational choice theorists have three distinct approaches to this theory. The first is the principal -agent approach. In this approach, a person entrusted with power (by the government who is the principal in this case) decides to use the power for private gain. According to this thesis, the actions of an agent of receiving payoffs or bribes for personal benefit may not interfere with the principal's interest.[43] However, the principal's inability to access important information may interfere with the principal's interest. In order to prevent this, the principle has three options that can be used to ensure that the agent performs only the duties that fulfil his interests. These include giving directives, incentives and persuasion to save supervision costs.[44]

The second approach is the one propagated by Nils Köbis[45] whose theory is based on the "prisoner's dilemma" where if a person does not engage in corruption, another will and will derive a benefit from it. According to him people will engage in corruption even though they consider it unethical, just because others are engaging in it as part of the social norm. Individuals therefore

[42] Klitgaard, R. Controlling Corruption. Berkeley: *University of California Press*,(1978):210 accessed on 10th May,2021 available at https://www.cambridge.org/core/journals/american-political-science-review/article/controlling-corruption-by-robert-klitgaard-berkeley-university-of-california-press-1988-210p-1995/F0052B158EBCE727D2C47A0C167B6AA4

[43] Groenendijk, N. (1997) A principal-agent model of corruption; Crime, law and Social Change, 27,3-4:203-227.

[44] Ibid

[45] Köbis, Nils C., Daniel Iragorri-Carter, and Christopher Starke. "A social psychological view on the social norms of corruption." In *Corruption and Norms*, (Palgrave Macmillan, Cham, 2018):31-52.

engage in corruption for individual gain or for self-interest. The third approach is the systemic problem approach. According to this approach the problem is with the culture or institution. Where an institution does not frown upon corruption, it provides good ground for it to thrive.

This theory is significant to the study because money is usually the main motivation for engaging in corruption. The theory sets out how increased costs of committing crime may lead to reduction of crime. In the same manner, this study will explore ways of minimizing or taking away the benefit derived from corruption thus taking away the motivation for corruption.

1.8 Hypotheses

H_1: There is a theoretical, legal, policy and institutional basis for the recovery of unexplained wealth in combating public sector corruption in select countries in Europe and Africa

H_0: There is no congruence in the approach to unexplained wealth in both Africa and Europe

H_1: There is a positive relationship between recovery of unexplained wealth and the reduction of corruption in the Public sector in select countries in Africa and Europe.

1.8.1 Conceptual model

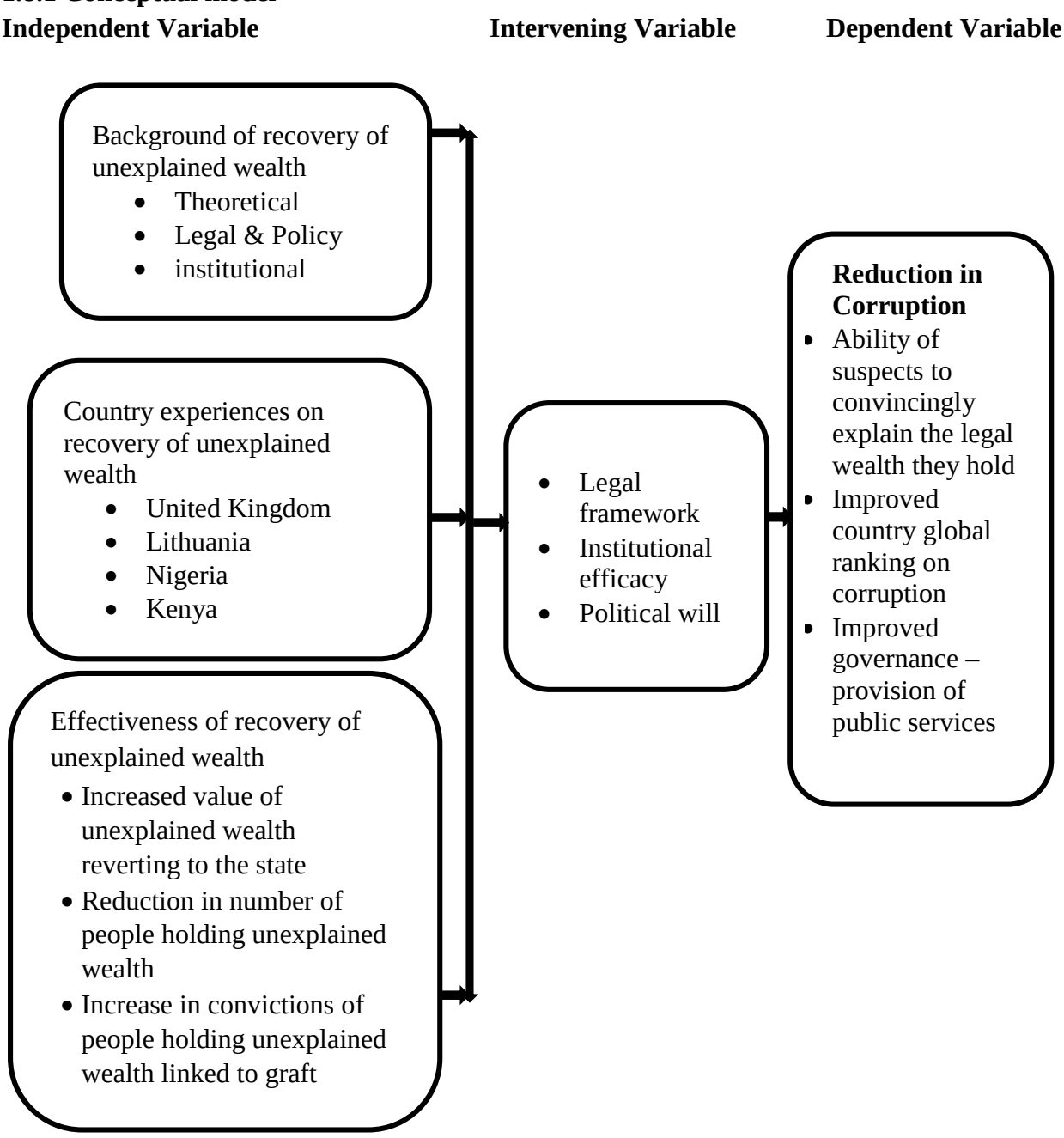

Figure 1.1: Conceptual Framework

1.9 Research Methodology

This section highlights the research design, research site, target population, sampling procedure, sample size, data collection tools, data analysis and ethical considerations. Each of these sections is explored in the subsequent paragraphs.

1.9.1 Research Design

A research design is a strategy that highlights how the researcher intends to go about the research process[46]. This study is envisaged to utilize both primary and secondary data. To achieve this, the researcher proposes to use the descriptive research design, executed using the embedded strategy that allows for a blend of qualitative and quantitative approaches to data collection, analysis and reporting. The descriptive research design is intended to help describe the legal, institutional and political dynamics surrounding the recovery of unexplained wealth as a pathway to combating corruption in the public sector, by comparing such dynamics in select countries in Africa and Europe.

1.9.2 Target population

In order to obtain the information necessary to answer the research questions, it is critical that the targeted population comprise of respondents familiar with the issues under investigations[47]. Against this background, this study will draw its respondents from among individuals working in some of the key institutions charged with leading the fight against corruption in Kenya. Precisely, the study will target respondents from Ethics and Anti-Corruption Commission (EACC), the department of Economic, Organized and International Crimes in the Office of the Director of Public Prosecutions (ODPP), Asset Recovery Agency (ARA) and Anti-Corruption Court. The

[46] Simon Obwatho, Academic Research Writing: The Logical Sequence, 56
[47] Frankfort-Nachmias, C. and Nachmias, D. (1996) Research Methods in the Social Sciences. Fifth Edition, Arnold, London., 63

study assumes that the respondents drawn from these departments have the first hand information on the study variables.

1.9.3 Sampling Procedure

Sampling is the process of selecting a part of the population and using it to determine the parameters of the large population[48]. Unlike other methods, sampling reduces researcher bias and allows them to draw general conclusions from the research. According to Nachmias & Nachmias[49], using samples of the population is convenient since it is impossible to collect data from the entire population. Hence, probability and non-probability sampling procedures will be used for this study. Precisely, the study proposes to use stratified, purposive and simple proportional random sampling procedure. The stratified sampling procedure will be used to ensure every participating institution is included in the eventual sample while purposive sampling will be used to obtain key informants who in the judgement of the researcher hold or are likely to direct the researcher to persons holding the specific information needed for the study. Simple proportional sampling on the other hand will be used to ensure that each of the units in the targeted segments of the population has an equal chance of selection into the final sample.

1.9.4 Sample size

In order to obtain the sample size on which the data collection instruments will be administered, the study proposes to use Mugenda and Mugenda's[50] recommendation of 10% to 30% of the target population. Applying this formula at 30% to the target population of 235, the study arrived at a sample size of 61 which was proportionately distributed across the strata comprising the sample as tabulated in Table 1.1

[48] Mugo, Fridah W. (2002) Sampling in research, 56
[49] Frankfort-Nachmias, C. and Nachmias, D. (1996) Research Methods in the Social Sciences. Fifth Edition, Arnold, London, 62
[50] Mugenda and Mugenda, (2003) Research methods: Qualitative and quantitative Approaches, 83

1Table 1.1: Sample size distribution

Stratum	Target population	Proportionate percentage (%)	Sample size
Ethics and Anti-Corruption Commission (EACC)	121	51	31
Asset Recovery Agency (ARA)	16	7	4
Judiciary (Anti-Corruption Court)	9	4	3
Office of the Director of Public Prosecutions (Economic, Organized and International Crimes,)	89	38	23
TOTAL	235	100%	61

Source: ODPP, EACC, ARA, EACC (2021)

1.9.5 Data Collection

Data collection entails the whole exercise of using the developed research instruments to obtain the information a researcher seeks from his or her respondents once they have given their informed consent to participate in the study. For purposes of this study, the researcher proposes to use a questionnaire and an interview guide. The interview guide will comprise of open ended questions which will be asked to the interviewees by the researcher. The essence of using this method is to allow for optimal data collection, seek clarifications as appropriate and possibly get more information than the researcher envisaged in certain aspects of the research[51]. The interviews will be four and will be conducted on the heads of the participating institutions or their appointees. This will be done through face to face sessions or through a communication medium such as telephone. The questionnaire will be designed to have closed and open-ended questions so as to allow for collection of qualitative and quantitative data. The questionnaire will be administered to respondents from the participating institutions, other than the heads of institutions (or their

[51] Ibid, Mugenda nd Mugenda, 84.

appointees) who will be engaged in the interviews. The questionnaire will be administered with the help of research assistants.

The secondary data collected from the extant literature available to the researcher will then be integrated as appropriate in discussing various dimensions of the research questions. The essence of this approach will be to ensure data triangulation and complementarity during interpretations and drawing of conclusions.

1.9.6 Data Analysis

Once data has been collected from the field, it will be subjected to a screening and cleaning process during which only questionnaires that will have been fully answered will be used in the analysis. It will be coded and keyed into the Statistical package for Social Science (SPSS) version 25. The obtaining descriptive statistics in the form of frequency counts and percentages will be used to describe the findings and draw comparisons between the items under study. The descriptive data will be presented using tables, graphs and pie charts. Inferential statistics in the form of regression analysis will be computed to help with testing the research hypothesis.

1.9.7 Legal and Ethical Considerations

In compliance with research regulations at the University of Nairobi and by government, the researcher will obtain clearance from the University of Nairobi, which will be presented to the National Council for Science Technology and Innovation (NACOSTI) to obtain the permit to collect data. It is these sets of documents once obtained which will be presented to participating institutions for endorsement so as to engage participants from those institutions. Each participant will be made aware of the research intentions and an informed consent to participate obtained before beginning the data collection exercise.

1.10 Study Layout

Chapter one of this research sets out the background to the study and lays out the research problem and identifies the research questions, objectives and the hypothesis of the study. It underscores the rationale of the study as well as the theoretical and conceptual model of the study. In addition, the chapter reviews the available literature and presents the methodology that will be used to accomplish the research.

Chapter two will examine the background to the recovery of unexplained wealth in combating corruption in the public sector. This will be attained by examining the theoretical, legal and institutional backgrounds of the study variables.

Chapter three will focus on examining the practices in the select countries used to aid in the recovery of unexplained wealth in the fight against corruption. The study will compare and contrast countries in Europe and Africa that have criminalized unexplained wealth vis-a vis those that have adopted a civil forfeiture procedure.

Chapter four will evaluate whether or not the recovery of unexplained wealth has been an effective mechanism in combating corruption in the modern times. The chapter will delve into examining the arguments that have been advanced in support or against the recovery of unexplained wealth as a pathway to combating corruption across the globe.

Finally, chapter five will summarize the findings in the previous chapters of the study and give recommendations on action points that can spur and enhance the efficacy of the actors charged with leading the efforts against corruption through recovery of unexplained wealth. The recommendations will cover all aspect of the research conducted and espouse the overall finding the research will be making.

CHAPTER TWO

THEORETICAL, LEGAL AND INSTITUTIONAL BACKGROUND OF THE RECOVERY OF UNEXPLAINED WEALTH IN COMBATING PUBLIC SECTOR CORRUPTION: A COMPREHENSIVE ASSESSMENT

2.1 Introduction

The concept of corruption is one that defies a universal definition owing to the many schools of thought that exist, each explaining what it is or ought to be. These schools use choice words such as perception, context, power-related or intentional when espousing the concept. In essence, there are many forms, types or acts that depending on how they are qualified can easily be accepted in the extant discourse on corruption. This study adopts the definition of corruption propounded by the United Nations Convention Against Corruption (UNCAC) as comprising all illegal actions such as bribery, embezzlement, influence peddling, illicit enrichment among others as contained in Articles 15 to 25 of the convention[52]. Corruption remains a major challenge in both the public and private sector in many countries across the world. This study is concerned with public sector corruption because it deprives citizens the goods and services that they are entitled to. A public officer is appointed or elected to office to serve the citizenry but because of various contextual, psychological and other factors, some of these officers end up diverting such resources for private gain[53]. Such resources belong to the public and must therefore be recovered and returned to the public as statement that corruption cannot be condoned and the perpetrators dealt with as per the law.

[52] UNODC, United Nations Convention against Corruption, Article 15 to 25, accessed on 4th June 2021, available at https://www.unodc.org/documents/brussels/UN_Convention_Against_Corruption.pdf

[53] Pozsgai-Alvarez, Joseph. "The abuse of entrusted power for private gain: meaning, nature and theoretical evolution." *Crime, Law and Social Change* 74 (2020): 433-455.

2.2 Theoretical Background

Various theoretical perspectives have been put forward to help demonstrate the connection between recovery of unexplained wealth and corruption in the public sector. This study picks on the game theory and the dominant institutional theoretical lenses to complement the rational choice theory in explaining the two study variables. Each of these sets of lenses are assessed and a case for their utility made hereunder.

2.2.1 Game theory

The game theory is credited to various scholars with the prominent ones being John von Neumann and John Nash[54]. The theory espouses four key aspects namely decision makers, strategy, payoff and information availability as central in the application of its arguments. Decision makers in this case can be equated to public sector officials who despite having a duty of ensuring resources under their care are deployed for the benefit of the public, devise a plan of action to divert the very resources under their care for personal gain, which this theory calls the payoff. The decision makers are aided in their heist by information in their custody at that point in time which may not be available to other people.

In various forms of corruption such as bribery, the person or entity giving out or receiving something in exchange for something is a rational actor. Though in some circumstances they may not explicitly state why they are giving 'the gift/token', the assumption is that the receiver is in a position to know the interests of the giver and to the extent that the receiver takes it, it is presumed that they are willing to play along, otherwise they would decline the gift upfront. Morris argues that corruption games are better understood by examining the location and function of public official involved i.e. political or bureaucratic corruption, direction of influence for instance bribery

[54] Binmore, Kenneth. "John Nash versus John von Neumann." In *Imaginary Philosophical Dialogues*, Springer, Cham, 2021: 163-167.

juxtaposed with extortion and the size and frequency of transaction which birth grand or petty corruption[55]. Acts of corruption, in whatever form mostly generate zero sum games. In these kinds of games, the gains of the individual or small group diverting public resources benefits while the wider public that was supposed to benefit from the diverted resources loses.

It is the game theory's contention that decision makers are rational people who are self-interested and use the information in their custody to develop a cost-benefit analysis matrix.[56] This study argues that looking at the situation through such lenses, where the benefits accruing from engaging in corruption activities far outweigh the costs, then the rational decision maker will have had the incentive to engage in the crime[57]. In situations where corruption is normalized, morally upright individuals, thinking rationally start changing their perception such that they see themselves as disadvantaged for not engaging in the vice while everybody else is. It can thus be argued that the fear of being outdone by those engaged in corruption, coupled with other temptations such as the change in lifestyle of the corrupt individual for the better rope in the erstwhile upright individual to join this game that promises easy change of fortune. Armed with a well thought out analysis on the costs and benefits that come with engaging in corrupt activities, the rational decision maker then devices a strategy that he or she will use to achieve their end, which in this case is maximization of the returns accruing from the acts of corruption.

The bureaucracy in the public sector makes it possible for the establishment of a web or chain of public officials who deliberately engage in acts of corruption, aware that the loot is shared and

[55] Stephen D. Morris "Forms of Corruption" 2011:13 accessed on 22nd May,2021 available at https://www.ifo.de/DocDL/dicereport211-forum2.pdf
[56] Oppenheimer, Joe. *Principles of politics: A rational choice theory guide to politics and social justice*. Cambridge University Press, 2012:85
[57] Klimczak, K.M., Sison, A.J.G., Prats, M. *et al.* How to Deter Financial Misconduct if Crime Pays? *J Bus Ethics* (2021): 4 accessed on 27th May,2021 Available at https://doi.org/10.1007/s10551-021-04817-0

there is protection especially where the senior people are involved.[58] In recent times, junior public sector officials have made use of the information in their custody, which they hold in trust for the public, to engage in acts of corruption, knowing that the questions will be answered by the senior leaders in the organization. To circumvent this scenario, officials at both levels would rather cooperate among themselves in fleecing the public, another dimension on how the game of corruption is played and which explains the pervasiveness of the vice in the public sector.

The game theory is particularly relevant in this study because it helps highlight the games that rational people play in diverting public resources for private gain. Typically, an individual keen on engaging in act of corruption will have to do a cost benefit analysis, to ascertain which of the two outweighs the other. Where the cost of corruption is too high compared to the benefits, the rational individual would rather not engage in corruption. The recovery of unexplained wealth accruing from acts of corruption which is grounded in clear legal provisions coupled with other sanctions such as fines or jail terms makes the vice unattractive to the rational thinker.

2.2.2 Institutional Theory

This theory was propounded by various scholars among them DiMaggio and Powell and North who demonstrate how the structures and practices of an institution become key markers of its identity. The theory was later developed by other scholars, key among them Luo[59] to show how social change within an institution does or can occur. Scott describes an institution as a multifaceted living entity, comprising of social structures, symbolic elements and social activities[60]. Institutions are more of the rules or meta spaces within which organizations thrive.

[58] Blundo, Giorgio, *et al Everyday corruption and the state: Citizens and public officials in Africa*. Zed Books Ltd., 2013:20

[59] Pillay, Soma, and Ron Kluvers. "An institutional theory perspective on corruption: The case of a developing democracy." *Financial Accountability & Management* 30, no. 1 (2014): 95-119.

[60] William R. Scott, Encyclopedia of social theory. Institutional theory2004: 408-14.

The most significant aspect of institutions is that they bring along the social aspect of life. Without human beings, socially interacting, there are no institutions and the theory does not find any expression. Mohammed argues that institutions are instruments through which rational people understand the tasks, for which, those institutions were created[61]. Like the game and rational choice theories, the institutional theory is explicit in explaining that institutions are developed by rational people and given capabilities and a legal personality that enable them stand on their own, take ownership of what they believe is beneficial to them and make changes as appropriate to survive in a competitive environment. The institutional theory goes further to give prominence to social order than individuals. In essence, the institutionalists are more keen on social life, order and what makes institutions grow and change overtime[62].

The institutional theory espouses the concept of isomorphism which simply put attempts to map item A on B and the vice versa. DiMaggio and Powell present a coercive, mimetic and normative pathway that influences an organization's quest for change[63]. Coercive isomorphism is informed by political decisions, mimetic isomorphism is the product of imitating competitors due to environmental uncertainty and ambiguous goals while normative isomorphism is the product of peer pressure[64]. Baum and Olivier argue that isomorphic organizations are efficient and this serves to preserve the duration of their survival[65]. Organizations have both internal and external factors which feed into what they become known for and the kind of reputation they cultivate for

[61] Ibrahim Mohammed, Some Issues in The Institutional Theory: A Critical Analysis, 2017:15 accessed on 22nd May,2021available at https://www.ijstr.org/final-print/sep2017/Some-Issues-In-The-Institutional-Theory-A-Critical-Analysis.pdf

[62] Jepperson, R.L. & Meyer, J.W., The Public Order and the Construction of Formal Organization, in the New Institutionalism in Organizational Analysis, 1991:145

[63] Yudha Sudibyo & Sun Jianfu, Institutional Theory for Explaining Corruption: An Empirical Study On Public Sector Organizations in China and Indonesia, *Corporate Ownership & Control, Vol,* 13(1), 2015:818

[64] Venard, Bertrand. "Corruption in emerging countries: A matter of isomorphism." *Management* 12, no. 1 (2009): 2-27.

[65] Bum & Olivier, Institutional Linkages and Organizational Mortality, *Administrative Science Quarterly, Vol.* 36, (2). 1991: 187-218

themselves. The operations of the organizations must be grounded in rationality, stability and predictability, factors which further serve to symbolize and project the standing of the organization among its peers. Social processes within the organization and the institutional continuum it exists are 'affected by the socialization practices, which play a more literal role in helping the organization achieve its technical objectives'[66].

In terms of explaining public sector corruption and the recovery of unexplained wealth, the concepts of isomorphism come in handy. Mimetic isomorphism, as earlier alluded is more of imitating what others are doing within the environment in which an individual or organization finds itself in. In other words, people will find corruption attractive and consider they are losing out by not joining the bandwagon.[67] Their entry into the corruption frame further normalizes the vices until change is desired and action taken to reverse the trend. This change could be informed by coercive isomorphism where the state puts laws and enforcement mechanisms in place that make corruption unattractive and costly to the individual or organization. The change emanating from the political actors could have been internal or as a result of pressure from peers, in which case the concept of normative isomorphism kicks in. The range of coercive isomorphism may entail having laws that criminalize holding of unexplained wealth and the reversal of any such kind of wealth as part of the larger project of combating corruption, and especially in the public sector.

2.3 The Legal and Policy Background Assessment

Corruption is not an undertaking that is publicly supported by any individual or organization, especially those in the public sector. To ensure that its dealt with in order to reverse its negative

[66] Ibrahim Mohammed, Some Issues in The Institutional Theory: A Critical Analysis, 2017:15 accessed on 22nd May,2021available at https://www.ijstr.org/final-print/sep2017/Some-Issues-In-The-Institutional-Theory-A-Critical-Analysis.pdf

[67] Ufere, Nnaoke, James Gaskin, Sheri Perelli, Antoinette Somers, and Richard Boland Jr. "Why is bribery pervasive among firms in sub-Saharan African countries? Multi-industry empirical evidence of organizational isomorphism." *Journal of Business Research* 108 (2020): 92-104.

effects on the populace, states acting on their own or in concert with others at the regional and global levels have developed legal and policy frameworks that expressly make it illegal and punishable. Some of the legal instruments developed at the global and regional levels to help combat corruption include the UNCAC (2003)[68], Council of Europe Criminal Law Convention on Corruption (1999)[69], Council of the European Union (EU) Convention On the Protection of the European Communities' Financial Interests (1995)[70] and the African Union Convention on Preventing and Combating Corruption, AUCPCC (2003)[71]. The common thread in these pieces of law is the call to action in terms of prevention, criminalization, support for international cooperation and asset recovery in the fight against corruption. Beyond these collegial legal instruments, some of which are limited in terms of jurisdiction, there are also country specific laws that have been put in place to anchor the fight against the scourge of corruption. This study will tend to assess only those legal instruments that are relevant to the select countries in Europe and Africa, precisely the United Kingdom, Lithuania, Nigeria and Kenya.

As at May 2019, the UNCAC had a membership of 186 state parties. This piece of international law is crucial in the fight against corruption because it not only criminalizes corruption, but also provides for modalities of addressing transnational corruption questions such as complex cases involving actors in different countries or the stealing of public resources and the hiding of such proceeds in another country. Articles 43 to 50 and Article 51 of the convention are particularly

[68] UNODC, *United Nations Convention Against Corruption (2003),* Article 1, accessed on 11th May, 2021 available at https://www.unodc.org/documents/brussels/UN_Convention_Against_Corruption.pdf
[69] Council of Europe, Criminal Law Convention on Corruption, Articles 1-42, available at https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090000168007f3f5
[70] Council of Europe, Convention on the protection of the European Communities' financial interests, para 5, available at https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:31995F1127%2803%29&from=EN
[71] AU, African Union Convention on Preventing and Combating Corruption, Article 1-28, available at https://au.int/sites/default/files/treaties/36382-treaty-0028_-_african_union_convention_on_preventing_and_combating_corruption_e.pdf

significant in the context of this study as they directly address the subjects of international cooperation and recovery of looted assets respectively. To assess the implementation and success of this convention, this study examines its usage alongside other pieces of domestic laws in the countries under review such as the United Kingdom's (UK) Criminal Finances Act,2017, Bribery Act (2010), Corruption Prevention Act (1906), Proceeds of Crime Act (2002), The Nigerian Independent Corrupt Practices and Other Related Offences *Act* (2000) and Kenya's Leadership and Integrity Act (2012), Ethics and Anti-Corruption Act (2011), Proceeds of Crime and Anti-Money Laundering Act (2009), Bribery Act (2016), the Anti-Corruption and Economic Crimes Act (2003) (the ACECA) among others. The study points out that these are some of the key legal tools at the disposal of investigative agencies and the judiciary when dealing with corruption cases and their central aim is criminalization and punishing of corruption besides recovery of the embezzled resources. Practical cases will be used for analysis sake.

The case of the officials of UK Printing Company Smith and Ouzman and officials from Kenya's Independent Electoral Boundaries Commission (IEBC) and the Kenya National Examinations Council (KNEC), popularly known in Kenya as the Chicken gate scandal is the starting point. In this case the UK's Serious Fraud Office investigated and caused successful prosecution of officials of Smith and Ouzman in 2014 who were found to have paid money to officials of IEBC and KNEC so as to secure printing contracts for ballot papers. This case was prosecuted under the Prevention of Corruption Act (1906) alongside the Proceeds of Crime Act (2002). The company was fined £2.2 million while its chairman and sales manager were jailed for 18 months and three years respectively. Instructively, whereas the Ethics and Anti-Corruption Commission (EACC) reported

that the country had recovered 52 million from the corruption cases[72] after triggering the provisions of ACECA in their cooperative endeavor with the UK, the people who were corrupted in the case of Kenya have never been convicted[73] as part of their criminal liability while the giver was convicted, paid their fines and served their respective jail terms in the UK.

This example points to the lackluster performance of the criminal justice system in Kenya in as far as convictions are concerned. Whereas, the UK remains fully cooperative in terms of offering support to her commonwealth partner's investigative authorities in line with UNCAC (2003),[74] the slow pace in handling the case in Kenya can correctly be cited for hindering the fight against corruption. It's important to point out here that the legal framework is in place to support the fight against corruption and in particular the recovery of embezzled resources. The weakness in the part of Kenya in terms of the cited example lies in the retributive aspect of criminalizing corruption. Other weaknesses within the legal framework as rightly pointed out by the EACC in her Anti-Corruption Policy of 2020 is the failure by the legal regime to include aspects of corruption spelt out in UNCAC to which Kenya is a party such as influence peddling and illegal enrichment[75]. This study argues that the recovery of the unexplained wealth without swiftly punishing the perpetrators of the vice does not serve the important purpose of making the cost of corruption high enough to discourage public servants from engaging in the vice.

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[72] Halakhe Waqo, EACC Chief Executive while appearing before the parliamentary Committee on Justice and Legal Affairs Committee, accessed on 12th June 2021, available at https://citizentv.co.ke/news/kenya-recovers-ksh-52-million-from-chickengate-scandal-120362/

[73] Ombati Cyrus, Chicken gate Suspects Oswago and Oyombra Arrested, 8th February 2017, accessed on 14th June 2021 available at https://www.standardmedia.co.ke/counties/article/2001228648/chicken-gate-scandal-suspects-oswago-and-oyombra-arrested

[74] Halake Waqo, EACC Chief Executive while appearing before the parliamentary Committee on Justice and Legal Affairs Committee, accessed on 12th June 2021, available at https://citizentv.co.ke/news/kenya-recovers-ksh-52-million-from-chickengate-scandal-120362/

[75] Attorney General, Sessional Paper No. 2 of 2018 National Ethics and Anti-Corruption Policy, 2020, p.8 accessed on 21st May 2021, available at https://eacc.go.ke/default/wp-content/uploads/2020/10/ANTI-CORRUPTION-POLICY-2020.pdf

With specific reference to the aspect of unexplained wealth, the UK and Kenya have given a fairly same approach to taking back from any public official wealth that they cannot offer an explanation as to how they got it. In the UK, sections 1 and 2 of the Criminal Finances Act, 2017 which came into effect in 2018, provides a civil pathway to recovering unexplained wealth. Its first unexplained wealth order was issued in 2018 against Zamira Hajiyeva.[76] The details of the case will be discussed in the next chapter when comparing the approach of European countries versus the approach in Africa. In Kenya, Section 55 of the Anti-Corruption and Economic Crimes Act has a similar provision to the UK's Act. Kenya's first success stories were reported in 2017 when the courts for the first time ordered that former public officials who could not explain how they acquired the properties to forfeit the same to the state.

Lithuania on the other hand opted for a criminal process in which anybody owning assets they cannot explain how they acquired is liable to prosecution. After ratifying UNCAC in 2006, Lithuania enacted legislation to deal with illicit enrichment in the year 2010.[77] The said code sets out a minimum standard of living which if exceeded will necessitate an explanation. If the explanation given is not satisfactory, a person is prosecuted. However, courts in Lithuania have challenged the constitutionality of that article.[78]

In Nigeria, state authorities have recovered unexplained wealth attributed to former leader General Sani Abacha amounting to the tune of USD 723 million stacked up in properties and accounts held in Switzerland[79]. It is estimated that USD 4 billion was embezzled and looted from Nigeria's

[76]Zagaris, Bruce. "Money Laundering, Bank Secrecy, and Asset Recovery." IELR 36 (2020): 43.
[77] *Republic of Lithuania Criminal Code (*2000 amended in 2010*)* Art.189
[78] Bikelis, Skirmantas. "Prosecution for illicit enrichment: the Lithuanian perspective." *Journal of Money Laundering Control* (2017):205
[79] Tranparency International, Returning Nigeria's Stolen Millions, accessed on 17th June 2021, available at https://www.transparency.org/en/news/returning-nigerians-stolen-millions

economy by the Abacha family[80]. Citing UNCAC's provision on international cooperation and the Swiss Criminal Code, the Swiss government noted that it was under obligation to cooperate with the Nigerian authorities to recover and return the money to the rightful owners for it had been corruptly acquired. Further, the asset recovery effort saw the family of Sani Abacha, committing to return USD 1 billion pilfered from public coffers in exchange for the freedom of their son Mohammed Abacha[81]. Whereas it is commendable that the Abacha family returned what their father facilitated them to own corruptly, the fact that the retributive component in the form of jail term was not meted lowered the bar in the fight against corruption.

The challenge with the Nigerian legal regime, precisely the constitution is that it grants immunity to executive office holders in their personal capacity while they serve their terms in office, which in some cases may be indefinite. This blanket immunity from civil and criminal proceedings serves to delay the justice process and further exacerbates an already bad situation, particularly where such officials hold lofty public positions that they can use to frustrate any investigations or prosecution against them[82].

From these illustrations and discussions, it is evident that there exists an adequate body of law to combat corruption, especially in the public sector. Critical provisions of the existing legal regimes, such as international cooperation and mutual legal assistance in the recovery of unexplained wealth stashed in overseas offshore accounts has increased the cost of corruption to the rational person, thus contributing to combating corruption. In addition, the legal regimes in the assessed countries

[80] David Enweremadu, Nigerias quest to recover looted assets, 2013: 53 accessed on 8th July 2021, available at https://d-nb.info/1038738512/34
[81] The New Humanitarian, Abacha's son freed, to return over $1 billion, accessed on 10 July 2021 and available at https://www.thenewhumanitarian.org/fr/node/203338
[82] G.P., Corruption in Nigeria, Hard graft in The Economist accessed on 1st July, 2021 available at http://www.economist.com/blogs/baobab/2012/04/corruption-nigeria

explicitly provides for punishment and the recovery of unexplained wealth accruing from acts of corruption. The country specific laws have developed their anti-corruption legal regimes from the global and regional instruments. However, in some cases such as that of Kenya, there are omissions of sections of the global laws in the domestic law such as the offences that are defined as constituting corruption which are in UNCAC but missing in the domestic law and the import of these anomalies has been criminally culpable people getting away with the crimes they commit. It would therefore be important that the domestic laws are amended to achieve among other things unit with the conventions and remove contradictions and duplications in the functions of the institutions created by such laws.

2.4 Institutional Background Assessment

In the four countries that this study has focused on, that is UK, Lithuania, Nigeria and Kenya, various institutional arrangements have been put in place to guide the efforts aimed at recovering unexplained wealth as an avenue for combating corruption. In the case of the United Kingdom, the principal institutions charged with recovery of unexplained wealth and the fight against corruption are the Serious Fraud Office (SFO) established by the Criminal Justice Act (1987) 'to deal with the most serious and complex cases of fraud, bribery and corruption'[83], the judiciary whose work is to render justice and the Serious Organized Crime Agency (SOCA) established under the Serious Organized Crime and Police Act of 2005, among others. It is instructive to note that the SFO has both investigative and prosecutorial powers, and this perhaps explains why it is faster to deal with corruption cases in the UK as no time is lost between investigation and prosecution. The significance of such an approach is that the memory of the case remains intact as

[83] Schedule 1 of the Criminal Justice Act, 1987 establishing the SFO accessed on 14th June 2021 and available at https://www.legislation.gov.uk/ukpga/1987/38/schedule/1

the institution and officers involved remains unchanged from start to finish[84]. The functional clarity among the various institutions diminishes duplication of roles and this enhances swiftness in the delivery of justice. The government of the UK in her 2019 Asset recovery action Plan states in no uncertain terms that 'a coherent, whole-system approach is needed to attack illicit finances successfully and deliver a step-change in our collective efforts to disrupt, deter and reduce crime'[85]. The operation effectiveness among the various institutions in the UK saw her recover assets worth over £1.6 billion between April 2010 and March 2018[86]. This contrasts with the situation in other countries such as Kenya as will be addressed later in this section.

In Nigeria, cases involving recovery of unexplained wealth and corruption are dealt with by among other institutions Independent Corrupt Practices and Other Related Offences Commission (ICPC) and the Economic and Financial Crimes Commission (EFCC) established by their respective Acts of Parliament of 2000 and 2002 respectively[87]. Whereas the EFCC has both an investigative and prosecutorial mandate the ICPC has only an investigative mandate and the furthest it can stretch is making recommendations to relevant state organs for further action against persons of interest. These institutions are complemented by the police force which also has an investigative role in criminal activities, including economic crimes such as corruption. The net effect of this duplicity in the investigation has in many cases caused slowing down of cases and consequently slowing down of the justice process. Other institutions such as the Asset Recovery Management unit exist

[84] SFO, About Us: What we do accessed on 25th June 2021, available at https://www.sfo.gov.uk/about-us/
[85] UK Home Office, Asset Recovery Action Plan, 2019, p.4 accessed on 25th June 2021, available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/815900/20190709_Asset_Recovery_Action_Plan_FINAL_Clean.pdf
[86] Ibid, p.4
[87] Alamu Oluwaseyi, Corruption, Anti-Corruption Agencies and the Nigerian Government, 2016: 3-4

but have also been reported as riddled with inefficiencies and opaqueness in the management of the recovered assets[88].

The key institutional arrangement in Kenya that deals with combating corruption and the recovery of unexplained wealth includes the Ethics and Anti-Corruption Commission (EACC), Asset Recovery Agency(ARA). The Directorate of Criminal Investigations (DCI), Public Procurement Regulatory Authority (PPRA), the Office of Director of Public Prosecutions (ODPP) and the Judiciary. The EACC and the DCI have an investigative mandate while the ODPP prosecutes the cases before the judiciary after perusing the investigation files to satisfy itself of the existence of a case and availability of evidence to secure conviction. The operations of these institutions have at times been at cross purpose, with each accusing the other of encroaching its space or doing a shoddy job in the process of dispensing justice. While the mandate of the EACC is more limited to ethical and economic crimes breaches, the DCI exercises original and unlimited jurisdiction in the investigation of criminal offences of whatever nature.

Instructively, all these institutions have divisions within them that deal with economic crimes and particularly those relating to corruption. In terms of obtaining convictions, the ODPP has not had a lot of success especially in big cases except those of John Walukhe and Grace Wakhungu in which they were slapped with fines of close to Ksh 1 billion each or jail terms of over 60 years each[89]. The EACC working alongside other global partners documents that they have managed to trace and recover proceeds of corruption variously referred to as unexplained wealth in this project

[88] CIFAR, Asset recovery in Nigeria: the good and the bad, para 3, accessed on 17th May 2021, available at https://cifar.eu/nigeria-asset-recovery/
[89] John Koyi Waluke & another v Republic [2020] eKLR, paragraph 8, available at http://kenyalaw.org/caselaw/cases/view/201444/

to the tune of Ksh. 11.3 billion in the 2019/2020 financial year[90]. Delving into the investigative and prosecutorial powers of Kenya's institutions charged with combating corruption, it is evident that the complexities and duplicities mirror those in the Nigerian case explored earlier.

It is this study's contention that the recovery of unexplained wealth without proper institutional mechanisms to foster accountability for the same by the receiving agency will generate never ending cycles and chains of corruption. A comparative analysis of the efforts by the African countries explored vis-à-vis their European counterparts indicates that the weaknesses that should concern interested parties lie in failure to align the anti-graft institutions with enabling laws, in a manner that eliminates duplicity while entrenching complementarity and a whole-system approach as is the case in the United Kingdom. The study further concurs with the United Nations Development Program (UNDP) of 2005 on the need to rethink the sharing of investigations and prosecutions across different institutions, to ensure efficiency in dealing with corruption cases as well as ensure institutional independence especially of the EACC[91]. This thinking is partly strengthened by the relative levels of efficiency in the UK in which the SFO has both investigative and prosecutorial jurisdictions compared to the cases in Kenya and Nigeria. The fact that both the EACC and the ODPP are independent offices operationally and as per law established makes it rather awkward that the ODPP can take files back to the EACC for amendments. Part of combating corruption in the public sector vide the recovery of unexplained wealth would mean a minimization of the chain of institutions involved to cut down the bureaucracy and enhance accountability.

[90] Basel Governance Project, Kenya: USD 271 million in stolen assets recovered and a fast upward trend, accessed on 3rd July 2021, available at https://baselgovernance.org/news/kenya-usd-271-million-stolen-assets-recovered-and-fast-upward-trend

[91] UNDP. "Institutional arrangements to combat corruption: A comparative study." (2005). Accessed on 25th May,2021 available at https://www.un.org/ruleoflaw/blog/document/institutional-arrangements-to-combat-corruption-a-comparative-study/

2.5 Chapter Summary

The presence of a robust legal and policy framework to anchor efforts aimed at recovery of unexplained wealth is an important step in the drive towards combating corruption at home and abroad in democracies. Evidence provided in this chapter is emphatic that comparatively, countries in Europe have legal regimes and institutions principally similar to those in Africa intended to guide the efforts towards recovery of unexplained wealth. The UNCAC which serves as the global lynchpin for the recovery of unexplained wealth has been domesticated by all the participating countries in the form of various Acts of parliament. Moreover, these countries had signed multilateral agreements (MLAs) to cooperate in fighting the vice, by punishing the perpetrators and recovering unexplained wealth held by individuals, especially those in the public sector. Comparatively, the MLAs had been designed to criminalize corruption acts and offer mutual support in the recovery of assets looted abroad and invested or stashed in their territories. Based on data provided in this chapter, the study concludes that European and African countries have the necessary legal and policy tools to aid the recovery of unexplained wealth. The differences in the volume of recovered wealth, the study argues, lies more in weaknesses related to enforcement of the laws or the pace at which cases progress towards the actual recovery of the unexplained wealth rather than an absence or lacunae in the existing laws and policy frameworks.

CHAPTER THREE
A FOCUSED COMPARISON OF RECOVERY OF UNEXPLAINED WEALTH IN SELECT COUNTRIES IN AFRICA AND EUROPE

3.1 Introduction

Countries across the world continue to suffer varied degrees of economic losses occasioned by acts of corruption perpetrated by their citizens holding positions of trust in public institutions. These public officials hatch plans and collaborate with fellow citizens or foreign accomplices to fleece the public or engage in corrupt activities that are expressly outlawed by the law of the land and whose punishment is in most cases provided for in the states' criminal codes. The reality of persistent corruption despite the sanctions put in place has caused states to develop various approaches to handle the menace such as civil forfeiture of the unexplained wealth and empowering the criminal justice system to pursue, punish and recover the illegally obtained assets.

Corruptly acquired assets have been variously described as illicit enrichment or unexplained wealth. The United Nations Convention Against Corruption (UNCAC) describes illicit enrichment in Article 20 as "a significant increase in the assets of a public official that he or she cannot reasonably explain in relation to his or her lawful income"[92]. It's important to emphasize here that a person's or an organization's wealth is termed illicit to the extent that it goes beyond the known and declared sources and such a person or entity cannot provide rational explanations as to how the 'extra-legal' wealth was obtained.

The criminalization of unexplained wealth is intended to deter corruption by increasing the costs of corruption while decreasing the benefits. The proponents of this approach argue that punishing

[92] UNODC, United Nations Convention against Corruption, Article 15 to 25, accessed on 4th June 2021, available at https://www.unodc.org/documents/brussels/UN_Convention_Against_Corruption.pdf

crime and recovering what has been stolen is painful and discourages would be offenders. [93]To this end, countries such as the United Kingdom (UK), Lithuania, Nigeria and Kenya that form the basis of this chapter's output have put in place various legal mechanisms and enabling institutions to aid in combating corruption and especially the recovery of unexplained wealth. These measures include ratification of UNCAC and domestication of its provisions into their various criminal codes.

A sample of the codes in the countries under review include the UK's Proceeds of Crime Act 2002[94], Lithuania's law on prevention of corruption 2002[95], Nigeria's Economic and Financial Crimes Commission (EFCC) Act 2004[96] and Kenya's Anti-Corruption and Economic Crimes Act of 2003[97]. These legal instruments and others not necessarily cited in this chapter create the institutions that actively deal with prevention of corruption and the recovery of the unexplained wealth. Under the criminalization of unexplained wealth, the legal approaches involved include the prosecution of individuals for engaging in the crime of corruption and securing court orders to recover the unexplained wealth and plea bargains between the prosecutors and the accused persons that are intended to acknowledge guilt on the part of the offender, recover the illicit wealth and a lesser punishment for the offender[98]. This study points out that in the criminal prosecution approach, the burden is on the state through the prosecutor to proof that the alleged crime was

[93]Kofele-Kale, Ndiva. *The international law of responsibility for economic crimes: holding state officials individually liable for acts of fraudulent enrichment*. Routledge, 2016:260-292

[94] UK National Archives, Proceeds of Crime Act, 2002, Accessed on 11th July 2021 from https://www.legislation.gov.uk/ukpga/2002/29/contents

[95] Chancellery of the Seimas of the Republic of Lithuania, Legislation, accessed on 15th June 2021 from https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/

[96]VERTIC, Economic And Financial Crimes Commission (Establishment) Act 2004, accessed on 10th July 2021 http://www.vertic.org/media/National%20Legislation/Nigeria/NG_Economic_Crimes_Commission_Act_2004.pdf

[97] Kenya Law Review, The Anti-Corruption and Economic Crimes Act, 2003 accessed on 31st May 2021 from https://eacc.go.ke/default/document/the-anti-corruption-and-economic-crimes-act/

[98] Florence Keen, Unexplained Wealth Orders: Global Lessons for the UK Ahead of Implementation Occasional Paper, 2017, para 21.

committed by the person on trial and that they benefited from the proceeds of the crime. It is only when these aspects are complied with that a conviction can be secured first and the subsequent confiscation/recovery orders for the proceeds of the crime issued so that such assets revert to the state.

Gikonyo[99] describes civil forfeiture as the non-conviction based recovery of the proceeds of crime, elaborating that the proceedings are not criminal in nature and they are not depended on the conviction of the accused person. This study emphasizes here that such proceedings are against the property itself, that is *in rem*, rather than against the person or entity holding it. The accuser must thus sufficiently demonstrate that the property was acquired through unlawful means[100]. In successful civil forfeitures, the holder of the unexplained wealth transfers its ownership to the state and loses all the rights to such wealth. The purpose of the court in the civil forfeiture proceedings is to establish illegalities at the origin of the acquisition of the unexplained wealth based on a balance or probabilities rather than beyond reasonable doubt as is the case in the conviction-based approach[101].

3.2 Country Case studies and Practices

In this section, the study explores the two approaches i.e. criminal forfeiture and civil forfeiture of unexplained wealth as used in the United Kingdom, Lithuania, Nigeria and Kenya.

3.2.1 United Kingdom

The UK has a rich legal framework that governs the handling of acts of corruption and in particular the recovery of unexplained wealth. The major constituting instruments that provide for recovery

[99] Gikonyo, Constance. "The Kenyan Civil Forfeiture Regime: Nature, Challenges and Possible Solutions." *Journal of African Law* 64, no. 1 (2020): 27-51.
[100] Boister, Neil. *An introduction to transnational criminal law*. Oxford University Press, 2018., p.240
[101] Ramaswamy, Jaikumar. "Overview of Asset Forfeiture and Money Laundering Program." *US Att'ys Bull.* 61 (2013):13

of unexplained wealth include Proceeds of Crime Act (POCA) 2002 and the Criminal Finances Act 2017. POCA had been the major legal instrument in use prior to 2018 and the process of unexplained wealth recovery mostly took a criminal confiscation approach where accused persons were charged in court and upon their conviction for the charges levelled against them, recovery proceedings would commence. The effectiveness of the criminal confiscation approach is a mixed bag, especially when the success rates in terms of the unexplained wealth recovered vis a vis the investigative and prosecution expenditure are taken into account. Some examples suffice here to underscore this assertion.

The Asset Recovery Agency (ARA) established under POCA 2002 recovered assets worth £23 million over a period of three years by 2006 against an expenditure of £65 million in the same period[102]. The House of Commons Committee on Public Accounts in its report of 2007 to the House reported that ARA prioritized criminal forfeiture of relatively low value cases and overlooked negotiated settlement, especially in the high value cases which in the opinion of the committee was a misnomer[103]. From an economic point of view, the cost of criminal forfeiture of the proceeds of crime far outweighs the benefits. This study argues that whereas corruption is not anything to be glorified, prudent management of public resources requires the use of minimum resources in the pursuit of maximum returns.

The Home Office that is charged with leading the unexplained wealth recovery programs reported that in the 2019/2020 financial year, assets worth £139 million had been confiscated from persons

[102] House of Commons Public accounts Committee, Asset Recovery Agency, accessed on 16th July 2021 from https://publications.parliament.uk/pa/cm200607/cmselect/cmpubacc/391/391.pdf p. 3
[103] Ibid

or entities adjudged to have illegally obtained them[104]. Comparatively, this was the lowest recovery especially when viewed against the preceding 5 years' recoveries of £157, £207, £161, £142, £167 million from the 2014/15 to 2018/2019 financial years respectively. The implication of this finding leads to the inevitable conclusion that criminal confiscation was not an effective approach in recovery of unexplained wealth in the UK as shown by the fluctuating returns accruing after such heavy investments in investigations and prosecution.

Other than the confiscation of unexplained wealth after conviction of an accused person or entity, the law in the UK also provides for civil recovery and forfeiture of illicit wealth. Unlike in the criminal confiscation where the burden of proof on the assets being pursued were proceeds of crime, these approaches have a civil touch and the burden of proof is on a balance of probabilities. The two fall under the category of civil proceedings and the accused persons or entities do not necessarily have to be convicted for the recovery of the illegally held wealth to be recovered. The focus in these approaches is the asset rather than the accused person. The study notes that civil proceedings against assets believed to have been illegally obtained can be brought even in circumstances where criminal proceedings had been instituted against the holder of the assets and an acquittal made by the courts.

Instructively, data from the UK Home Office for the 2019/2020 financial year indicates that assets worth £69 million were recovered through the civil proceedings approach. This was explained as the highest recovery through this approach over a six-year period beginning from 2014/2015 financial year. An analysis of the data provided in the report further revealed a consistent increase in the value of assets recovered via the civil proceedings (forfeitures) over a four-year period i.e.

[104] UK Home Office Asset Recovery Bulletin, March 2020 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/923194/asset-recovery-financial-years-2015-to-2020-hosb2320.pdf p. 1

£42, £42, £62 and £69 million for the 2016/2017 to 2019/2020 financial years respectively[105]. The study notes that the Unexplained Wealth Orders (UWOs) came into effect in 2018 and this could be having a positive impact on the recovery of unexplained wealth.

When the two approaches to recovery of unexplained wealth are juxtaposed, it is clear that the civil proceedings approach incorporating civil recovery and forfeitures seems to be more consistent and less costly compared to the criminal confiscation approach. These civil approaches coupled with plea bargaining adds a new impetus and potential for success in the efforts aimed at the recovery of unexplained wealth as a pathway to combating public sector corruption.

3.2.2 Lithuania

Article 189 of the Lithuanian Criminal Code (CC) provides for the offence of illegal acquisition of property where such an owner cannot explain the manner and circumstances under which the wealth was acquired. The CC further outlines the framework that grounds the efforts aimed at recovery of assets belonging to persons or entities that cannot explain how they obtained such wealth, beyond their declared official sources of wealth. Lithuanian law allows for the prosecution of any person who possesses unexplained wealth worth more than €25,000. The specific and enabling laws towards this endeavor have been incorporated into the country's criminal code and aligned with the UNCAC. The CC at Articles 72 and 73 provides for the extended confiscation of the assets and or properties found to have been corruptly obtained by a person who has been convicted[106]. In other words, the CC provides for the punishing of the person or entity that has committed a crime as prescribed by Lithuanian law and the confiscation of such asset to revert to

[105] UK Home Office Asset Recovery Bulletin, March 2020 accessed on 18th June 2021 and available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/923194/asset-recovery-financial-years-2015-to-2020-hosb2320.pdf p. 6

[106] Criminal Code of the Republic of Lithuania, revised 2017, accessed on 18th June 2021:30-31 available at: https://www.legislationline.org/download/id/8272/file/Lithuania_CC_2000_am2017_en.pdf

the rightful owner – the state. This piece of legislation is further strengthened by a Resolution of the Government of the Republic of Lithuania No. 634 of 2004 which allows the state to sell confiscated property that has been found to have been fraudulently obtained and the proceeds thereof transferred to the state budget along with any cash recoveries made.

Lithuania has tended to take a criminal proceedings approach in the pursuit and recovery of unexplained wealth. In a study conducted by Skirmantas Bikelis[107], it was established that only 4 out of 28 criminal proceedings with regard to illicit enrichment secured convictions between 2015 and 2019, with the remaining 24 being dismissed at various levels for various reasons such as failure to prove the illegal origins of the assets. It would appear that the burden of proof was too much for the prosecutors to sustain their cases. Of the four convictions, two confiscation orders for the recovery of the illegally acquired wealth were issued, with the other two attracting no such orders on grounds of the defendants possessing no such wealth as they were mere conduits/enablers while in the other case, confiscation orders had already been issued in another separate case not dealing with illicit enrichment. From the convicted cases, the confiscation orders amounted to approximately €0.58 million representing a success rate of 6%[108]. These statistics point to the inefficiency of pursuing the criminal proceedings approach in the recovery of unexplained wealth.

Civil forfeiture and recovery of unexplained wealth in Lithuania is a fairly recent phenomenon, given that the enabling law was adopted by the Lithuanian parliament in March 2020 and came

[107] Bikelis, Skirmantas. "Chasing criminal wealth: broken expectations for the criminalization of illicit enrichment in Lithuania." *Journal of Money Laundering Control* (2021):p.8 accessed on 5th June,2021 available at https://www.emerald.com/insight/content/doi/10.1108/JMLC-12-2020-0135/full/pdf?
[108] Ibid

into force in July 2020[109]. This piece of legislation sets a minimum value of €100000 for civil confiscation proceedings to be instituted against a suspected person. However, given its fairly recent implementation (less than a year since adoption), no data has at yet been provided to show how the civil proceedings approach has fared in light of recovery of unexplained wealth as a means to combating corruption in the public sector.

In conclusion, Lithuania maintains both the criminal and civil approaches to the recovery of unexplained wealth. Despite the criminal confiscation not having been as successful as it was thought to be at its inception, its deterrence purpose may have informed its retention in the anti-corruption and unexplained wealth recovery legal regime.

3.2.3 Nigeria

The Federal Republic of Nigeria has an elaborate legal regime to guide the efforts geared towards combating corruption and recovering of assets and or unexplained wealth. Various reports such as the Transparency International's 2017 Corruption Perception Index have consistently scored Nigeria as one of the most corrupt countries in the world with this particular report ranking her 148/180.[110] These instruments include Corrupt Practices Act 2000, Economic and Financial Crimes Commission (EFCC) Act 2004 and the Code of Conduct Bureau and Tribunal (CCB) Act 1991. These instruments create the institutions charged with spearheading the fight against corruption, including the recovery of illegally acquired wealth. Other than the legal instruments, presidential decrees have also been issued aimed at containing the scourge of unexplained wealth

[109] Bikelis, Skirmantas " Modeling The Patterns of Civil Confiscation: Balancing Effectiveness, Proportionality and The Right to Be Presumed Innocent," *Baltic Journal of Law & Politics, Vol 13* (2) 2020: 30

[110] Zouaoui, Azzouz, Anas Al Qudah, and Mounira Ben-Arab. "World corruption perception index analysis." *Research Journal of Finance and Accounting* 8, no. 24 (2017): 87 accessed on 13th June, 2021 available at https://ssrn.com/abstract=3095852

among public servants, with a case in point being the Presidential Executive Order 006 of 2018 which preserved properties or wealth held by politically exposed people which was under investigations.

Invoking the provisions for mutual legal assistance as provided for in various legal instruments such as the UNCAC, Nigeria has been able to pursue and recover unexplained wealth linked to acts of corruption and stashed in foreign countries. Cases in point include the cooperation sought by the Abubakar regime from the UK in the pursuit of unexplained wealth held by the late General Sani Abacha in which she recovered 825 million USD[111]. The Obasanjo regime recovered 1.2 billion USD[112] from the same Abacha and his allies, an indicator of the depth of sleaze during his time in office. The investigations into the origins of the unexplained wealth held by Abacha and members of his family were traced to bribes paid by oil companies, construction companies as well as other business entities which had won contracts to supply various goods and services but did not supply anything though money had been paid to them[113]. Other criminal activities included direct withdrawals from the Central Bank of Nigeria for purchases that never materialized.

Nigerian politically exposed persons such as former governors James Ibori and Diepreye Alamieyeseigha have been charged in UK courts with many counts of money laundering directly related to acts of corruption committed while they held office and to which they pleaded guilty. However, there is no evidence as to whether the UK has repatriated such unexplained wealth to the Federal Republic of Nigeria. Enweramadu reports that the UK has tended to take too long and

[111] Enweremadu, David. U "Nigeria's Quest to Recover Looted Assets: The Abacha Affair" *Africa Spectrum*, Vol. 48, No. 2 (2013), p.52
[112] Ibid
[113] United Nations Office on Drugs and Crime, World Bank. "Stolen Asset Recovery (StAR) Initiative: Challenges, Opportunities, and Action Plan." (2007): p.18

sort of put road blocks in the path to cooperation in terms of repatriating the assets[114]. The ICPC which is more specialized in the investigation and prosecution of corruption cases has had a fairly underwhelming level of success with the best year in terms of securing convictions being 2018 when 14 people were convicted from a pool of over 300 cases active in court then[115]. Records from the ICPC report of 2019 indicated that the commission had recovered unexplained wealth in the form of money and fixed assets valued at 77 billion Naira[116].

3.2.4 Kenya

The Ethics and Anti-Corruption Commission (EACC) is established by Articles 79 and 252 of the constitution of Kenya and is charged with the responsibility of conducting investigations into unethical and corrupt practices, functions which are intended to secure punishment of the violators and help in recovery of unexplained wealth that has been linked to acts of corruption. The scope of its functions are stipulated in the constitution itself, the EACC Act 2011, as well as the Anticorruption and Economic Crimes Act (ACECA) 2003. Upon conducting investigations and establishing culpability for economic crimes or corruption on a suspected person, the EACC prepares the file with all necessary charges and evidence and forwards the same to the Office of the Director of Public Prosecutions (ODPP) so that such persons can be charged in court. It is important to emphasize here that the EACC does not have prosecutorial powers.

In an effort to curb corruption in the Kenyan public sector which has been estimated to cost the country Ksh. 2 billion daily[117], the EACC caused the prosecution of 554 corruption related cases

[114] David U. Enweremadu, Nigeria's Quest to Recover Looted Assets: The Abacha Affair, *Africa Spectrum*, Vol. 48, No. 2 (2013)
[115] Mathew Page, 2021, Innovative or Ineffective? Reassessing Anticorruption Law Enforcement In Nigeria, Working Paper 9, p. 10 available at https://ace.globalintegrity.org/wp-content/uploads/2021/02/Page-Nigeria-workingpaper9-1.pdf
[116] ICPC, Value of Assets Recovered from acts of corruption undertaken by federal government officials as at 2017
[117] President Uhuru Kenyatta in an interview with Kameme FM on 18th February 2021

between 2003 and 2019, out of which 289 convictions were made representing a conviction rate of 52%[118]. Over the same duration, recoveries in the form of cash and immovable property with an estimated value of Ksh. 22.5 billion[119] have also been made and repatriated to the state. In this figure of Ksh. 22.5 billion, the EACC clearly indicates in their 2019 report that Ksh. 26.7 million were recoveries in the form of unexplained wealth/assets in line with the provisions of ACECA. In 2017, the Ethics and Anti-Corruption Commission finalized its first ever case of unexplained wealth in which Stanley Mombo Amuti was ordered to forfeit unexplained assets valued at Ksh. 42.5 million[120]. A communication from the EACC further indicates that the commission had traced illegally acquired and unexplained assets to the tune of Ksh 4.6 billion and apart from placing preservation orders or caveats on the properties, not much of progress had been made in terms of recovering them except in one case worth Ksh. 491 million[121] where alternative dispute resolution was underway to secure non-conviction based recovery.

3.4 Comparative Analysis

The cases presented in this chapter paint a picture of the various approaches that have been used by states in the recovery of unexplained wealth that has been linked to corrupt activities in the respective countries. One of the main observations that is evident from the data presented is that all four countries under review relied heavily on the criminalization of illicit wealth and therefore used criminal proceedings to pursue conviction and confiscation of the unexplained wealth. Comparatively, the criminal proceedings have been applied in all four countries under review. The

[118] EACC, Convictions since 2003, accessed on 22nd June 2021, available at https://eacc.go.ke/default/wp-content/uploads/2019/12/Convictions-since-2003.pdf
[119] EACC, Assets recovered between 2003 and 2019, accessed on 22nd June 2021, available at https://eacc.go.ke/default/wp-content/uploads/2019/12/ASSETS-RECOVERED-BETWEEN-2003-AND-2019..pdf
[120] Stanley Mombo Amuti v Kenya Anti-Corruption Commission [2019] eKLR http://kenyalaw.org/caselaw/cases/view/172924/
[121] EACC Annual Report of 2019 accessed on 22nd June 202, available at https://eacc.go.ke/default/wp-content/uploads/2018/11/ILLEGALLY-ACQUIRED-AND-UNEXPLAINED-ASSETS-TRACED-July-2017-to-Sept-2018.pdf

presented information indicates that such proceedings have taken long to secure convictions while consuming sizeable resources as the UK case has demonstrated, where the recoveries made were not even one third of the expenses incurred in their pursuit. The long duration is partly attributed to the nature and process of litigation in criminal matters, whose standards of securing of securing convictions are too high and the fear of conviction, causing accused persons to do anything that they believe can lead to their acquittal.

In addition, the cases demonstrate that the actual value of unexplained wealth recovered after conviction is way below the value that was being pursued as the cases demonstrate. The cases further demonstrate that convictions do not necessarily translate to actual recovery of the unexplained wealth in its totality even in cases where the convicted persons had pleaded guilty to economic malfeasance as was the situation in the James Ibori case. This study argues that the international nature of the unexplained wealth cases coupled with legal demands placed on parties to criminal justice proceedings as well as jurisdictional dynamics have undermined the recovery process despite clear provisions for mutual legal assistance subsisting as per the UNCAC and other international conventions such as the anti-money laundering convention.

A similar observation holds true with reference to criminal cases prosecuted in the UK involving persons involved in corruption activities. In Nigeria and Lithuania persons whose unexplained wealth was traced to acts of corruption perpetuated by the convicted persons and their accomplices while they held public offices in the respective countries was equally recovered. However, whereas the accused persons were convicted and confiscation orders given for the recovery of the unexplained wealth, the full amount of the unexplained wealth has not reverted to its country of origin. Does this point to the complicity of the UK law enforcement institutions in militating against repatriation of unexplained wealth held by individuals engaged in corrupt undertakings?

This study is persuaded by Enweremedu's[122] argument that the UK and other European countries' secrecy around the financial dealings, particularly those involving corrupt serving or former public officials does not help the cause for curbing corruption. It is the study's contention that convictions ought to be swiftly followed by the confiscation and repatriation of the unexplained wealth to its rightful owners. Else, any rationalizations made by such countries against corruption would easily be disregarded as lacking in substance, thus undermining the global efforts aimed at curbing the vice.

The study's finding that the value of confiscated unexplained wealth in the UK, the most advanced and swift of the four countries in terms of the criminal justice system capabilities, was on the decline over a four-year period up to 2019[123] is a pointer to the limits of criminalization. This is especially significant given the heavy investment she has made in the area of putting in place robust investigative agencies and enabling laws. The decline is consistent with observations that are discernible from the case of Lithuania, with the prosecutor's office there conceding that the criminal approach had not delivered in terms of unexplained wealth and asset recoveries as anticipated. It thus proposed the enactment of a new legal regime to allow for an alternative approach. A critical assessment of the four cases adds fodder to the thought that the deterrence objective usually pursued by the criminal approach may be attained, albeit not substantially. Overall, it would appear the that the benefits of corruption outweigh the costs in the long run. It would appear that the essence of recovering unexplained wealth which is to deny the accused

[122] Enweremadu, David U. "Nigeria's quest to recover looted assets: The Abacha affair." *Africa Spectrum* 48, no. 2 (2013): 51-70.
[123] UK Home Office Asset Recovery Bulletin, March 2020 accessed 20th July 2021 and available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/923194/asset-recovery-financial-years-2015-to-2020-hosb2320.pdf p. 1

persons an opportunity to benefit from it will not be met if the approach remains entirely criminal with its numerous limitations as argued.

The country case studies have also indicated a gradual shift in approach with new legal regimes in place or underway to complement those that took an entirely criminal approach. These fairly new regimes such as the UKs Financial Crimes Act 2018 providing for the Unexplained Wealth Orders, Lithuania's Civil forfeiture law of 2020 and Nigeria's Proceeds of Crime bill before parliament seek to strengthen the non-conviction based approach to recovery of unexplained wealth/assets. Kenya's ACECA has express provisions on seizure and the demand for an explanation of suspect wealth which is not consistent with the declared or known sources of income for that person.

The shift in legal regimes is an appreciation of the limits of the criminal approach and the new legal orientation towards civil proceedings seeks to overcome the high standards and burden of proof required in criminal proceedings placed on the prosecutor. Skirmantas[124] argues that in civil proceedings, the standards required to secure forfeiture of unexplained wealth are on a balance of probabilities rather than beyond reasonable doubt as is the case with criminal proceedings. Instructively, the burden of proof somewhat is shared by the prosecutor/complainant and the accused person. This argument is consistent with the provisions of ACECA in section 26 where the secretary of the EACC is empowered to "by notice in writing, require a person who, for reasons to be stated in such notice, is reasonably suspected of corruption or economic crime to furnish the commission with a statement of when the suspected wealth was acquired".[125]

[124] Bikelis, Skirmantas. "Modeling the patterns of civil confiscation: balancing effectiveness, proportionality and the right to be presumed innocent." *Baltic Journal of Law & Politics* 13 (2021): 24-48.
[125] Stanley Mombo Amuti v Kenya Anti-Corruption Commission [2019] eKLR http://kenyalaw.org/caselaw/cases/view/172924/

The possibility of reaching a deal between the plaintiff and the defendant as to the forfeiture of unexplained wealth in exchange for withdrawal or cessation of charges is appealing to persons who may be aware of the overwhelming evidence possessed by the prosecutor. In such cases, they may be convinced that forfeiting their unexplained wealth in exchange for their freedom rather than await a criminal trial where they could lose both is more sensible. This thinking appears to have informed the negotiations between Nigerian authorities and the Abacha family over the £1.1 billion case in which the state recovered £1 billion in unexplained wealth, leaving £100 million for the Abachas[126]. In the agreement consented to and signed by both parties, Nigeria would not only withdraw the case against the Abachas, but also lost its right to further pursue the case or any other property held by the family.

The civil forfeiture, variously referred to as civil recovery[127] has demonstrated as having a higher chance of success compared to the criminal confiscation that is conviction based. The UK data set shows that in the five-year period it has been used even before the strengthening of the enabling laws, it has shown an upward trajectory in terms of the recovered unexplained wealth/assets[128]. The study argues that it is possible that the limits of criminal approach coupled with the promise of the civil proceedings where a conviction is not required for the recovery of unexplained wealth may have informed the expediting of the Financial Crimes Act 2018 to entrench civil forfeiture in law. Similarly, Kenya's recovery of unexplained wealth/assets belonging to Stanley Mombo Amuti valued at Ksh. 42.5 million whose origins was situated in corruption dealings could give an insight into the use of the civil/alternative dispute resolution approach pursued by the EACC in

[126] David U. Enweremadu, Nigeria's Quest to Recover Looted Assets: The Abacha Affair, *Africa Spectrum*, Vol. 48, No. 2 (2013)
[127] Bikelis Skirmantas, Ibid
[128] See the chart in the Home Office Bulleting of March 2020, p. 1 accessed on 24th July 2021 and available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/923194/asset-recovery-financial-years-2015-to-2020-hosb2320.pdf

pursuit of similar unexplained wealth held by various individuals as reported in the commission's 2019 report[129].

In concluding this comparative analysis, the study argues from the evidence adduced in the discussion that the civil proceedings approach to the recovery of unexplained wealth holds better promise that the criminal proceedings approach. This view stems from the fact that civil proceedings are flexible and the negotiations obtain higher recoveries of unexplained wealth in a relatively shorter period of time and at a reasonably cheaper cost compared to the criminal approach. The recovery of the unexplained wealth by civil means thus increases the cost of corruption, thus snuffing it of its allure to would be offenders. Additionally, the recovery does not of necessity mean that the culprits will not be punished in addition to losing the unexplained wealth. The exception being cases where it is expressly stated in the negotiation agreement between parties prior to commencement of criminal proceedings. Besides, the state saves on its resources that would have been spent on providing for the offenders while they are held in custody after their conviction.

3.5 Chapter Summary

The reviewed cases surrounding the approaches used in recovery of unexplained wealth and the relative levels of success point to the array of challenges inherent in the procedures and the respective operational environments. One of the significant challenges relates to the place of political goodwill. This is especially important because law making and enforcement essentially lies in the hands of political class, yet in some cases like Nigeria, the political class forms a sizeable chunk of the offenders of anticorruption laws and guidelines. The Nigerian constitution in Section

[129] See EACC Report of 2019 available at https://eacc.go.ke/default/wp-content/uploads/2018/11/ILLEGALLY-ACQUIRED-AND-UNEXPLAINED-ASSETS-TRACED-July-2017-to-Sept-2018.pdf

308[130] provides for the immunity of elected officials at the level of the governor and president and their deputies while serving their term in office. The scale and magnitude of potential offenders enjoying such immunity significantly hinders the efforts aimed at combating corruption in the public sector by undermining the recovery of unexplained wealth and risking the transfer of such wealth to third parties which then complicates the processes of recovering it.

The challenge of political will is further seen in international cases were despite clear provisions on mutual legal assistance and repatriation of unexplained wealth, holding countries do not seem to fully cooperate, especially in repatriation. The Cases of Nigerian and Lithuanian nationals tried in the UK and convicted for various corruption cases suffice to highlight the point here. Moreover, recovery efforts have been politicized by the elites with a view to deny the processes the legitimacy needed for success. Another significant challenge in the recovery of unexplained wealth is the slow nature of criminal proceedings. While it is important to follow due process, sometimes the processes have been used to unnecessarily slow down recovery proceedings through orders, appeals and other technicalities. This leads to increased costs of litigation compared to the value of property being pursued. From an economic perspective, it would be irrational to use more money to obtain less.

Moreover, the study established that as the reviewed countries continue to shift their focus to civil approaches, they had maintained the criminal approaches. Neither of the legal regimes in all the countries provide for use of one approach to the exclusion of the other. The effect of this lack of clarity in the long term is that it could lead to unwillingness of suspected persons to cooperate and their preference for the criminal procedure which is too long and may lead to acquittals rather than

[130] Constitution of the Federal Republic of Nigeria 1999 accessed on 18th July 2021 and available at https://lawsofnigeria.placng.org/laws/C23.pdf , Section 308

convictions. This is besides the prosecutor bearing the burden of proof. This can prove difficult especially in complex cases involving multiple jurisdictions. Danger further lurks as the allure of accused persons becoming fugitives is a reality.

Finally, the country case studies show a serious problem of authenticity of the available statistics in light of the cases undertaken, success rates and the confiscation orders obtained for unexplained wealth. The UK and Lithuania had fairly consistent statistics, thanks to coordination of investigations and allied processes while Kenya and Nigeria have inconsistent data sets. This could be attributed to the overlapping mandates given to the multiple institutions working in the sector. The lack of authentic data sets makes it difficult to determine whether efforts such as recovery of unexplained wealth aimed at combating corruption in the public sector are on the right trajectory or not. This study argues that addressing these challenges will go a long way in enhancing the efforts aimed at combating corruption in the public sector through the processes of recovery of unexplained wealth.

CHAPTER FOUR

EFFECTIVENESS OF RECOVERY OF UNEXPLAINED WEALTH IN COMBATING PUBLIC SECTOR CORRUPTION IN THE 21ST CENTURY INTERNATIONAL SYSTEM: FOCUS ON KENYA

4.1 Introduction

This chapter presents the findings from the data collected in respect of the effectiveness of recovery of unexplained wealth in combating public sector corruption. The data was drawn from both primary and secondary sources. As indicated in chapter one, interviews were conducted on the heads of the participating institutions while the rest of the respondents were handed a questionnaire to respond to. Thus, a total of 4 interviews were conducted out of which two were conducted in a face to face setting and the other two through telephone. A total of 57 questionnaires were administered out of which 45 were returned, fully answered. The return rate of the questionnaire was thus 78.9%, which was considered adequate to allow for analysis as proposed by Mugenda and Mugenda[131]. The response rate was summarized as shown in Table 4.1

2Table 4.1: Questionnaire return rate

Questionnaires	**Frequency**	**Percentage (%)**
Returned filled in	45	78.9
Not returned	12	21.1
Total	**57**	**100**

Source: Research data (2021)

4.2 Demographic data

The study sought to establish various demographic characteristics of the respondents, among them gender, age and duration of service with the respective institutions. In terms of gender, the study

[131] Mugenda and Mugenda, *Research Methods*, 2014, P. 86

established that 68% of the respondents were males while 32% were female, implying a higher representations of the males compared to the females. These was particularly so from the EACC and the ODPP, two of the institutions which carried the bulk of the respondents. The skewness towards male was found to be related to the nature of the work done in the two institutions which for long had been masculinized but the trend was changing. Table 4.2 shows the distribution of respondents by gender.

3Table 4.2: Gender distribution of respondents

Gender	Frequency	Percentage (%)
Male	31	68
Female	14	32
Total	**45**	**100**

Source: Research data (2021)

Data on respondents age indicated that a majority of the respondents, 42%, were aged between 41 to 50 years closely followed by those aged 31 to 40 years at 36%. Respondents aged between 51 and 60 years were found to be 22% of the total respondents. None of the respondents was aged under 30 years. The study established that the majority of the respondents falling between 31 to 50 years were largely recruited to perform the functions they were performing on account of experience post college training and agility in terms of deployment as the need may arise from time to time within their respective institution. Though experienced, respondents aged over 50 years were found not to be very attractive to the institution because of the agility component, which the study found to be key particularly in the operations of the EACC and the ODPP. Data on age of respondents was as summarized in Table 4.3.

4Table 4.3: Age of Respondents

Age range	Frequency	Percentage (%)
21-30years	0	0
31-40 years	16	36
41-50 years	19	42
51-60 years	10	22
Over 60 years	0	0
Total	**45**	**100**

Source: Research data (2021)

Finally, data on the duration the respondents had worked with their respective institution indicated that a majority of them, 56% had worked in those institutions for between 6 to 10 years. The study adjudged this category as having the necessary institutional memory that would allow them provide the requisite information. A further 11% of the respondents had worked with their respective institutions for over 10 years, again providing a pool of knowledgeable people in terms of the study variables. The rest of the respondents had worked with their respective institutions for a period of 1 to 5 years, and thus could still provide insights into the research concerns. None of the respondents indicated that they had worked for their respective institutions for a period under one year. The data on duration of work with participating institutions was as summarized in Table 4.4

5Table 4.4: Duration of work involving unexplained wealth

Duration	Frequency	Percentage (%)
Less than 1 year	0	0
1-5 years	15	33
6-10 years	25	56
Over 10 years	5	11
Total	**45**	**100**

Source: Research data (2021)

4.3 Working relationship among institutions dealing with unexplained wealth

The study sought to establish the nature of working relationship between the various government institutions dealing with unexplained wealth. The respondents were specifically asked whether the working relationship among the institutions was good or bad. In this regard, 58% of the respondents indicated that the working relationship among the four institutions involved with handling unexplained wealth was not good while 42% indicated that it was good. This data was presented as per Figure 4.1.

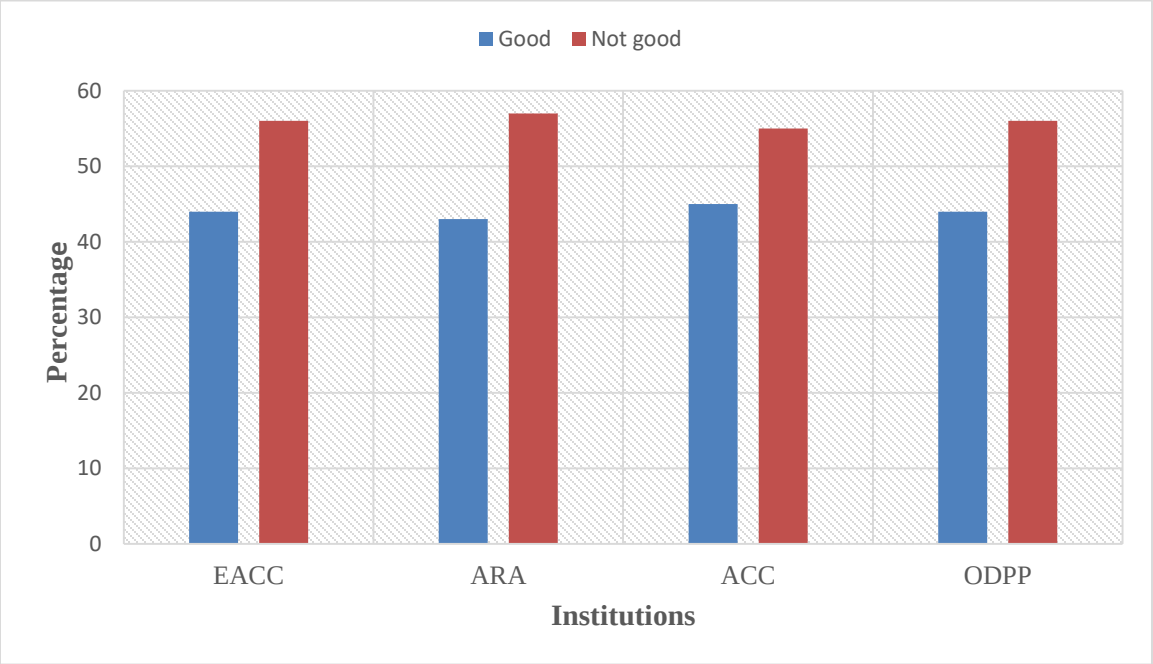

Figure 4.1: Nature of working relationship among institutions working on unexplained wealth

The study findings derived from the questionnaire were corroborated by findings from the interviews were the interviewees expressed concern that the working relationship among institutions was more often strained than it was cordial. To illustrate the sentiments of the interviewees, respondent A explained as follows:

> To be honest with you, the working relationship among the institutions is not the best. Part of the not so good relationship is because of the nature of our mandates. The investigator of a case is not the prosecutor. A prosecutor can dismiss a case without consulting with the investigator, thus at times killing morale. Operational independence of each institution at times has led to stalling of cases because of factors such as change of investigators, prosecutors or even magistrates dealing with particular cases, dragging of hearings seeking various orders deemed necessary to investigations, thus sometimes allowing suspects time to dispose of suspect and unexplained wealth among other issues. The effect of these dynamics has been frequent blame game among the institutions and especially where a report card in terms of institutional performance is to be given. (Respondent A, interviewed in Nairobi on 8/7/2021)

The study findings demonstrate that competition among the institutions undermines their effectiveness in terms of recovery of unexplained wealth. Other factors cited by the interviewees as contributing to the strained working relations among the institutions included poor resourcing of the institutions, the preference for criminal proceedings rather than civil forfeiture by some agencies and failure to fast track cases even where evidence has been provided by external collaborators through multilateral agreements. The study further established that the quality of evidence gathered could not withstand trial in the case of criminal proceedings and when such feedback was given to the investigators, they felt slighted by the prosecutors. These study findings are consistent with the challenges the United Kingdom faced prior to the adoption of the unexplained wealth orders and the empowerment of the SFO to investigate and prosecute cases relating to possession of unexplained wealth[132]. A similar scenario played out in Lithuania[133] and Nigeria[134], further pointing to the complexities associated with coordinating various agencies to deliver on a task. This study argues that a good working relationship among state agencies charged with leading the fight against corruption is critical if the efforts are to bear any fruit. Collaboration

[132] The White Collar Crime Centre, Unexplained Wealth Orders: Thoughts on scope and effect in the UK Briefing Papers January 2017: 3 accessed on 8th July 2021 available at https://brightlinelaw.co.uk/wp-content/uploads/2019/07/Unexplained_Wealth_Order_-_Briefing_Papers_Final.pdf
[133] Skirmantas Bikelis, "Prosecution for illicit enrichment: The Lithuanian perspective." *Journal of Money Laundering Control* 2017:206
[134] Alamu Oluwaseyi, Corruption, Anti-Corruption Agencies and the Nigerian Government, 2016: p. 4

and synchronization of activities among the agencies will go a long way in giving the efforts the nudge needed to make corruption expensive and unattractive to would be offenders.

4.4 Effectiveness of Recovery of Unexplained Wealth in Combating Public Sector Corruption in Kenya

The recovery of unexplained wealth is a critical milestone in the global efforts aimed at fighting corruption within the international system. Perceptions on success or failure of recovery efforts impacts the fight differently. From the data obtained in the Kenyan case, the study established that since the enforcement of ACECA went a notch higher in the last decade the pervasive corruption practices had gone down as the vice lost attractiveness since suspects were required to explain any wealth they held that was not commensurate with their incomes. This was further worsened by the demand from government for all public servants to fill in wealth declaration forms whence deviations of held wealth compared to the declared one would attract investigations. The publication of what some holders of unexplained wealth considered private information further reduced the attractiveness of graft. An interviewee succinctly put this scenario thus:

> Some of the holders of unexplained wealth are extremely private citizens who would do anything to ensure their privacy is not breached. With investigations citing them as holding unexplained wealth and press coverage, they would rather pursue civil negotiations to turn in what they could not account for in exchange for their freedom and privacy. In some cases, some of them due to the networks they have, including within the EACC, voluntarily turn in any unexplained wealth they may have and seek to bar the press from covering their cases. (Respondent B, interviewed in Nairobi on 6/7/2021)

Respondent B further noted that the negative publicity associated with corruption and the manner in which some investigations and trial rope in the suspect's accomplices, including family members was in some cases acting as a deterrent for corruption. It would appear that publicity was playing an important role in the fight against corruption, particularly in those cases involving high profile suspects and 'reputable' firms or organizations. This study argues that to the extent that

negative publicity was aiding the fight against corruption, then such publicity should be packaged even better to attain maximum benefit for the institution charged with containing corruption.

The study further established that some institutions such as the anticorruption courts were now bold enough and handing sentences and or fines as spelt out in the law. A respondent cited the corruption case of the Kenya Anticorruption Commission against Stanley Mombo Amuti[135] in which the defendant was found to have failed to account satisfactorily how he had amasses wealth to the tune of Ksh. 42 million. According to the respondents the conclusion of cases involving unexplained wealth, though not many, were positively impacting the fight against corruption as they provided critical precedents for the prosecutor in terms of determining whether they had adequate evidence to secure convictions. The recovery of such wealth further helped plug some of the resource gaps the investigating institutions were facing, as part of the proceeds were allocated to them upon completion of cases. Moreover, such convictions and recoveries highlighted the high costs associated with corruption in the long-term. In this regard, Responded C noted as follows:

> Convictions coupled with recovery of unexplained wealth are devastating to the perpetrators of corruption. You can imagine a situation where you are being thrown to jail, thus being deprived of your liberty and what you called your property is taken away from you such that neither you nor your dependents can benefit from it. In my view, such scenarios render corruption very unattractive and that is part of the reason why consistent collaboration among institutions will continue to be essential in the fight against corruption (Respondent C, interviewed in Nairobi on 7/7/2021).

Prodded to explain what they attributed to the changes they had cited, the respondents explained that the EACC had intensified campaigns aimed at sensitizing public sector workers on the impact of corruption to the national economy and the consequences of holding unexplained wealth. Besides sensitization, the study also established that the EACC which is charged with conducting

[135] Kenya Anti-Corruption Commission vs Stanley Mombo Amuti [2017] eKLR, para 48 accessed on 11th July 2021 available at http://kenyalaw.org/caselaw/cases/view/193630/

investigations had built a reasonable capacity among its officers to undertake thorough work, besides collaborating with external actors through multilateral and bilateral agreements. It also emerged that enforcement of sections 26 and 55 of ACECA had gone a long way in managing cases of unexplained wealth suspected to be proceeds of crime. Section 26 empowers the EACC secretary to demand a statement from a suspected person relating to wealth held by that person while section 55 provides for the forfeiture of such unexplained wealth[136].

The study further established that the progress made in recovery of unexplained wealth as a pathway to containing corruption in Kenya could also be attributed to the use of a mixture of approaches i.e. criminal proceedings as well as civil forfeiture of the unexplained wealth. In this regard, Respondent B explained thus:

> The institutions involved with fighting corruption are increasingly agreeing on the need to use both the criminal approach and the civil approaches. Initially there was inertia in the use of the civil proceedings approach but, most of us are now turning round to embrace it after understanding the benefit it offers such as the low evidentiary threshold and the shift in burden of proof from the prosecutor to the accused person. This is unlike the criminal approach where these demands are placed on the prosecutor. We have bench marked with countries that have used the civil approach such as the UK and the lessons are positively serving us here in Kenya (Respondent B, interviewed in Nairobi on 6/7/2021).

Drawing from Respondent B's explanation and findings from Lithuania as advanced by Skirmantas[137], this study argues that the civil proceedings are a far more effective approach because the state is able to recover what was stolen from it, with the options of fines and or imprisonment, meaning that the loss to the perpetrator is bigger than the gain. The approach further gives the institutions some leeway in their operations compared to the penalties under the criminal approach which are given in the ACECA and the courts do not have any say on the matter, other

[136] Kenya Law, Anti-corruption and Economics Crimes Act, accessed on 2nd August 2021 from https://eacc.go.ke/default/wp-content/uploads/2018/06/aceca.pdf

[137] Skirmantas Bikelis, "Modeling The Patterns of Civil Confiscation: Balancing Effectiveness, Proportionality and The Right to Be Presumed Innocent", *Baltic Journal of Law & Politics, Vol* 13 (2) 2020, p. 31

than interpreting the law as is and handing the sentences or fines. Plea bargaining, though a progressive twist in criminal proceedings initiated by the prosecutor's office could make render itself unattractive to suspects because the best deal they can get is a slightly reduced sentence. Efforts at collaboration among institutions were also advanced as contributing to the strides being made in the recovery of unexplained wealth suspected or linked to acts of corruption.

4.5 Civil Forfeiture of Unexplained Wealth in Kenya

In this question, the researcher used a Likert scale comprising of five statements, each with three options from which the respondent was guided to select one that they thought captured their perception in light of the statement at hand. The findings in this regard were as presented in Table 4.5

6Table 4.5: Effect of recovery of unexplained wealth

As a result of recovery of unexplained wealth, there is:	Agree	Neutral	Disagree
Reduction in corruption in the country	48%	7%	45%
Increase in volume of unexplained wealth surrendered to the state	62%	5%	33%
Enhanced ethical practice in the public sector	20%	8%	72%
Enhanced cooperation between financial institutions and enforcement agencies	58%	14%	28%
Registration of unexplained wealth in the names of 3rd parties	68%	7%	18%

Research data (2021)

Table 4.5 shows that a light majority of 48% were of the view that the recovery of unexplained wealth had contributed to a reduction in corruption while those who disagreed with the statement accounted for 45%. The respondents who returned a neutral response were 7% of the total. This neutral group was considered significant because if they were to all agree or disagree, then they could swing the finding either way. This finding was considered significant given that the responses were drawn from institutions charged with leading the fight against corruption in the public sector.

The question further sought to establish whether the recovery of unexplained wealth efforts had in any way increased the volume of such wealth surrendered to the state. The findings show that 62% of the respondents had agreed that there was an increment in the volume of unexplained wealth reverting to the state from people assumed to have corruptly obtained it since they couldn't explain how they had acquired it. 33% of the respondents disagreed with the view as a further 7% expressed neutrality. Based on the finding, it is evident that the volume of unexplained wealth reverting to the state was on the increase. This is also comparable to the situation in the UK and Nigeria, particularly after the promotion of the use of civil forfeiture of unexplained wealth held by private citizens. This outcome suggests that the strategies being deployed by the agencies were bearing fruit and they can only be improved for the net effect to become more pronounced.

In terms of recovery of unexplained wealth contributing to enhanced ethical practice in the public sector, 72% of the respondents disagreed, while 20% agreed as a further 8% returned a neutral response. A similar view was expressed by all interviewees. Respondent D explained the situation thus:

> Matters of ethics are fairly personal; it is a choice that individuals make. I believe this is largely dependent on a cost-benefit analysis that people make before deciding to engage in corruption or shun it. Again, the chain of corrupt activities is so long such that not a single investigation can completely unearth it and hold perpetrators to account. The fact that a person known to another has been found guilty and their unexplained wealth recovered does not in any way mean others will not attempt to engage in corruption. (Respondent D, interviewed in Nairobi on 9/7/2021).

This study agrees with the interviewees perspective based on the frequency of corruption cases being reported by the range of institutions working on fighting corruption. If indeed there was any increase in ethical practice, then there would be a reflection of that by way of a decrease in corruption cases reported by the EACC[138].

[138] This is based on EACC reports of 2017 to 2020 which show a consistent increase in corruption cases in Kenya

The study further established that the introduction of the recovery of unexplained wealth had been partly enhanced by the cooperation between financial institutions and law enforcement agencies, wherein the institutions fully implemented lawful orders issued by the courts in light of cash held by suspects. This was as reported by 58% of the respondents, with 28% disagreeing and a further 14% expressing neutrality. The cooperation, however may be informed by factors beyond the financial institutions control such as the obligation to comply with the law, failure to which they would bear the consequences that may be injurious to their businesses.

Finally, the study, sought to determine whether the efforts made at recovering unexplained wealth through civil forfeiture had contributed to alternative ways of attempting to evade scrutiny by way of registering such wealth in the names of third parties. Instructively, 68% of the respondents agreed, 7% were neutral while the remaining 18% disagreed. The majority response also found favour with three out of the four interviewees, signifying that it was now the trend used by corrupt people. Indeed, Respondent B explained that development as follows:

> Registration of corruptly acquired wealth in the names of third parties has been on the rise since the ACECA law allowing for forfeiture of unexplained wealth came into force. The thinking here has been that, such third parties, mostly family members or acquaintances of the graft masterminds, are unlikely to be investigated and even if they are, the master will likely pursue various avenues to bail them out. However, the investigators working closely with the Asset Recovery Authority are able to piece the trail and nail both the third party and the originator of such wealth and freeze it as the case progresses through negotiations (Respondent B, interviewed in Nairobi on 6/7/2021).

Overall, this study argues that civil forfeiture of unexplained wealth is a relatively new ground that has had its own share of pros and cons. The fact that the approach has yielded more returns to the state implies its potential in handling corruption within the public sector in Kenya. An interviewee explained the relative success of the civil proceedings approach as a result of several factors thus:

> In my view, civil proceedings approach leading to forfeiture is more effective than the criminal approach because evidentiary thresholds are lower, the wealth in question may not necessarily have been obtained via criminal means and the presence of reasonable doubt will be ground enough to

> demand explanations from the suspect. These factors are central to the criminal approach and the burden lies with the agencies rather than the suspect. So for me I think the leeway that the agencies have has made their work easier and has yielded more results within a relatively shorter period. (Respondent A, interviewed in Nairobi on 8/7/2021)

However, the tendency towards leniency in terms of punishing holders of unexplained wealth could encourage would be offenders to engage in corruption, enjoy the proceeds for a while before they are caught up by the sleuths and opting to voluntarily turn in such wealth. In essence, this study the approach a double aged sword, though more tangible compared to the criminal approach.

4.6 Collaboration between Kenyan Agencies and External Actors

In this question, the study sought to find out whether the agencies in Kenya worked with their counterparts outside the country in the pursuit of unexplained wealth stashed abroad. This question was based on the fact that people holding irregularly acquired wealth whose origin they cannot explain tend to hide part of it abroad in an effort to dodge investigators and or local scrutiny. The findings presented in Figure 4.1 show that 98% of the respondents indicated that Kenyan institutions charged with the tracing and recovery of unexplained wealth as a measure to curb corruption worked closely with similar agencies in partner countries.

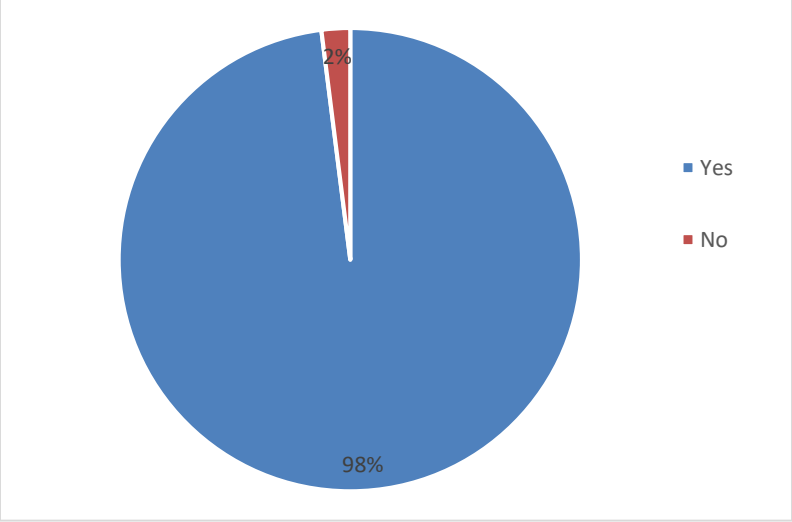

Figure 4.2: Collaboration between local and foreign agencies

An interviewee explained that the local institutions had entered into multilateral agreements for mutual cooperation purposes:

> As a country, we belong to the community of nations and there is no way we can entirely deal with cases of tracing and recovering unexplained wealth stashed abroad without involving our counterparts in the countries of interest. Under the UNCAC, state parties are obligated to support each other in bringing the perpetrators of corruption to book. Our colleagues have been particularly helpful in sharing the evidence of some or whole of unexplained wealth held by an individual. So the collaboration is there and has been great for us (Respondent B, interviewed in Nairobi on 6/7/2021).

When asked whether the collaborations were adding value to the efforts aimed at recovering unexplained wealth, the respondents indicated were unanimous that they did. This response is lend credence by a report of the UK's SFO which explained that they worked closely with other agencies in partner states in an effort to eradicate corruption[139]. Another report from Nigeria also indicated that the institutions charged with fighting corruption had managed to recover unexplained wealth estimated to be over 10 billion Naira[140] through the interstate multilateral agreements on collaboration.

4.7 Chapter Conclusion

This chapter sought to investigate the extent to which the recovery of unexplained wealth was contributing to the fight against corruption in the public sector within the international system and more so in Kenya. The study findings established that the civil forfeiture was bearing more fruit than the criminal approach for a variety of reasons such as low thresholds of evidence requirements, shift in burden of evidence from prosecutor to the suspect among others. The efforts were to a large extend being facilitated by the multilateral and bilateral agreements signed among and between nations on areas such as sharing of information, seizing of the unexplained effort,

[139] Boister, Neil. *An introduction to transnational criminal law*. Oxford University Press, 2018., p.241
[140] David U. Enweremadu, Nigeria's Quest to Recover Looted Assets: The Abacha Affair, *Africa Spectrum*, Vol. 48, No. 2 (2013) p.6.

among others. The efforts in Kenya were however being hampered by factors such as incongruent mandates of involved agencies, too much bureaucracy and prolonged litigation. This was in contrast to the practice in other countries such as the UK and Lithuania where the institutions involved were fewer, making operational efficiency possible. It would therefore be paramount that these issues are addressed if the fight against corruption through the recovery of unexplained wealth in the Kenyan public sector is to be successful.

CHAPTER FIVE

SUMMARY OF FINDINGS, CONCLUSIONS AND RECOMMENDATIONS

5.1 Introduction

This chapter provides a summary, conclusion and recommendations of the study. This is done based on the three objectives that the study set out to address namely: An analysis of the theoretical, legal and policy background of the recovery of unexplained wealth held by serving or former public officers, a comparison of the participating country experiences as well as a measure of the effectiveness of the recovery of unexplained wealth as a means to fighting corruption.

5.2 Summary of Findings

This study was grounded on three objectives that sought to assess the theoretical, legal, policy and institutional background of the recovery of unexplained wealth in combating public sector corruption; to compare and contrast experiences with recovery of unexplained wealth in combating public sector corruption in select African and European countries and to critically evaluate the effectiveness of recovery of unexplained wealth in combating public sector corruption in the 21st Century international system. The summary of the findings under each of these objectives are as presented hereunder.

5.2.1 Theoretical, legal, policy and institutional background of the recovery of unexplained wealth in combating public sector corruption

In this objective, the study established that the rational choice and institutional theories were seminal theoretical pieces in explaining the phenomenon of corruption and the recovery of unexplained wealth. From an analytical standpoint, institutions are created and given capabilities as well as legal personalities by rational people who believe that as necessary in the functioning of society. As social and self-interested beings, people develop networks within institutions wherein decisions are made on whether to or not to engage in acts of corruption, the provisions of the law

notwithstanding. Through a mix of coercive, mimetic and normative isomorphism, people learn and engage in corruption and use the law to either fight corruption or protect themselves from accusations of corruption. Thus, the fight against corruption must contend with the rational actors, using isomorphic dynamics to further their interests at the expense of the common good.

Legally, each of the four countries under review had a range of legal and policy frameworks that guided the anticorruption efforts in those countries. The legal and policy frameworks were found to be derivatives of the UNCAC and these countries had codified and domesticated the convention to suit their particular needs, besides reviewing and enhancing those laws to meet the challenges of the ever evolving corruption frame. In the case of the United Kingdom, the research established that there was a range of anticorruption laws dating to as far back as 1906. Gaps in these laws were continually sealed through amendments to the Acts or supplemented through other laws such as the Criminal Finances Act 2017 and the proceeds of crime Act 2002. It is the Criminal Finances Act 2017 which empowers investigative agencies to seek orders from a court of law, demanding an explanation of suspect wealth, where if that does not happen, then the wealth reverts to the state. The law further provides the basis for civil proceedings in the recovery of such wealth, a practice that has seen a rise in volume or recovered wealth in the UK in the last five years. Laws such as the Criminal Justice Act of 1987 were found to provide the basis upon which core agencies such as the SFO draw their power. The Lithuania criminal code provides the basis for the fight against corruption, including seizure of unexplained wealth. The criminal procedure appears not to have been very successful in Lithuania leading to the more pragmatic change of tact in the recovery of unexplained wealth through civil proceedings.

5.2.2 Experiences with recovery of unexplained wealth in combating public sector corruption in select African and European countries

In the case of Kenya and Nigeria, there is a range of laws used to fight corruption in those countries which sort of mirror each other. For instance, the Nigerian ICPC Act is a mirror image of the Kenyan ACECA. Other enabling laws in the two countries include the Bribery Act and the Anti Money Laundering Acts. All of which serve a similar purpose of complementing the ICPC and the ACECA in combating corruption. Whereas these pieces of legislation are well intentioned, the challenge lies in their frequent amendments by the political class as they seek to shield themselves from the harsh penalties imposed on perpetrators of corruption by the law. The constitution in some instances such as Nigeria even provides for the immunity of certain cadres of elected public servants such as governors and the head of state while they hold office. The effect of such provisions is that they work counter to the fight against corruption. Moreover, such treatment makes politics an attractive conduit of corruption. The practice in Nigeria differs significantly from the UK, Lithuania and Kenya where only the head of state is given immunity from criminal prosecution while they are in office. This study argues that immunity for public servants from criminal prosecution should be discouraged and if necessary, proceedings to remove them from office to face investigations and eventually trial should be commenced. Otherwise letting a person enjoy such immunity amounts to abetting corruption as they can use their offices to destroy evidence that could incriminate them were they to be taken to court upon their exit from office.

5.2.3 On the effectiveness of recovery of unexplained wealth in combating public sector corruption in the 21st Century international system.

The study finding on the effectiveness of the recovery of unexplained wealth demonstrated that the civil approach was bearing more fruits and at a faster pace compared to the criminal proceedings. Countries that had used it such as the UK had seen a tremendous growth in the volume

of unexplained wealth reverting to the state, growing by close to 50% over a period of six years. A similar trend, though differing on the scale of what was recovered was observed in Kenya and Nigeria. It was instructive to note 86% of the study respondents thought the civil proceedings approach was more effect than the criminal route. The reasons given for this trend were established to be the low evidentiary threshold and the shift in the burden of proof from the prosecutor to the suspect. Other dynamics such as the near informal nature of the proceedings, the ease of obtaining freezing orders, cooperation from other countries where part of such wealth has been kept and the room for negotiations allowed for some degree of willingness on the part of the suspected person to cooperate with the concerned agencies.

Despite the findings as explored in this section, the recovery of unexplained wealth aimed at taming graft is beset with numerous challenges. These include the duplication of roles among institutions working on the area, inadequate personnel capacity to investigate and prosecute the ever increasing cases of corruption, under resourcing, constitutional immunity of political actors and the inertia among personnel in the sector to change tact and be more proactive rather than reactive. The study argues that to the extent that these challenges are not addressed, the effort towards combating corruption may not yield the desired outcomes. Overtime, the effort will become normalized, thereby emboldening the holders of unexplained wealth and further providing the fodder to would-be planners and executors of corruption.

5.3 Conclusions

Based on the findings of the study and in line with the objectives, this study makes the following conclusions:

First, there exists the necessary legal framework that the participating countries can make use of to drive the efforts aimed at combating corruption in the public sector. Indeed, all the countries'

laws for anchoring the fight against corruption are grounded on the UNCAC, meaning that it is a comprehensive piece of legislation that captures the core facets of corruption and ways of handling them, including the recovery of unexplained wealth. The laws provide for among other things cooperation and collaboration with other countries across the continuum of handling the recovery of unexplained wealth. The laws however need to be synchronized and simplified so that they are comprehensive enough yet easy to understand for the common person. This needs to be followed up with a firm enforcement mechanism that renders the anticorruption efforts more proactive than reactive as was found to be the case, especially in Kenya and Nigeria.

Secondly, corruption is prevalent in all countries across the world, irrespective of their status as either developed or developing countries. However, the organization of the processes leading up to recovery of unexplained wealth and the punishment of perpetrators of corruption differs. Countries like the UK and Lithuania have robust systems that process cases f unexplained wealth fairly faster compared to their counterparts in Africa. For instance, a corruption case involving citizens of Kenya and the UK saw the UK citizens quickly processed through the legal system including payment of fines and serving jail terms while their co-collaborators are still being processed through the Kenyan justice system. Moreover, institutions such as the SFO are empowered to investigate and prosecute corruption cases unlike in Kenya where the investigator and the prosecutor are two independent offices. The case of Nigeria mirrors that of Kenya with several institutions handling matters of corruption, thus causing delays since each institution is independent of the other in terms of operations. Thus, it will be in the best interest of justice and a shot in the arm for the efforts against corruption if the actors involved with handling unexplained wealth are reduced to one supra actor with the necessary facilitation to conclusively handle such cases.

In terms of efficacy in wealth recovery, the four countries under review recorded higher returns from the use the civil proceedings compared to the use of criminal processes. The UK had the highest output, thanks to the flexibility in the civil approach and the organizational capacity of the SFO in handling cases of unexplained wealth. Even though Lithuania had recorded progress, the study contends it would have been much more if the country had adopted the civil approach fully and only use the criminal approach when it was very necessary to do so. Comparatively, the recovery of unexplained wealth in the cases of Kenya and Nigeria was far more than in Lithuania. This means that actors in the area of recovery of unexplained wealth need to pursue the civil approach for faster conclusion of the processes and making the cost of corruption too expensive, thus serving the deterrence purpose. Whereas the criminal proceedings still have their place in the fight against corruption, the study findings are clear that the inflexible litigation associated with it militate against the efforts, thus impacting on the eventual output.

5.4 Recommendations

This study recommends that law enforcement agencies and those charged with leading the fight against corruption need to be regularly trained in order to be at par with emerging trends regarding the practice of corruption through third parties. The training should also infuse the knowledge of alternative dispute resolution so that it is not perceived as a weaker approach in the drive towards justice. These should be in addition to expansion of the personnel capacity especially in Kenya and Nigeria which were found to have human resource challenges.

Moreover, the study also recommends enactment of asset management laws to allow for preservation of assets during the entire duration of investigations. This law should further provide for the manner in which the recovered wealth is to be accounted for so that it does not create another black hole for the embezzlement of the recovered wealth. This recommendation comes

against a background of reports from Nigeria where recovered wealth had been misused or embezzled by those to whom it had been entrusted.

Finally, the study recommends strict adherence to and enforcement of wealth declaration timelines to minimize amendments during investigations. This should be supported by the restriction of access to the records once they have been submitted to the appropriate offices. This recommendation is informed by a finding from the case of Kenya where suspects under active investigations were found to have access to their wealth declaration documents and some had even made efforts towards amending them to cover themselves from prosecution.

References

Abdullahi Y. Shehu, 'Key Legal Issues and Challenges in the Recovery of the Proceeds of Crime: Lessons from Nigeria' (2014) 3(1) International Law Research

Alamu Oluwaseyi, Corruption, Anti-Corruption Agencies and the Nigerian Government, 2016: pp.3-4

Bikelis, Skirmantas, "Modeling The Patterns of Civil Confiscation: Balancing Effectiveness, Proportionality and The Right to Be Presumed Innocent", *Baltic Journal of Law & Politics, Vol 13* (2) 2020, p. 30

Bikelis, Skirmantas. "Chasing criminal wealth: broken expectations for the criminalization of illicit enrichment in Lithuania." *Journal of Money Laundering Control* (2021):p.8

Bikelis, Skirmantas. "Prosecution for illicit enrichment: The Lithuanian perspective." *Journal of Money Laundering Control* (2017):205

Binmore, Kenneth. "John Nash versus John von Neumann." In *Imaginary Philosophical Dialogues*, pp. 163-167. Springer, Cham, 2021.

Blundo, Giorgio, *et al Everyday corruption and the state: Citizens and public officials in Africa*. Zed Books Ltd., 2013:20

Boister, Neil. *An introduction to transnational criminal law*. Oxford University Press, 2018., p.240

Borlini, Leonardo S. and Giulio Nessi. "International Asset Recovery: Origins, evolution and current challenges." Baffi Center Research Paper (2014).

Bum & Olivier, Institutional Linkages and Organizational Mortality, *Administrative Science Quarterly, Vol.* 36, (2). 1991: 187-218.

Buscaglia, Edgardo. "Controlling organized crime and corruption in the public sector." In *Forum on crime and society, vol*. 3, no. 1/2. 2003.

Chaikin, David A. "Controlling Corruption by Heads of Government and Political élites." In Corruption and Anti-Corruption, edited by Larmour Peter and Wolanin Nick, 97-118. ANU Press, 2013.

David U. Enweremadu, Nigeria's Quest to Recover Looted Assets: The Abacha Affair, *Africa Spectrum*, Vol. 48, No. 2 (2013)

Dimant, Eugen and Thorben Schulte. "The Nature of Corruption: An Interdisciplinary Perspective." German Law Journal 17, no 1 (2016), 53–72

Dimant, Eugen, and Thorben Schulte. "The nature of corruption: An interdisciplinary perspective." *German Law Journal* 17, no. 1 (2016): 53-72.

Ehi Eric Esoimeme 'Institutionalising the war against corruption: new approaches to assets tracing and recovery' (2018) Journal of Financial Crime

Enweremadu, David U. "Nigeria's quest to recover looted assets: The Abacha affair." *Africa Spectrum* 48, no. 2 (2013): 51-70

Frankfort-Nachmias, C. and Nachmias, D. (1996) Research Methods in the Social Sciences. Fifth Edition, Arnold, London.

Gary S. Becker, Crime and Punishment: An Economic Approach, 76 J. POL. ECON. 169(1968).

George Pavlidis, 'Asset Recovery: A Swiss Leap Forward?' (2017)20(2) Journal of Money Laundering Control.

Gikonyo, Constance. "The Kenyan Civil Forfeiture Regime: Nature, Challenges and Possible Solutions." *Journal of African Law* 64, no. 1 (2020): 27-51.

Gray, Larissa, Kjetil Hansen, Pranvera Recica-Kirkbride, and Linnea Mills. Few and Far: the hard facts on stolen asset recovery. The World Bank, 2014.

Groenendijk N. (1997) A principal-agent model of corruption; Crime, law and Social Change, 27,3-4:203-227.

Ibrahim Mohammed, Some Issues in The Institutional Theory: A Critical Analysis, 2017:15

Jepperson, R.L. & Meyer, J.W., The Public Order and the Construction of Formal Organization, in the New Institutionalism in Organizational Analysis, 1991:145

Jimu, Ignasio. "Managing Proceeds of Asset Recovery: The Case of Nigeria, Peru, the Philippines and Kazakhstan." Basel Institute on Governance Working Paper Series 6 (2009).

John Boucht, 'Asset confiscation in Europe-past, present and future challenges' (2019) 26(2) Journal of Financial Crime.

Julien, Rita, Unexplained Wealth Orders (UWOs) Under the UK's Criminal Finances Act 2017: The Role of Tax Laws and Tax Authorities in its Successful Implementation

King, Colin, and Clive Walker. Dirty Assets : Emerging Issues in the Regulation of Criminal and Terrorist Assets, Routledge, 2014

Kitenge, Seleman Yusuph. "The Global Challenges of Illicit Financial Flows." (2020).

Klimczak, K.M., Sison, A.J.G., Prats, M. *et al.* How to Deter Financial Misconduct if Crime Pays?. *J Bus Ethics* (2021): 4

Klitgaard, R. (1988). Controlling Corruption. Berkeley: University of California Press.

Köbis, Nils C., Daniel Iragorri-Carter, and Christopher Starke. "A social psychological view on the social norms of corruption." In Corruption and Norms, pp. 31-52. Palgrave Macmillan, Cham, 2018.

Köbis, Nils C., Daniel Iragorri-Carter, and Christopher Starke. "A social psychological view on the social norms of corruption." In *Corruption and norms*, pp. 31-52. Palgrave Macmillan, Cham, 2018

Kodjo Attisso, 'The Recovery of Stolen Assets: Seeking to balance fundamental human rights at stake' International Centre for Asset Recovery Working Paper Series No. 8.

Leasure, Peter. "Asset recovery in corruption cases: Comparative analysis identifies serious flaws in US tracing procedure." Journal of Money Laundering Control 19, no. 1 (2016): 4-20.

Mathew Page, 2021, Innovative or Ineffective? Reassessing Anticorruption Law Enforcement In Nigeria, Working Paper 9, p. 10

McCaw, Catherine E. "Asset forfeiture as a form of punishment: a case for integrating asset forfeiture into criminal sentencing." Am. J. Crim. L. 38 (2010): 181.

Money Laundering Control, Vol. 20 Issue: 2, pp.203-214, https://doi.org/10.1108/JMLC-07-2016-0029 accessed on 10th May,2021

Moorman, Ted C. "Kleptocracy and foreign corruption manifesting in illicit financial flows." Journal of Financial Crime (2018).

Mugo, Fridah W. "Sampling in research." (2002).

Muzila,Lindy, Michelle Morales, Marianne Mathias, and Tammar Berger.2012 on the Take: Criminalizing Illicit Enrichment to Fight Corruption. Washington, DC: World Bank

Nikolov, Nikolay. "General characteristics of civil forfeiture." Journal of Money Laundering Control (2011).

Olatunde Julius Otusanya, 'An investigation of the financial criminal practices of the elite in developing countries' (2012) 19 (2) Journal of Financial Crime 194.

Oppenheimer, Joe. *Principles of politics: A rational choice theory guide to politics and social justice*. Cambridge University Press, 2012:85

Pillay, Soma, and Ron Kluvers. "An institutional theory perspective on corruption: The case of a developing democracy." *Financial Accountability & Management* 30, no. 1 (2014): 95-119.

Pozsgai-Alvarez, Joseph. "The abuse of entrusted power for private gain: meaning, nature and theoretical evolution." *Crime, Law and Social Change* 74 (2020): 433-455.

Ramaswamy, Jaikumar. "Overview of Asset Forfeiture and Money Laundering Program." *US Att'ys Bull.* 61 (2013):13

Rose-Ackerman, S. (1978). Corruption: A Study in Political Economy. New York: Academic Press

Serby, Tom. "Follow the money: confiscation of unexplained wealth laws and sport's fixing crisis." Sweet & Maxwell International Sports Law Review 13, no. 1 (2013): 2-8.

Simon N.M. Young, 'Why Civil Actions Against Corruption?'(2009) 16(2) Journal of Financial Crime.

Simser, Jeffrey. "Asset recovery and kleptocracy." Journal of Financial Crime (2010).

Skirmantas Bikelis, (2017) "Prosecution for illicit enrichment: The Lithuanian perspective", Journal of Money Laundering Control

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

Stephen D. Morris “Forms of Corruption” 2011:13

Stolen Asset Recovery Initiative (StAR): Challenges, Opportunities, and Action Plan, available at www.unodc.org/pdf/Star_Report.pdf

Ufere, Nnaoke, James Gaskin, Sheri Perelli, Antoinette Somers, and Richard Boland Jr. "Why is bribery pervasive among firms in sub-Saharan African countries? Multi-industry empirical evidence of organizational isomorphism." *Journal of Business Research* 108 (2020): 92-104.

Unexplained Wealth Orders: Thoughts on scope and effect in the UK Briefing Papers January 2017

Venard, Bertrand. "Corruption in emerging countries: A matter of isomorphism." *Management* 12, no. 1 (2009): 2-27.

William R. Scott, Encyclopaedia of social theory. Institutional theory2004: 408-14.

World Bank, Stolen Assets Recovery (STAR) Initiative: Challenges, Opportunities and Action P2007, p.18

Wrage, Alexandra Addison. Bribery and extortion: undermining business, governments, and security. Greenwood Publishing Group, 2007.

Yudha Sudibyo & Sun Jianfu, Institutional Theory for Explaining Corruption: An Empirical Study On Public Sector Organizations in China and Indonesia, *Corporate Ownership & Control, Vol,* 13(1), 2015:818

Zagaris, Bruce. "Money Laundering, Bank Secrecy, and Asset Recovery." IELR 36 (2020): 43.

Zouaoui, Azzouz, Anas Al Qudah, and Mounira Ben-Arab. "World corruption perception index analysis." *Research Journal of Finance and Accounting* 8, no. 24 (2017): 87