AN APPRAISAL OF THE LEGAL AND INSTITUTIONAL FRAMEWORK FOR ASSET RECOVERY IN TANZANIA

Abdulrahman O.J. Kaniki[*]

Abstract

This article examines the legal and institutional framework that governs asset recovery in the country. It is through this framework that criminal justice is administered in relation to asset recovery. It undertakes an in-depth analysis of the laws and institutional framework that deal with asset recovery. The main focus is identifying the roles of key institutions in the processes and mechanisms aimed at enabling recovery of proceeds and instrumentalities of crime under the existing law. In the course of the discussion, legal provisions that provide the procedures through which asset recovery should be undertaken are appraised. The article reveals that there are challenges in the legal and institutional framework that governs asset recovery in the country thereby affecting its performance. Recommendations are made in order to remedy the situation.

Keywords: *proceeds of crime, legal and institutional framework, asset recovery, Tanzania.*

1. INTRODUCTION

Criminal activities that are perpetrated by criminals within national boundaries and across international frontiers generate illicit income.

[*] LL.B (Hons), LL.M (Dar); Master's Degree in Security and Strategic Studies [National Defence College-Tanzania]; PhD (Law), Dar. This author can be contacted at abdulkaniki@yahoo.com

Criminals who gang up into organised and networked groups take advantage of liberalised market economies together with technological innovations in terms of easy and fast communications to realise huge profits with less risky activities within and across national frontiers.[1] This explains why there are continued global efforts to ensure that criminals do not profit from their criminal activities. It is very important to note that depriving criminals of their ill-gotten gains is tantamount to disrupting and dismantling their criminal organisations. Indeed, seizing the instrumentalities of crime prevents others from using the infrastructure in place.[2]

In the last analysis, the goal underlying most criminals' conduct, that is greed for material gain, is frustrated. Hence confiscation of proceeds of crime has a compensatory and deterrent effect. Realising all these depends much on the legal and institutional framework that governs asset recovery in the country. It is through this framework that criminal justice is administered in relation to asset recovery. This being the case therefore, the article undertakes an in-depth analysis of laws and institutional framework that deal with asset recovery.

The main concern is to identify key institutions and critically analyse their roles in the processes and mechanisms aimed at enabling recovery of proceeds and instrumentalities of crime under the existing laws. In the course of the discussion, legal provisions that provide the procedures through which asset recovery should be undertaken are appraised. However, it should be

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1 http://www.scidev.net/sub-saharan-africa/icts/feature/cybercrime-africa-facts-figures.html, accessed on 15th April, 2020, where SciDev.Net in its publication of 7th July, 2016 entitled *Cybercrime in Africa: Facts and Figures*, states that according to widely accepted estimate, cybercrime costs the world economy the sum of USD 500 billion.

2 According to UNODC, *Manual on International Cooperation for the Purposes of Confiscation of Proceeds of Crime,* Publishing and Library Section, United Nations Office, Vienna, September 2012, at p.3, the term "instrumentalities," means the assets used to facilitate crime, such as a car or boat used to transport narcotics.

noted that the efficacy of those institutions and effectiveness of the law on asset recovery depend much on the criminal justice system in place. To what extent the system is supportive and facilitative to those institutions in the asset recovery process is a matter to be reckoned with. In view of the above introductory remarks, the following section provides an overview of the criminal justice system administration set-up in relation to asset recovery processes and mechanisms. The aim is to see how those institutions that have a bearing on asset recovery are tied up to the criminal justice system under the established legal framework.

2. AN OVERVIEW OF CRIMINAL JUSTICE SYSTEM ADMINISTRATION SET-UP AND ITS ROLE IN ASSET RECOVERY

Administration of criminal justice is a core function of government, namely to achieve justice so that peace and tranquility prevail. Government institutions are put in place to ensure this public duty is fulfilled.[3] It entails a list of activities such as detection, apprehension, pretrial release, post-trial release, prosecution, adjudication, correctional supervision, or rehabilitation of accused persons or criminal offenders or the collection, storage, and dissemination of criminal history record information.[4] All the institutions involved in the administration of the criminal justice system should follow a systematic way to accomplish their respective duties.

The administration of the criminal justice system in Tanzania is carried out by several important actors, including the Police, Prosecution, the Judiciary and Prisons. The functions of each of these institutions are closely related,

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3 Buteera, R., "The Role of the Director of Public Prosecutions (DPP) and the Police in the Administration of Justice," *The Scope Magazine*, Law Development Centre, Kampala, Issue No. 4, 2004, pp. 18-20, at p. 18.

4 Administration of Criminal Justice Law & Legal Definition, *http://definitions.uslegal.com/a/administration-of-criminal-justice,* accessed on 7 December 2016.

interdependent and complementary. However, the criminal justice system administration set-up gives room for each of these institutions to have, as Max Weber puts it, (a) a continuous organisation of official functions bound by rules; (b) a specific sphere of competence, *i.e.,* a sphere of obligations, in the division of labour to be performed by a person who is provided with the necessary means and authority to carry out his tasks; (c) the organisation of offices following the principle of hierarchy; and (d) a set of technical rules and norms regulating the conduct of the offices.[5]

The criminal justice system administration set-up is therefore very important in the whole asset recovery process. Given the fact that asset recovery processes involve various institutions, it is expected that the set-up provides avenues through which the said institutions can effectively play their respective roles. In addition, so long as criminal asset forfeiture is regarded as a law enforcement tool, it is obvious that asset recovery processes form an integral part of the criminal justice system thereby contributing to the reduction of crime and fear of crime. This argument is tenable because the criminal justice system entails collective institutions through which an accused person passes until the accusations have been disposed of or the assessed punishment concluded.[6] What matters most is to have an integrated and well-coordinated criminal justice system in asset recovery that brings on board all relevant organs of the state and stakeholders to play their key and instrumental roles in the whole asset recovery process. On this note, the issue of adequate accountability on matters relating to asset recovery by these organs and stakeholders is also expected to be addressed by the criminal justice system administration set up in place.

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5 Source: *Ibid*., p.410. Max Weber (1864-1920), a renowned German sociologist, philosopher, jurist and political economist, propounded the theory of bureaucracy.

6 Black's *Law Dictionary*, 7th Edition.

3. LEGAL AND INSTITUTIONAL FRAMEWORK ON ASSET RECOVERY

Asset recovery is an uphill task, which requires joint efforts to undertake. Proving and establishing commission of a predicate offence itself is not at all a leeway through which assets illegally acquired are exposed. The reason behind is that the assets are not easily found. Gathering evidence that enables the commission of predicate offences needs to go hand in hand with revealing the whereabouts of assets alleged to have been illegally acquired. Indeed, tackling recovery is a very tough assignment because criminals use all possible means to hide the true origin, nature and ownership of those assets. They do so through giving misleading information or withholding the information. Given the sophistications that are tied up to the international financial systems, the matter is even more complicated. This explains why asset recovery, as Marshall correctly puts it, involves working across frontiers and between governments, which is tough at the best of times.[7] It is in this understanding that the legal and institutional framework which is involved in the whole asset recovery process should be operating.

3.1 Key Institutions and their Roles in Asset Recovery

In order to make the legal and institutional framework on asset recovery operative, several institutions should be in place and their respective roles spelt out. The legal set-up should be in such a way that it gives room for the institutions to have shared responsibilities in the course of performing their respective duties. Moreover, there is interdependence on each of the institutions. It is therefore expected that the institutions should assume the multiple positions through working jointly and promoting practical coordination, cooperation and collaboration among themselves. The institutions should play an instrumental role in the whole asset recovery

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7 Marshall, A., *What's Yours Is Mine: New Actors and New Approaches to Asset Recovery in Global Corruption Cases*, Centre for Global Development, Washington DC 200036, CGD Policy Paper 018, April 2013, p.7.

process. The need for institutions responsible for recovering the proceeds and instrumentalities of crime cannot therefore be overstated.

There are key institutions that practically play a central role in dealing with asset recovery processes. The police, prosecution and the judiciary are practically central in dealing with asset recovery processes. Others include the Prevention and Combating of Corruption Bureau (PCCB), Tanzania Revenue Authority (TRA), the Immigration Services Department,[8] Tanzania National Parks (TANAPA),[9] Ngorongoro Controlled Area Authority (NCAA),[10] Tanzania Wildlife Management Authority (TAWA),[11] Forest Department[12] and Fisheries Department,[13] which are responsible for and empowered to carry out investigations and prosecution in respect of various offences set out in various pieces of legislation governing daily activities in their respective areas of operation.[14] The Bank of Tanzania (BoT), commercial banks and financial institutions as well as Financial Intelligence Unit (FIU) support intelligence gathering and investigation to all these

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8 The Immigration Services Department facilitates and controls movement of citizens and non-citizens through enforcing the Immigration Act, Cap. 54 [R.E. 2002]; the Tanzania Citizenship Act, 1995, Act No.6 of 1995; the Tanzania Passports and Travel Documents Act, 2002, Act No. 20 of 2002, and their respective subsequent Regulations.

9 The Tanzania National Parks Act, Cap. 282 [R.E. 2002].

10 The Ngorongoro Conservation Area Act, Cap. 284 [R.E. 2002].

11 Tanzania Wildlife Management Authority [TAWA] was established under the Wildlife Conservation (The Tanzania Wildlife Management Authority) Establishment Order, 2014, Government Notice No. 135 of 9th May, 2014; read together as one with the Wildlife Conservation (The Tanzania Wildlife Management Authority) (Amendment) Establishment Order, 2015, Government Notice No. 20 of 23rd January, 2015. The Order was made under section 8 of the Wildlife Conservation Act, Cap. 283 [R.E. 2002]. The Authority took over the wildlife management functions specified in the Schedule to the Order, which were to be performed by the Wildlife Division in the Ministry of Natural Resources and Tourism. Among those functions is to undertake law enforcement and curb illegal off-take of wildlife resources.

12 The Forest Act, Cap. 323 [R.E. 2002].

13 The Fisheries Act, 2003, Act No.22 of 2003.

14 Feleshi, E.M., "Prosecution-led Investigation in Tanzania: The Role of the National Prosecutions Service in Criminal Investigations," *National Prosecutions Service (NPS) Journal*, Issue No.002, April-June 2013, pp.4-8, p.6.

mentioned institutions. All these institutions, however, ought to have shared responsibility in effecting recovery of the assets acquired through criminal activities. They should work jointly with a view to promoting practical collaboration, consultation and cooperation in all asset recovery phases, namely, pre-investigative phase, investigative phase, the judicial phase and the return phase. However, it needs to be realised at the outset that the success of each of these institutions depends much on the involvement of many other actors who have a stake in the intelligence, national defence and security. The following discussion goes into detail on some of those key institutions:

Tanzania Police Force

One of the fundamental functions of any modern government, as stated above, is administration of criminal justice. The government through its state apparatuses should ensure justice to all and should commit itself to ensure that through the established criminal justice system there is smooth and speedy dispensation of criminal justice. Being one of state organs responsible for efficient and effective delivery of justice, the Tanzania Police Force (TPF or the Force) is conceived to have a central role to play in the administration of criminal justice. The Force is statutorily duty bound to preserve the peace, maintain law and order, investigate crime, prevent and detect crime, apprehend suspected criminals, guard offenders, protect life and property and enforce all laws and regulations with which it is charged.[15] Looking at the above outlined duties, the Force is the one which sets in motion the criminal justice system mechanism. As a matter of fact, the Force is the major actor of criminal law in terms of detection and prevention of crime. In its bid to take an immediate action in order to save life or property or apprehend an offender, the Force undertakes preliminary investigation in order to establish

[15] Section 5(1) of The Police Force and Auxiliary Services Act, Cap. 322 [R.E. 2002].

whether a criminal act has been committed, and if so what crime. In this connection, the Criminal Procedure Act[16] provides under section 10(1) that:

If from the information received or in any other way a police officer has reason to suspect the commission of an offence or to apprehend a breach of the peace he shall, where necessary, proceed in person to the place to investigate the facts and circumstance of the case and to take such measures as may be necessary for the discovery and arrest of the offender where the offence is one for which he may arrest without warrant.

Thus a police officer conducting the investigation will have to gather facts and evidence necessary to establish the truth in respect of the allegations levelled against the offender. To accomplish this, inquiries and searches are done. In the process police officers are statutorily empowered to arrest and put under restraint individuals who are suspected to have committed offences. They are as well allowed to interrogate those individuals who are under restraint and have their statements be recorded and if the cases go to court such statements may be used in evidence. It means that TPF has a central role to play in conducting criminal investigations. It is primarily the lead investigative organ mandated by different laws such as the Criminal Procedure Act[17] and the Police Force and Auxiliary Service Act,[18] to conduct investigation of all kinds of crimes falling under the Penal Code,[19] the Economic and Organised Crime Control Act,[20] the Prevention of Terrorism Act,[21] the Anti-Money Laundering Act,[22] the Anti-Trafficking in Persons Act, 2008,[23] and the Proceeds of Crime Act,[24] to mention but just a few.

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16 Cap. 20 [R.E 2019].
17 Cap. 20 [R.E. 2019], ss. 5 and 10.
18 Cap. 322 [R.E.2002], s.5.
19 Cap. 16 [R.E. 2019].
20 Cap. 200 [R.E. 2019].
21 Act No.21 of 2002.
22 Cap. 423 [R.E. 2019].
23 Act No. 6 of 2008.
24 Cap. 256 [R.E. 2019].

However, the individuals should not be subjected to more restraint than is necessary.[25] It should be noted that police officers should comply with laid down procedures as enumerated by the law in the course of carrying out their investigative responsibilities. The Criminal Procedure Act[26] provides on how police officers should carry out arrests; conduct search without warrant and interview and record the statements of persons suspected to have committed any offence.

It is apparent that police officers are very instrumental and in fact occupy a central position in the prevention and detection of crime. Not only so but also the setting in motion of the prosecution machinery in respect of cases which go to courts of law depends much on the groundwork mainly done by them at the investigation stage. They are legally duty bound to investigate every case reported with due diligence and necessary expertise. The Force therefore plays a very big and important role in the administration of criminal justice. It is one of the most important components in the administration of criminal justice. When talking of smooth and speedy administration of criminal justice in Tanzania, the Force has its share.

From what has been explained above the Force has an instrumental role to play in the whole asset recovery process. Most of the asset recovery investigation is conducted by TPF. It sets in motion the asset recovery process through investigating serious offences, predicate offences and money laundering, which involve acquisition of illicit assets. The Force is one of the main actors in the asset recovery regime.

Tanzania Police Force is also a custodian and manager of the assets subject to recovery throughout the process and thereafter.[27]

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25 See section 12 of the Criminal Procedure Act, Cap. 20 [R.E 2019].
26 Cap. 20 [R.E. 2019], sections 5 to 69.
27 See section 18 of the Proceeds of Crime Act, Cap. 256 [R.E. 2019].

From the foregoing discussion, it is apparent that the Tanzania Police Force plays a very important role in retrieving illicitly acquired assets. This is an institution charged with the duty of investigating most predicate offences. To what extent TPF has contributed to recovery of illicitly acquired assets, that is a matter which is open to discussion.

National Prosecution Service

Prosecution is yet another important institution in the dispensation of criminal justice. It forms an integral part of the machinery for the administration of criminal justice. Looking at the criminal justice system administration set-up, it is apparent that prosecution matters are under the authority of the National Prosecutions Service.[28] The head of the Service is the Director of Public Prosecutions (DPP), who is appointed by the President.[29] He is assisted by State Attorneys for the proper performance of the functions of the Service.[30] All prosecutions are under the control of the DPP and all prosecution officers operate under powers delegated to them by the DPP.[31] The DPP and state attorneys in the service are officers of the court, charged with the noble duty of assisting the court in discovering the truth or otherwise of allegations against accused persons.

They have therefore to present the case against accused persons by bringing all the evidence that is necessary and available, and presenting it in the best

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28 See section 4 of the National Prosecutions Service Act, Cap.430 [R.E. 2019]. This Act became operational on 4th April, 2008, through GN No.90 of 2008.

29 See Article 59B (1) of the Constitution of the United Republic of Tanzania of 1977.

30 See section 5 of the National Prosecutions Service Act, Cap.430 [R.E. 2019].

31 See Section 9 of the National Prosecutions Service Act, Cap.430 [R.E. 2019]. See also the Constitution of the United Republic (Office of the Attorney General (Restructure)) Order, G.N.No.48 published on 13/2/2018 issued by President Joseph P.J. Magufuli and the Written Laws (Miscellaneous Amendments) (No.2) Act, 2018, Act No. 7 of 2018, ss.49-58.

possible manner, in order to enable the court to reach a just decision.[32] By doing so they have a burden of proving the cases beyond reasonable doubt. Otherwise accused persons are presumed innocent. That is to say they enjoy the presumption of innocence, as provided under the Constitution of the United Republic of Tanzania of 1977.[33] The presumption of innocence is in fact a fundamental principle underlying the criminal law and enforceable under the Bill of Rights as enshrined in the Constitution. Thus under this basic right, a person is presumed to be innocent until he is proved guilty by a competent court through due process. The burden of proving guilt is entirely on the prosecution. The standard of proof is beyond reasonable doubt. The accused does not have the duty to prove his innocence. It was held in the case of *Marando Suleiman Marando v. Serikali ya Mapinduzi Zanzibar ("SMZ")*[34] that he needs not to prove his defence. He discharges his duty by merely raising a reasonable defence and it remains for the prosecution to disprove the defence beyond reasonable doubt. This is so because the presumption of innocence always remains with a suspected person until he is found guilty by a court of law.

In order for the prosecution to discharge its duties as spelt out above, there is no doubt that it should work very closely with the Police Force and other investigative organs. It is on this view that the National Prosecutions Service is also charged with the duty of coordinating investigation conducted by the investigative organs with the view to promoting and enhancing dispensation

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32 Chipeta, B.D., *A Handbook for Public Prosecutors*, Volume One, Eastern Africa Publications Limited, Dar es Salaam, 1988, p. xiii.

33 Article 13(6)(b). See also Mnyasenga, T.R., "Locating the Scope and Application of the Right to Presumption of Innocence in Tanzania," *International Journal of Law, Education, Social and Sports Studies,* Vol.2, Issue 4, 2015 (Oct-Dec), pp. 73-93, at p. 74.

34 [1998] T.L.R. 375.

of criminal justice.[35] With effect from 2008, the country experienced a prosecution-led investigation. The aim is to ensure that both investigation and prosecution institutions work very closely right from initial stages of investigation so that investigators collect evidence that is admissible in court. By having such evidence, it is true that the DPP and State Attorneys will present cases against accused persons without any shadow of doubt. Thus, there is a mutual dependence between the two institutions namely, the Police Force and the National Prosecutions. The emergence of new crimes, some most of which are transnational in nature, calls for the two institutions to become closer and pull up all their necessary resources together. The need for prosecution-led investigation especially for those serious and complicated cases most of which are predicate offences cannot be overstated. Well investigated and well prosecuted cases have an impact on the asset recovery process, which is conviction based.[36]

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35 See the long title of the National Prosecutions Service Act, Cap.430 [R.E. 2019]. See also sections 16 and 17 of the Act, which provide for the investigative coordinative mandate of the DPP over investigative organs.

36 The following are some successful and landmark asset recovery cases pursued by the Assets Forfeiture and Recovery Section (AFRS)] in the AG Chambers & DPP at the Headquarters: *Attorney General v. John Masaka Kisima & Emil Ladislaus Kimario,* Court of Resident magistrates of Morogoro, Criminal Application No. 35of 2012.; *R. v. Mtumwa Salum,* Court of Resident Magistrates of Dar es Salaam at Kinondoni, Criminal Case No. 1425 of 2010; *R. v. Sifael Mtares and Four Others,* Court of Resident Magistrates of Dar es Salaam at Kisutu, Criminal Case No. 109 of 2009; *R. v. Omprakash Singh,* Court of Resident Magistrates of Dar es Salaam at Kisutu, Criminal Case No. 227 of 2014; *R. v. Hamis Omar & Others,* Court of Resident Magistrates of Dodoma, Criminal Case No. 10 of 2015; *R. v. Jerome Mramba,* Court of Resident Magistrates of Manyara, Criminal Case No. 313/2014 and *R. v. Arquemides Joao Mahanjane and Another,* District Court of Kyela, Economic Case No. 1 of 2015.

Moreover, according to information obtained from a questionnaire form filled in by Mr. Canisius M. Karamaga, then Assistant Director, Wildlife Development, Ministry of Natural Resources and Tourism, Wildlife Division, in November, 2017, in 2010 at the Court of Resident Magistrates in Tanga Region in Case No. ECO.13/2007 one house in Tanga Municipality was recovered by the Government of the United Republic of Tanzania.

The Judiciary

The role of the judiciary in the asset recovery process cannot be overemphasised. As stated above when looking at the roles of the police and prosecution in the asset recovery process, it is a primary task of law enforcement organs to bring offenders to justice. However, it is not up to them to decide on the guilt or innocence of the offenders. Their responsibility is to submit before the courts all the facts and evidence related to the crime alleged to have been committed by the offenders. It is upon the courts to find whether the offenders are guilty or not guilty. Whereas law enforcement officials are charged with fact-finding, it is the judiciary that is charged with truth-finding, which is analysing these facts in order to determine the guilt or innocence of the accused.[37]

Courts have therefore a decisive role to play in the asset recovery process. Courts issue forfeiture orders after convicting the accused and upon requests by the prosecution. According to the Proceeds of Crime Act, an appropriate court in relation to adjudicating serious offences that are envisaged in relation to generating proceeds of crime is any court other than a primary court.[38] The exclusion of primary courts from adjudicating serious offences means that the Magistrates' Courts are courts of first instance with regard to confiscation matters, followed by the High Court and then the Court of Appeal.[39] The High Court can act as both a court of first instance and an appellate court in respect of the cases originating from the Magistrates'

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37 de Rover, C., *To Serve and to Protect: Human Rights and Humanitarian Law for Police and Security Forces*, International Committee of the Red Cross, Geneva, 1998, pp.172-173.

38 Cap. 256 [R.E .2019], s.8.

39 Diwa, Z.M., *Managing the Proceeds of Crime: A Critical Analysis of the Tanzanian Legal Framework,* Research Paper Submitted in Partial Fulfilment of the Degree of Masters of Laws: Transnational Criminal Justice and Crime Prevention - An International and African Perspective, University of the Western Cape, South Africa, 2013, p.57.

Courts. However, the law vests in the High Court exclusive jurisdiction as far as the appointment of the trustee to manage restrained assets is concerned.[40]

Tanzania follows a conviction-based forfeiture system of asset recovery. Therefore, full trials of predicate offences should be conducted against accused persons. The prosecution has a fundamental duty of presenting a case against the accused so that the court reaches a just decision of finding him guilty or not guilty. In case the accused is found guilty, the court is mandatorily required by section 235(1) of the Criminal Procedure Act[41] to convict the accused. According to the case of *Shabani Iddi Jololo and Others v. R.*,[42] failure by a trial court to enter a conviction after having found the accused guilty is fatal. In the course of discharging this noble duty, the prosecution should lay before the court a formal complaint or information against the accused. The same should indicate specific allegations of a crime.

The prosecution is also duty bound to prove those allegations against the accused in accordance with evidential standards that embody significant requirements of probative value as a prerequisite of admissibility. The allegations should be proved beyond reasonable doubt through witnesses who testify, exhibits produced and so on. The law requires that no person should be compelled to incriminate himself as part of the process of proving his guilt. Having done all these, the prosecution should now leave the matter for the court to enter a verdict. If the accused person is found guilty, what follows is punishment.

As far as predicate offences are concerned, upon conviction and conventional punishments meted out, forfeiture orders should be applied for by the prosecution before the court.

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40 *Ibid.* See also The Proceeds of Crime Act, 1991, Cap. 256 [R.E. 2019], s.3.

41 Cap. 20 [R.E. 2019].

42 Court of Appeal of Tanzania at Dodoma, Criminal Appeal No.200 of 2006 (Unreported).

Prevention and Combating of Corruption Bureau

As already indicated, the asset recovery process is a shared responsibility among various law enforcement agencies. The Prevention and Combating of Corruption Bureau (PCCB) is among those agencies with investigative and prosecution mandates in corruption and other related offences. PCCB is a creature of the statute established under the Prevention and Combating of Corruption Act,[43] whereby its mandates extend from prevention to awareness raising and law enforcement. According to the Act, PCCB is an independent public body, which is empowered to investigate and, subject to the directions of the DPP, prosecute offences involving corruption.[44] The PCCB has jurisdiction to prosecute cases under section 15 of the Prevention and Combating of Corruption Bureau Act without the consent of DPP and can file these cases directly to the court.[45] For all other cases, the consent of DPP is required. In practice, after an investigation the completed file is taken to DPP for final review. Joint prosecutions by DPP and PCCB are also common.[46]

The requirement of DPP's consent requirement before prosecuting a number of predicate offences emanating from PCCB has been causing delay to take criminal matters to court for trial.[47] It has been observed that one of the limitations facing the Bureau is the need for consent from the DPP in order

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43 Cap. 329 [R.E.2019].

44 The Prevention and Combating of Corruption Act, Cap.329 [R.E. 2019], ss. 5(2) and 7(e) and (f).

45 *Ibid.,* s. 57(1).

46 UNODC, *Country Review Report of the United Republic of Tanzania*, Review by Sierra Leone and Australia of the implementation by the United Republic of Tanzania of articles 15 – 42 of Chapter III. "Criminalization and Law Enforcement" and Articles 44-50 of Chapter IV. "International Cooperation" of the United Nations Convention against Corruption for the Review Cycle 2012 – 2013, p.51, para.247.

47 According to the case of *R. v. Ishila Kitundu* [1981] TLR 339, in cases where DPP's consent is required, the prosecution of the accused in the subordinate court before obtaining sanction of the DPP is irregular and the trial is a *nullity ab initio*. In this case proceedings were declared null and void.

to prosecute. Such legal technicalities and formalities delay prosecution of cases. Reforms should be done as a matter of urgency. It has been argued that with prosecution-led investigation in place the DPP is engaged from the initial to the final stages of investigation.[48] As such his instructions and opinions over the cases are expected to be taken on board throughout the investigation process. Thus the need for his consent seems to be redundant.

The Drug Control and Enforcement Authority

Drug trafficking and abuse is a global problem that countries the world over vow to fight. National, regional and international efforts are in place so that the menace is contained. It is in this understanding that Tanzania had in 1995 enacted the Drugs and Prevention of Illicit Traffic in Drugs Act,[49] which established the Commission for Coordination of Drugs Control with the responsibility of defining, promoting and coordinating drug control activities in the country. However, in its course of implementation, the Commission faced various challenges including lack of legal powers to investigate, arrest, search and seizure.[50] To address these inadequacies, the Drugs and Prevention of Illicit Traffic in Drugs Act,[51] has been repealed and replaced by the Drug Control and Enforcement Act.[52]

The Act establishes the Drug Control and Enforcement Authority whose functions include taking measures to combat drug trafficking including

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48 See sections 16 and 17 of the National Prosecutions Service Act, Cap. 430 [R.E.2019], which provides for the investigative mandate of the DPP over investigative organs.

49 Cap.95 [R.E.2002]. This Act repealed the Cultivation of Noxious Plants (Prohibition) Ordinance, Cap.134 and the Dangerous Drugs Ordinance.

50 The United Republic of Tanzania, *The Functions and Organisation Structure of the Drug Control and Enforcement Authority (DCEA)*, Government Printer, Dar es Salaam, April, 2016, p. 2. The functions and organisation structure of the DCEA were approved by the President on 15th April, 2016.

51 Cap. 95 [R.E. 2002].

52 Cap. 95 [R.E. 2019].

conducting comprehensive investigation and operations on drug trafficking and other related activities. That means the Authority now has legal powers to arrest, search, seize and investigate drug related matters.[53] Furthermore, the Act has forfeiture provisions in respect of property derived from, or used in illicit trafficking. Where any person is convicted under this Act, the property owned by him is subjected to forfeiture in accordance with the provisions of the Proceeds of Crime Act.[54] In this endeavour, the Drug Control and Enforcement Authority has a vital role to play in facilitating and taking part in the asset recovery process.

Tanzania Revenue Authority

The Tanzania Revenue Authority (TRA) has also a stake in facilitating asset recovery processes. TRA is a semi-autonomous government agency charged with the responsibility of managing the assessment, collection and accounting of all central government revenue; and to administer and enforce the laws relating to such revenue.[55] Those laws include the Income Tax Act,[56] the Value Added Act,[57] the Stamp Duty Act[58] and the East African Community Customs Management Act, 2005.[59] These laws create tax offences that are

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53 See the Drug Control and Enforcement Act, Cap. 95 [R.E. 2019], s.4.

54 *Ibid*., ss. 49-55.

55 TRA is established by Act of Parliament namely, the Tanzania Revenue Authority Act, Cap. 399 [R.E. 2019], which became operative in 1995. As reiterated by the Court of Appeal of Tanzania in the case of *Samson Ngw'alida v. The Commissioner General of Tanzania Revenue Authority*, Court of Appeal of Tanzania at Dar es Salaam, Civil Appeal No.86 of 2008, (Unreported), at p.8 of the judgement , the Act was enacted to establish TRA as a central body for the assessment and collection of specified revenue, to administer and enforce the law relating to such revenue and to provide for related matters. See the long title of the Act.

56 Cap. 332 [R.E. 2019].

57 Cap. 148 [R.E. 2019].

58 Cap. 189 [R.E. 2019].

59 Act No.1 of 2005.

aimed at curbing tax evasion.[60] The Tax Administration Act[61] empowers the Commissioner General of TRA or officers acting on his behalf to audit or investigate a person's tax affairs.[62] The aim is to ensure tax compliance through employing voluntary tax compliance and compelling non-compliant individuals to pay their taxes. It has been stated that:

> …tax compliance requires a combination of strategies. A tax administration must adopt both voluntary tax payment measures, as well as effective measures to compel non-compliant persons to pay their taxes. The challenge for governments and tax administration alike is how to determine the right mix between these two compliance strategies. For many tax administrations, there appears to be an irresistible attraction to enforcement as the most efficient way to combat tax non-compliance. The justification could well be that a slight relaxation in enforcement can lead many compliant taxpayers to join the non-compliant. In this regard, the effectiveness of enforcement need not always be measured by the ability to increase the number of taxpayers, but rather, the ability to sustain the number of compliant taxpayers.[63]

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60 According to Ocran, T.M., "Major Issues in Income Taxation of Transnational Corporations in Africa," *Eastern Africa Law Review,* Vol. 15, 1982, pp.175-193, at p.183:

> Tax evasion describes the deliberate and illegal non-payment of taxes which are properly due, e.g. by the submissions of wrong business returns or of no returns at all. The important point about tax evasion is that non-compliance with the tax laws is the result of a willful and conscious failure to do so…Tax evasion is considered illegal…

61 Cap.438 [R.E. 2019].

62 *Ibid*., s.45(10.

63 Ongwamuhana, K., *Tax Compliance in Tanzania*, Mkuki na Nyota Publishers Ltd, Dar es Salaam, 2011, p.186.

Thus in view of what is stated above, there is no way tax non-compliance should be entertained. Through its Tax Investigation Department, TRA is able to detect and prevent criminal activities related to tax. Such criminal activities, which amount to tax evasion or fraud, are obviously in violation of tax laws. At times corruption comes in as a facilitative mechanism, involving tax officers, taxpayers, importers and customs clearing agents.[64] As a result the tax officers abuse their positions for financial gain from taxpayers in support of tax evasion and other tax malpractices, thereby denying the government of its lawful revenues.[65] Likewise through such assistance from tax officers, taxpayers and their associates are able to wilfully and deliberately reduce or escape payment of taxes that are imposed by law. As a result they amass huge amounts of illicit money out of such criminal activities. In this endeavour, TRA is inevitably required to work very closely with the Prevention and Combating of Corruption Bureau and other law enforcement and investigative organs to address corruption and other tax malpractices in the revenue quarters. This is so because, as Odd-Helge puts it correctly, corrupt tax officers often operate in networks, which also include external

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64 See Mtasiwa, A.M.J., Factors *Causing Inefficiency on Tax Revenue Collection in Tanzania. A Case of Tanzania Revenue Authority Located in Temeke Tax Region*, MBA Dissertation, The Open University of Tanzania, Dar es Salaam, 2013, p.18. See also Ongwamuhana, K., *ibid.,* who states on p.4 that the factors which show that Tanzania has not succeeded in the important task of securing high level taxpayer compliance are the narrow tax base, the prevalence of dissatisfaction with taxation, and a perception that tax administration is high-handed and severely tainted with corruption.

65 According to Luoga, F.D.A.M., "Formulation of Tax Policy in a Developing Country: Some Suggestions for Tanzania," in Mbunda, L.X. and Mtaki, C.K. (Eds.), *Taxation Policy in Tanzania: Constraints and Perspectives*, Faculty of Law, University of Dar es Salaam, Dar es Salaam, 1995, pp.10-25, at p.11, the objective of the tax system should be to raise the revenues needed to pay for publicly funded programmes in a fair and reliable way that supports economic growth. As such, how tax is levied, and how much is exacted is of critical importance. It should signal the message that no loopholes are left, and at the same time fairness to taxpayers prevails.

actors.[66] A number of joint operations that have been conducted involving TRA and other several law enforcement and investigative organs are said to have positive outcomes.[67]

Banks and Financial Institutions

Traditionally, banks and financial institutions enjoy a well settled principle of bank secrecy. The relationship between a banker and customer is a contractual one. There are duties/obligations and rights attached to them all in their respective capacities. Under the relationship, the banker is, among other things, under obligation to keep the customer's affairs under secrecy. This includes secrecy in statements of account. The rationale behind this duty is that in essence the banking transactions between a banker and his customer are of privacy in nature. The act of divulging any information connected with the customer's state of his account is a breach of the banker's duty of secrecy. This may attract a legal action before a court of law against the banker with a punishment of a fine not exceeding twenty million shillings or imprisonment for three years or both.[68] Therefore, the existing confidential relationship between banks with their customers makes them jealously guard their customers' financial information.

However, this fiduciary relationship between banks and their customers creates a conducive environment whereby most of the criminally acquired assets in monetary terms are deposited in or pass over or exchange hands in

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66 Fjeldstad, O., "Fighting Fiscal Corruption: Lessons from Tanzania Revenue Authority," *Public Administration and Development,* (2003) 23, 165-175, 165. Available at: *https://www.cmi.no/publications/file/1532-fighting-fiscal-corruption.pdf.,* accessed on February 1, 2017.

67 For more details on some of successful joint operations, see Tanzania Police Force Annual Report for the Year 2014, p.29. Apart from conducting investigation of tax criminal offences, TRA officers do prosecute tax cases upon being authorised by the DPP as per the National Prosecution Service Act, Cap.430 [R.E. 2019], s.22.

68 The Banking and Financial Institutions Act, 2006, Act No.5 of 2006, s.48 (6).

these institutions. Criminals use very sophisticated and complicated techniques in the financial systems to hide criminally acquired assets. Those techniques include electronic funds transfers, which take a very short period of time to cross national borders. With such complicated techniques, criminals feel their assets are safe and their financial information would not be divulged. They feel insulated under the banker's confidentiality obligation. To them this insulation is of fundamental importance because one of a criminal's concerns after committing a crime is how to hide the proceeds accrued therefrom. Being part of the globe, Tanzania has never been immune from this ugly fact. The liberalisation of the financial market saw banks and financial institutions in the country being exposed to financial risks of embracing some customers whose deposits are dirty monies from unlawful sources.[69]

However, a banker's duty of confidentiality is not absolute. Moreover, the duty of confidentiality cannot be used to conceal criminality.[70] The case of *Tournier v. National Provincial and Union Bank of England Ltd*[71] spelt out four instances under which a bank is allowed to disclose customer's information by stating that:

On principle, I think that the qualifications can be classified under four heads: (a) where disclosure is under compulsion by law; (b) where there is a duty to the public to disclose; (c) where the interests of the bank require disclosure; and (d) where the disclosure is made by express or implied consent of the customer.

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69 For general discussion on liberalisation of financial market in Tanzania, see Makame, L.E., *The Law of Money Laundering and its Trend in the Banking Industry: The Case Study of Tanzania*, LL.M. Dissertation, University of Dar es Salaam, Dar es Salaam, 2003.

70 See the case of *Bankers Trust Company v. Shapira and Others* [1980] 1 W.L.R.1274.

71 [1924]1 K.B.461, 473.

In Tanzania, there are several statutory exceptions to bank or financial institutions' duty of confidentiality. These are generally provided for in the banking laws and those covered in specific legislation dealing with addressing criminality in Tanzania for predicate offences like terrorism and money laundering.[72] Criminal statutes normally require the banks to disclose the customer's information either on banker's volition for suspicion of commission of a crime; or compel banks to disclose information about a customer who is investigated by law enforcement agencies.[73]

According to the Proceeds of Crime Act, no bank or financial institution can refuse to furnish information to a police officer in the course of investigating any person who is involved in the commission of a serious offence, a predicate offence or money laundering.[74] This is in recognition of the fact that banks or financial institutions have a key role to play in the asset recovery process by ensuring that statutory procedures are followed. They need therefore to take active part in assisting the police force and other investigative bodies to successfully identify, seize and freeze the assets alleged to have been illicitly acquired. So far there is no room for them to refrain from doing so under the pretext of the duty of confidentiality. What is expected from them is cooperation and not confrontation with law enforcement agencies, which risks them to face wrath of the law.[75] After all, banks and financial institutions in Tanzania are required to pay special

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72 Longopa, E., "Cracking Down Criminality and Erosion of Banker's Confidentiality Obligation in Tanzania," *Eastern Africa Law Review*, Issue No. 2, Vol. 41, December, 2014, pp.1-31, p. 5. See also Mandopi, K., "Anti-Terrorists' Financing: Does it Undermine Privacy of the Customer of a Bank?" *The Law Reformer Journal*, Vol. 3, No. 1 April, 2011, pp.47-59, pp.48-51.

73 Longopa, *Ibid.*, p.7

74 Cap. 256 [R.E. 2019], sections 31A and 63A.

75 According to section 63A (3) of the Proceeds of Crime Act, Cap. 256 [R.E.2019], any person who fails to produce a bank account when required to do so by a police officer commits an offence punishable by a prison term not exceeding two years or a fine of not less than one million shillings or both.

attention to complex, unusual or large business transactions and to unusual patterns of transactions and to insignificant but periodic transactions which have no apparent economic or lawful purpose.[76] All this is aimed at ensuring safety, soundness and stability of the banking sector and the economy as a whole.

In view of the above, BoT in its regulatory and supervisory role over performance of the banking sector should be in the forefront to ensure that all the banks and financial institutions abide by the law so that criminals do not find these institutions as hiding places for their dirty monies.[77] It formulates and implements policies to protect the integrity of the domestic financial system.[78] BoT pays regular on-site visits on a rotational basis once per year to all the banks in Tanzania.[79] Furthermore, there are off-site inspection assessments of financial soundness through analysis of the statistical and other returns covering key areas of the institutions. This information is submitted daily, weekly, monthly, quarterly, biannually and annually.[80]

Financial Intelligence Unit

Financial Intelligence Unit (FIU) has also a very crucial role to play in the asset recovery process, especially at a stage of investigation of predicate offences, specifically money laundering, terrorist financing and financial

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76 ESAALMG, *Mutual Evaluation Report on Anti-Money Laundering and Combating the Financing of Terrorism*, United Republic of Tanzania, December, 2009, p.17, para.20.

77 The Bank of Tanzania Act, 2006, Act No.4 of 2006, ss.5(1) and 6(1) read together.

78 *Ibid*., s.7.

79 Rwechungura, C.R.B & Pesha, R.C., "Tanzania," in Shapiro, D.E. (Ed.*), Getting the Deal Through – Banking Regulation 2013,* Law Business Research Ltd, London, 2013, pp.161-165, p.162. Source: *www.gettingthedealthrough.com,* accessed on 10 August 2017.

80 *Ibid.*

related crimes, by providing quality intelligence to the Tanzania Police Force and other investigative organs.

The Egmont Group of Financial Intelligence Units (Egmont Group), which is the international standard setter for FIUs, defines an FIU as:

"A central, national agency responsible for receiving (and, as permitted, requesting), analysing, and disseminating to the competent authorities, disclosures of financial information (i) concerning suspected proceeds of crime, or (ii) required by national legislation or regulation, in order to counter money laundering."[81]

Similarly, UNODC defines an FIU as a central, national agency responsible for receiving (and, if authorised, requesting), analysing or disseminating to the competent authorities, disclosures of: (a) financial information concerning suspected proceeds of crime and potential financing of terrorism; or (b) financial information required by national legislation or regulation, in order to counter money-laundering and financing of terrorism.[82]

An FIU is defined as an agency that receives reports of suspicious transactions from financial institutions and other persons and entities, analyses them, and if it concludes that the reports indicate underlying criminal activity, refers them to law enforcement agencies and foreign FIUs.[83] Generally speaking, FIUs are conceived to perform the following three basic

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81 Egmont Group, *Information Paper on Financial Intelligence Units and the Egmont Group*, p.2 Source: *http://www.egmontgroup.org/info_paper_final_ 092003.pdf;* accessed on 28th December, 2017.

82 UNODC, *Manual on International Cooperation for the Purposes of Confiscation of Proceeds of Crime*, United Nations, Vienna International Centre, Vienna, Austria, September 2012, p.2.

83 International Monetary Fund/World Bank (IMF/World Bank), Financial Intelligence Units: An overview, 2004, accessed at <*http://www1.worldbank.org*>. *Source:* Gwintsa, N., "Challenges of Establishing Financial Intelligence Units," in Goredema, C., *Money Laundering Experiences, A Survey*, Institute for Security Studies, Monograph No. 124, June 2006, pp. 39-54, p.39.

functions: (a) to act as a centralised repository of reports of suspicious transactions and other disclosures. The premise is that centralised information ensures greater efficiency in the gathering, processing and analysis of information; (b) to analyse the reports received in order to determine which constitute evidence of potential criminal activity. In addition to these reports, FIUs also rely on information contained in their own databases, information from government databases and other public sources, additional information from reporting entities and information that is held by other FIUs; and (c) to disseminate the resulting intelligence as part of a country's efforts at anti-money laundering and combating the financing of terrorism.

In order to be effective, this information sharing function of FIU requires that it should be mandated to share information with domestic regulatory and judicial authorities as well as with international authorities involved in the detection, prevention and prosecution of money laundering and terrorist financing.[84]

In Tanzania, FIU was established under the Anti-Money Laundering Act,[85] with responsibility of receiving, analysing and disseminating suspicious transaction reports and other information regarding potential money laundering or terrorist financing received from the reporting persons and other sources from within and outside the country.[86] FIU became operational in September, 2007. Its operation is throughout the United Republic of Tanzania.[87]

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84 *Ibid*., p.41.

85 Cap. 423 [R.E. 2019].

86 Cap.423 [R.E. 2019], s.4.

87 Regarding its application in Zanzibar, see the Anti Money Laundering and Proceeds of Crime Act, [R.E.2012], of the Revolutionary Government of Zanzibar, s.6A.

According to the Anti-Money Laundering Act,[88] the FIU's roles, functions and powers include:

Receiving and analysing Suspicious Transaction Reports (STRs), Electronic Funds Transfer Reports (EFTR), Cross Border Transportation of Currency Reports (CBTCR), Currency Transaction Reports (CTR) and other reports; Disseminating intelligence to relevant law enforcement agencies.[89] If after analysis there are grounds to suspect money laundering, terrorist financing or any other criminal activities, an FIU is charged with: Supervising reporting persons for Anti-Money Laundering and Combating the Financing of Terrorism (AML/CFT) compliance; Compiling AML/CFT statistics and records; Issuing guidelines to reporting persons; Creating and providing AML/CFT training to reporting persons, the judiciary, law enforcement agencies and other stakeholders; Creating AML/CFT awareness to stakeholders and the general public;

Preparing periodic reports on money laundering typologies and trends; Exchanging information with overseas FIUs and comparable bodies, and Liaising with relevant investment and business registration and licensing authorities in assessing genuine investors.[90]

Upon receiving the suspicious transaction reports, in relation to suspected money laundering and terrorist financing activities from various sources, FIU analyses and disseminates intelligence to appropriate law enforcement agencies for investigation and further action.[91] Over the past six years, FIU has disseminated the following intelligence issues to various investigative bodies, Tanzania Police Force included, as the following Table 1 illustrates:

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88 Cap. 423 [R.E. 2019].

89 Cap.423 [R.E. 2019], s.6. See also the United Republic of Tanzania, Ministry of Finance, *Financial Intelligence Unit Annual Reports 2011/2012,* p.4.

90 *Ibid.*

91 Cap.423 [R.E. 2019], s.6.

Table 1: Intelligence Issues Disseminated by FIU to Investigative Bodies During the Period between 2010/11 and 2014/15

Number of intelligence issues disseminated by FIU to investigative bodies	2010/11	2011/12	2012/13	2013/14	2014/15	Cumulative
Disseminated to Police	13	19	19	11	19	82
Disseminated to PCCB	0	0	5	3	4	12
Disseminated to TRA	0	1	4	8	23	36
Total	13	20	28	23	46	130

Source: These data were retrieved from FIU website (Annual Reports) at *http://www.fiu.go.tz* under "publications."

One of the fundamental questions about FIU in Tanzania is to what extent it has capacity to interact, cooperate and exchange information effectively within and outside the country. This question is valid because much as it works closely with reporting persons, regulators, law enforcement agencies and other stakeholders, FIU, as any other newly established institutions in the developing economies, faces a number of challenges, which need attention. Those challenges include the following:

Money laundering and terrorist financing are new types of crimes and they are evolving rapidly with global technological changes. This makes the war against the two vices complex and challenging. Our laws are new and stakeholders that are supposed to fight these crimes (reporting persons, law enforcement agencies, regulators, etc.) are still trying to figure out what is going on. This means that the FIU has a huge task of raising awareness among

stakeholders and the public. The evolving nature of ML/TF also calls for constant review of our laws, regulations and guidelines.[92]

Tanzania is largely a cash based economy. This means that most financial transactions are carried out in cash. This poses a big challenge in the fight against money laundering and terrorist financing. Dealing in cash tends to leave little or no audit trail, and for this reason criminals like to deal in cash. Cash transactions leave the AML/CFT stakeholders with disjoint or no information to work with. As a result it facilitates money laundering because it is difficult to detect suspicious business deals.[93]

Information and communication technology penetration in Tanzania is still low. This means that most of the information in businesses and government offices is kept in manual form. This poses huge challenges in accessing, processing and transporting information. Manual records take much longer time and are difficult to handle when compared to information kept electronically. FIU encounters huge barriers and delays during analysis, especially when trying to access information held in other government offices and private businesses. We need to create awareness and encourage offices to automate their processes.[94]

FIU has not been able to recruit staff commensurate with its organisation structure and establishment needs. AML/CFT is a challenging discipline which requires specialised skills. This poses unique challenges to FIU on staff to recruit, and specialised training to institute to ensure that staff are up to

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[92] The United Republic of Tanzania, Ministry of Finance, *Financial Intelligence Unit Annual Report 2012/2013,* p.16 and information obtained from questionnaire forms, which were filled in by five respondents from the FIU as well as an interview conducted by the researcher to one senior FIU officer at FIU offices in the Ministry of Finance and Planning in Dar es Salaam on 18 July 2017.

[93] *Ibid.*

[94] The United Republic of Tanzania, Ministry of Finance, *Financial Intelligence Unit Annual Reports 2012/2013,* p.16 and *2014/2015*, p.23.

the challenge. FlU plans to recruit more staff to address the shortage of staff. AML/CFT related training is scarcely available worldwide but FlU has a training and attachment programme for its staff to acquire the requisite skills.[95]

FlU offices are located within premises of the Ministry of Finance. The office space can accommodate up to 20 people. In the medium to long term future, office space will not be enough to accommodate staff as FlU grows to discharge its mandate effectively and efficiently. FlU has to start planning for office accommodation immediately, if it is to grow to the required level of operational capacity and best practices.[96]

The Anti-money laundering laws of Tanzania (the Anti-Money Laundering Act and Anti-Money Laundering and Proceeds of Crime Act) identify various categories of reporting persons. Not all these categories of reporting persons have laws and apex bodies or Regulators to oversee their operations. This poses a challenge to FIU when it comes to supervising these reporting persons for AML/CFT compliance. There is therefore a need to sensitise more stakeholders to enact laws to cover these areas and for relevant regulators to be established.[97]

Most information is held in papers and files rather than in electronic form. This makes information exchange between AMC/CFT stakeholders difficult and slow. Moreover, money laundering (ML), terrorist financing (TF) and asset recovery are new not only in Tanzania but worldwide. For this reason

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95 The United Republic of Tanzania, Ministry of Finance, *Financial Intelligence Unit Annual Reports 2011/2012,* p.4 and *2014/2015*, p.24.

96 The United Republic of Tanzania, Ministry of Finance, *Financial Intelligence Unit Annual Reports 2012/2013,* p.16 and *2014/2015*, p.24.

97 The United Republic of Tanzania, Ministry of Finance, *Financial Intelligence Unit Annual Report 2014/2015,* p.25.

ML/TF requires the FIU and law enforcement agencies (LEAs) to be a step ahead to combat these crimes and keep the pace.[98]

AML/CFT related training is scarcely available worldwide. This poses unique challenges to FlU to train its staff to the required standards. Due to its nature, training is expensive and attaching staff to more advanced FlU has not been easy. Efforts have been taken to seek assistance in this regard from international bodies such as the Eastern and Southern Africa Anti-Money Laundering Group (ESAAMLG), the Egmont Group of FIUs, World Bank, IMF, UNODC and development partners.[99]

Inadequate financial resources to implement the planned activities so as to achieve the predetermined objectives.[100]

However, despite all these challenges, it may be argued that FIU is a vital source of information for detection and prevention of money laundering and terrorist financing activities. It is an integral part of the investigative organs because its information has the potential to set in motion financial crime investigations.

3.2 Some Salient Features of Laws that Deal with Asset Recovery

The discussion in this part gives an appraisal of what the law provides in the asset recovery process. It is a widely accepted notion in the international community that criminals should be stripped of the proceeds of their crimes. The objective is to remove the incentive for the commission of crime. The legal framework that deals with asset recovery in Tanzania is therefore premised on this objective.

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98 *Ibid*., p.23.
99 *Ibid*., p.24.
100 *Ibid*., p.25.

3.2.1 Asset Recovery Processes and Mechanisms

(a) Some Laws that Operate alongside with the Proceeds of Crime Act

Asset recovery legal regime in Tanzania is not contained in a single law. There are several statutes that make provisions for recovery of criminally acquired assets. However, such provisions are ancillary to other matters. So long as the country has a conviction-based forfeiture system, all predicate (income generating) offences, which are subject to freezing and confiscation must first undergo full criminal trials. This explains why various pieces of legislation ranging from substantive to procedural laws are involved. Most of those various pieces of legislation create several predicate offences and penalties to be meted out. In addition, however, they have forfeiture provisions to those predicate offences most of which are also covered by the main forfeiture law namely, the Proceeds of Crime Act.[101] Such laws that have forfeiture provisions include the Prevention of Terrorism Act,[102] the Wildlife Act,[103] the Fisheries Act, 2003,[104] the Economic and Organised Crime Control Act,[105] the Criminal Procedure Act,[106] the Forest Act[107] the Anti-Trafficking in Persons Act, 2008[108] and the Drug Control and Enforcement Act.[109] Some of these laws are outlined as follows:

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101 Cap. 256 [R.E. 2019]. According to its long title, this is an Act to make better provisions for dealing with proceeds of crime.

102 Cap. 19 [R.E. 2019], s.36(1).

103 Cap. 283 [R.E. 2009], s.111(1).

104 Act No.22 of 2203, ss.38(1) and 39.

105 Cap. 200 [R.E. 2019], s.23.

106 Cap. 20 [R.E. 2019], ss. 351 and 352.

107 Cap. 323 [R.E. 2002], s.97.

108 Act No.6 of 2008, s.14.

109 Cap.95 [R.E. 2019]. The Act states explicitly under section 49 (1) that where any person is convicted for an offence under Part III, the property owned by him on the date of the conviction or acquired by him after that date, shall be forfeited to the Government in accordance with the provisions of the Proceeds of Crime Act.

The Prevention and Combating of Corruption Act[110]

Corruption is one of the predicate offences that generate huge amounts of illicit assets. As such PCCB's effective investigation of corruption cases has a very significant impact in the asset recovery process. In order to discharge this and other functions, the Director General and authorised officers of the PCCB are conferred powers of police officers of or above the rank of ASP and the provisions of the Police Force and Auxiliary Services Act[111] conferring upon police officers powers necessary or expedient for the prevention, combating and investigation of offence.[112] Those powers include power to arrest, enter premises, search, detain suspects and seize property where there is a reasonable cause to believe that an offence involving corruption has been or is about to be committed by the suspect in the premises or in relation to the property; power to investigate and inspect account, books, documents or other articles relating to a person identified; require any person to produce accounts, books, documents or other articles of all or any information relating thereto; and take copies of such account, books or documents or, of any relevant entry therein and photographs of any other article, to institute criminal proceedings against the owner of the property seized; the power to require information from, and to procure attendance of any person for the purpose of answering questions relating to anything under investigation by the PCCB.[113] The fact that the law confers such powers on the Director General and authorised officers of the PCCB is in itself not a bad thing because authority without the means is impotent.

Regarding forfeiture of proceeds of corruption, the Act provides that the PCCB may in collaboration with the DPP recover proceeds of corruption

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110 Cap.329 [R.E. 2019].

111 Cap. 322 [R.E. 2002].

112 See the Prevention and Combating of Corruption Act, 2007, Cap.329 [R.E. 2019], sections 8 and 9.

113 *Ibid.*

through confiscation to the Government.[114] This explains why the Act establishing the Bureau has some provisions under Part IV thereof on forfeiture of proceeds of corruption. They include forfeiture of proceeds of corruption after conviction,[115] notice of application for a forfeiture order,[116] forfeiture orders,[117] effects of forfeiture orders[118] and a principal may recover secret gifts through civil proceedings.[119] However, the Act is silent on instrumentalities of crime that may be involved in the commission of corruption offences.

The Prevention of Terrorism Act[120]

This is an Act, which criminalises acts of terrorism and financing of terrorism. It also has provisions for forfeiture of any property used for, or connected with; or received as payments for the commission of terrorist acts.[121] Orders for forfeiture of proceeds and instrumentalities of crime are made upon conviction for offences under the Act. Property forfeited to the United Republic of Tanzania is vested in the Government.

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114 *Ibid*., s.40(1).

115 *Ibid*, s.40.

116 *Ibid*., s.41,

117 *Ibid*., s.42.

118 *Ibid*., s.43.

119 *Ibid*., s.44. According to Peter, C.M. and Masabo, J., "Confronting Grand Corruption in the Public and Private Sector: A Spirited New Initiative in Tanzania," *Namibia Law Journal*, Volume 01- Issue 02, July-December 2009, pp.49-70, at p.6: This forfeiture serves to preclude situations where the convicted official comes back to enjoy the proceeds of his/her corrupt actions after serving a prison term. This is meant to send a warning to all those involved in corruption that society will not allow them to enjoy fruits of their illegal transactions in future, and this discourages them from indulging in corrupt practices.

120 Cap.19 [R.E. 2002].

121 *Ibid*., s.36(1).

The Forest Act[122]

The Act provides for the management of forests. One of its objectives is to enhance the contribution of the forest sector to the sustainable development of Tanzania and the conservation and management of her natural resources for the benefit of present and future generations.[123] The Act created offences under Part XI, which include offences relating to forest reserves,[124] trees not in forest reserves,[125] listed wild plants,[126] listed wild animals,[127] unlawful taking possession or receiving of forest produce,[128] trade in forest produce,[129] counterfeiting and similar offences.[130] The Act empowers any authorised officer, forest officer or police officer to prevent movement of, search, seize and detain any forest produce believed to have been unlawfully obtained.[131] Custody of the seized produce and articles should be at the nearest police station.[132] The Forest Act empowers the court upon conviction of an accused person of any of the above offences, in addition to any penalty, to make forfeiture orders in respect of instrumentalities and proceeds of crime.[133]

The Wildlife Act[134]

This Act makes provisions for conservation, management, protection and sustainable utilisation of wildlife and wildlife products. The Act has forfeiture provisions in respect of proceeds and instrumentalities of crime committed thereunder. The forfeiture order is made upon accused persons convicted of

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122 Cap. 323 [R.E. 2002].
123 *Ibid*., s.3(a).
124 *Ibid*., s.84.
125 *Ibid*., s.85.
126 *Ibid*., s.86.
127 Ibid., s.87.
128 Ibid., s.88.
129 Ibid., s.89.
130 *Ibid*., s.90.
131 *Ibid*., s.93.
132 Ibid., s.94.
133 Ibid., s.97.
134 Cap. 283 [R.E. 2009].

offences committed under the Act.[135] The property that forfeited to the Government is vested in the Director of Wildlife who may decide a disposal thereof.[136]

The Fisheries Act, 2003,[137]

According to its long title, the Act makes provisions for the conservation and sustainable development of aquaculture and the control of fish and related matters. The Act puts in place forfeiture provisions for those persons who commit offences under it. The Act has non-conviction/civil and conviction based forfeiture. Non-conviction or civil forfeiture takes place only where property liable to forfeiture is fish, fish product or aquatic flora.[138] A court may order forfeiture of such products regardless of whether a person has been convicted of an offence or not. As regards conviction based forfeiture, instrumentalities of crime such as vessels or vehicles that were used for commission of offences are the target.[139]

The Economic and Organised Crime Control Act[140]

The Act creates economic offences. It has forfeiture provisions, which empower the court to issue an order to the effect that the property used in, or in connection with, the commission of a crime is either destroyed, disposed of or dealt with in any manner the court may specify.[141] Previously the Act's main concern was to deal with instrumentalities only and not

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135 *Ibid*., s.111(1).
136 *Ibid*., s.111(3) and (4).
137 Act No.22 of 2203.
138 *Ibid*., s.38(1).
139 *Ibid.,* s.39.
140 Cap. 200 [R.E. 2019]. This Act was enacted to repeal and replace the Economic Sabotage (Special Provisions) Act, 1983. It was amended by the Written Laws (Miscellaneous Amendments) Act, 2016, Act No.3 of 2016, to among other things, establish the High Court of Tanzania, Corruption and Economic Crimes Division.
141 *Ibid*., s. 23.

proceeds of crime. However, with recent amendments effected in the Act in 2016 by the Written Laws (Miscellaneous Amendments) Act, 2016,[142] mainly for the establishment of the Corruption and Economic Crimes Division of the High Court, the law now introduces confiscation and forfeiture provisions of proceeds derived from the offence committed under this Act. It means that so far both instrumentalities and proceeds derived from the commission of an offence under this Act are now subject to confiscation and forfeiture. In fact the law makes it mandatory for the court to award forfeiture orders in addition to the penalty imposed on the accused persons found guilty.[143]

The Anti-Money Laundering Act[144]

The Act makes provisions for prevention and prohibition of money laundering. Matters covered include the disclosure of information on money laundering, an establishment of a Financial Intelligence Unit and the National Multi-Disciplinary Committee on Anti-money Laundering. These are coordinating measures for combating money laundering. The Act also provides a list of predicate offences, whereby proceeds of crime accruing therefrom are subject to forfeiture under the Proceeds of Crime Act.[145] It would, however, be noted that whereas the Act criminalises money laundering under section 12, the Proceeds of Crime Act does the same under section 71. This, it is argued, is a duplication of efforts which at times confuses law enforcement agencies as to whether they should opt for either of them or take on board both of them when dealing with a money laundering offence.

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142 Act No.3 of 2016.

143 The Act states under section 60 (3) that:

In addition to the penalty imposed under subsection (2), the court shall order the confiscation and forfeiture, to the Government of all instrumentalities and proceeds derived from the offence committed under this Act.

144 Cap.423 [R.E. 2019].

145 *Ibid., s.3.*

The Anti-Trafficking in Persons Act, 2008[146]

The Act seeks to criminalise acts of trafficking in persons and related matters. Trafficking in person is a crime, which is centered on profit making. In fact it is becoming an increasingly attractive income generating business.[147] Traffickers make profits at several points along the way. The Act also has provisions on forfeiture of proceeds and instrumentalities of crime. The forfeiture is in addition to the penalties which would be awarded by the court upon conviction of an offence of trafficking in persons.

The Drug Control and Enforcement Act[148]

The Drug Control and Enforcement Act, which repeals and replaces the former Drugs and Prevention of Illicit Traffic in Drugs Act,[149] establishes the Drug Control and Enforcement Authority for the prevention and control of drug trafficking and other related matters.[150] The Act establishes, among other things, drugs related offences. In essence it prohibits possession of drugs and their consumption, cultivation, processing, manufacturing, preparation, sale, purchasing, distribution, storage, importation into and exportation from Tanzania. The Act provides for the forfeiture of property owned by an accused person on the date of the conviction of an offence under the Act or acquired by him after that date.[151] The forfeiture is carried out in accordance with the provisions of the Proceeds of Crime Act.[152]

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146 Act No.6 of 2008.

147 For some discussion on the seriousness of trafficking in persons crime in Eastern African region, see INTERPOL, *Serious and Organised Crime Threat Assessment for Eastern Africa,* Analytical Report, October 2010, pp.62-67.

148 Cap. 95 [R.E. 2019]..

149 Cap. 95 [R.E. 2002].

150 See the long title of the Act.

151 Cap. 95 [R.E. 2019]. s.49.

152 *Ibid.*

An Analysis of the Proceeds of Crime Act and other Laws Related Thereto

The following part of the discussion gives an appraisal of the main forfeiture law namely, the Proceeds of Crime Act with a view to seeing the extent to which asset recovery processes and mechanisms are effected. The Proceeds of Crime Act is the primary legislation that deals specifically with forfeiture of proceeds and instrumentalities of crime. Part II of the Act contains provisions for making applications for confiscation orders.[153] It is within this Part of the Act where it is provided for granting of forfeiture orders and their effects not only on the accused found guilty but also on third parties who had interests on the forfeited assets. Modalities of dealing with registered foreign forfeiture orders are also provided under this Part.[154] Non-conviction based forfeiture,[155] occurs where the DPP suspects, on reasonable grounds, that any person has acquired, holds or is dealing with tainted property and it is not possible (a) for any person to bring the person before a court on a charge for any serious offence, or (b) for a foreign pecuniary penalty order or a foreign forfeiture order to be made in respect of the person. In such a situation DPP may apply to the High Court for an order to declare the property forfeited to the United Republic of Tanzania.[156] The main question is: to what extent such express provisions of the law have been invoked? So far there are no records or statistics on non-conviction based forfeiture. However, almost all the respondents who participated in giving their views

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153 See sections 9-13 of the Proceeds of Crime Act, Cap. 256 [R.E. 2019].

154 Sections 14-17 of the Proceeds of Crime Act, Cap. 256 [R.E. 2019].

155 Regarding non-conviction based forfeiture or otherwise known as civil forfeiture in Tanzania, see Amani, N.P., "Civil Forfeiture in Tanzania: A Panacea for Recovering Illicitly Acquired Property by Politically Exposed Persons (PEPs)?," *Eastern Africa Law Review*, Issue No. 2, Vol.41, December, 2014, pp.125-155.

156 See sections 4(1) (c), 5 and 12 of the Proceeds of Crime Act, Cap. 256 [R.E. 2019] in respect of making of forfeiture order where a person has absconded. See also ss.13A and 30 of the same Act regarding civil forfeiture due to death of the accused and due to practical impossibility to prosecute the accused person, respectively.

on the issue of asset recovery argued that the law should widen the scenarios to include civil forfeiture in its widest sense. It helps to avoid the stringent burden of proof in criminal cases which is beyond reasonable doubt. Also, the burden of proof is in most cases on the part of the offender to establish that the asset was not the product of illegality.

Moreover, it is a powerful tool as it allows LEAs to seize illegally acquired assets and money that could in turn be used by LEAs to continue fighting illegal activities. Part III of the Act addresses pecuniary penalty orders. It allows for property of an equivalent value to be forfeited.[157] While Part IV is dealing with forfeiture in respect of specified offences;[158] Part V of the Act deals with control of property liable for forfeiture.[159] Such issues like power of search and restraining orders are discussed at length in this part. Part VI provides for information gathering powers, such as production orders, search powers, monitoring orders and obligations of financial institutions.[160] The last part, which is Part VII, is reserved for miscellaneous provisions.[161]

Having outlined the main contents of the Act, the following discussion is on how those salient features of the Act are used in the asset recovery processes and mechanisms. The discussion is mainly guided by four related, connected and interdependent stages that are involved in the asset recovery process. The stages are first, identifying and tracing the criminally acquired assets through institution of investigation; second, securing the assets; third, confiscation or forfeiture of identified criminally acquired assets; and fourth, returning of the assets to the rightful owners. The discussion ventures on analysing the legal framework that is involved in all these stages. In the course of analysis, the discussion underscores on which institutions are mandated

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157 The Proceeds of Crime Act, Cap. 256 [R.E. 2019], ss 19-24.
158 *Ibid.*, ss 25-30.
159 *Ibid.* ss 31-57.
160 *Ibid.*, ss 58-70.
161 *Ibid.*, ss 71-79.

by the law to undertake a given assignment in order to accomplish the processes and mechanisms in place.

(i.) *Identifying and Tracing the Criminally Acquired Assets*

As a matter of understanding, it is worth noting at this point to be conversant with terms "identifying" and "tracing" in relation to asset recovery process. The Oxford Advanced Learner's Dictionary of Current English defines the term "identifying" as the process of showing, proving or recognising who or what is. It is the process of making a close connection between one person or thing and another.[162] From this definition, it may be argued that when applied to asset recovery process, identifying is a stage whereby LEAs recognise or are able to recognise or make a close connection between persons and assets they are alleged to have acquired illegally.

As regards the term "tracing," it, according to Ladan, refers to tracking or following up, step by step, by patient inquiry or observation; or searching into; examining and inquiring into with care and accuracy; finding out with careful inquisition; or a legal inquiry.[163] On the same note, Monteith and Dornbierer state that asset tracing refers to the process whereby an investigator tracks, identifies, and locates proceeds of crime.[164] Similarly,

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[162] Hornby, A.S., *The Oxford Advanced Learner's Dictionary of Current English*, New 7th Ed., Oxford University Press, Oxford, 2008, p.739.

[163] Ladan, M.T., *Tracing, Freezing, Confiscation, Recovery and Forfeiture of Illegal Proceeds of Money Laundering in Nigeria*, A Paper Presented at A 3-day Financial Investigative and Prosecutorial Anti-money Laundering Training Workshop Organised by the US Department of State, Bureau of International Narcotics and Law Enforcement and the US Department of Justice, Office of Overseas Prosecutorial Development, Assistance and Training, Held at EFCC Training Academy, Abuja, Nigeria, on 9-13 December, 2003.

[164] Monteith, C. and Dornbierer, A., *Tracking and Tracing Stolen Assets in Foreign Jurisdictions*, International Centre for Asset Recovery, Basel Institute on Governance, Basel, Switzerland, Working Paper Series No.15, 2013, p.10. Source*: http://www.fatf-gafi.org/pages/faq/Moneylaundering*, accessed on 10th November, 2015.

Lord Millett defines the term "tracing" in the case of *Foskett v. McKeown*[165] as follows:

Tracing is neither a claim nor a remedy. It is merely a process by which a claimant demonstrates what has happened to his property, identifies its proceeds and the persons who have handled or received them, and justifies his claim that the proceeds can properly be regarded as representing his property.

The process of tracing or inquiring into or tracking down through inquiry is also known as investigation in law.[166] When an investigator has identified the assets and compiled documents related thereto, he goes on inquiring into who owns, possesses or handles those assets and how they are connected with the alleged criminal activities.

Identifying and tracing of assets that are alleged to have been acquired through criminal activities is a very important and basic stage in the asset recovery process. This stage involves tracking and unveiling of hidden assets through financial investigation. It forms a foundation of the rest of the stages because collection of intelligence and evidence aimed at enabling tracing the assets and establishing ownership is undertaken. All recovery efforts that follow thereafter depend largely on this preliminary stage.

Criminals increasingly develop sophisticated ways of concealing their illicitly acquired assets without respecting borders. Efforts to recover them must cross borders. However, a jurisdiction where assets have been hidden will not confiscate or repatriate the assets to the country of origin unless evidence is presented, linking them to an illegal activity.[167] Therefore, whether assets

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165 (2001) 1 A.C 102, 128.

166 Ladan, M.T., *op cit.*

167 Lasich, T., "The Investigative Process-A Practical Approach," in Basel Institute on Governance, International Centre for Asset Recovery, Tracing *Stolen Assets:*

are located within or outside the country, the evidence should "establish that the targeted assets derive directly or indirectly from the commission of a crime."[168] It is at this stage where investigation is instituted for that purpose and other stages that follow thereafter. The role of investigators in this endeavour is not only to locate assets but also the manner in which criminals hold those assets.

In view of the above, investigators should in the course of investigation strive to meet three objectives namely, locating the assets, linking them to an unlawful activity and proving the commission of a predicate offence. Identification and tracing of the proceeds of crime and securing the property for final confiscation are essential and integral parts of the whole asset recovery process. It is at this stage where investigators not only strive to locate the assets but also gather evidence that establishes the manner of holding assets and link them with criminality. As such, investigators trace assets for the purpose of freezing and seizing them, so that these assets can ultimately be confiscated through a judicial order and returned to the victims of crime.[169] This is an uphill task which should be conducted in parallel with investigation of predicate offence, which is a criminal offence generating material benefit. It is sometimes very challenging to gather evidence which links the assets and instrumentalities of crime to the criminal activities. The reason behind this is that criminals always seek to transfer and hide assets that are illicitly acquired. They are readily prepared to exploit any available

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A Practitioner's Handbook, Basel Institute on Governance, Basel, Switzerland, 2009, pp.49-60, p.49.

168 UNODC, *Manual on International Cooperation for the Purposes of Confiscation of Proceeds of Crime*, United Nations, Vienna International Centre, Vienna, Austria, September 2012, p.35.

169 Monteith, C. and Dornbierer, A., *Tracking and Tracing Stolen Assets in Foreign Jurisdictions*, International Centre for Asset Recovery, Basel Institute on Governance, Basel, Switzerland, Working Paper Series No.15, 2013, p.10. Source*: http://www.fatf-gafi.org/pages/faq/Moneylaundering*, accessed on 10th November, 2015.

opportunity at any cost in order to obscure the location and path of the assets. It is no wonder that at times they transfer assets to multiple-jurisdictions in order to make it difficult to identify and recover them. Some of these otherwise known as off-shore jurisdictions frequently have regulatory setups and secrecy laws that are designed to obscure links to money with shell companies and nominee directors.[170] This is an outright informal and financial obstacle to asset recovery particularly to most developing countries where capital flight is at a very staggering stage.

One of the challenging factors to most developing countries, including Tanzania, is that they have a cash-based economy where funds do not often flow through the established financial systems. As such efforts to trace and track suspected financial flows may prove futile. As a result, it becomes difficult to gather evidence which links the assets to criminal activities. This explains why the task of identifying and tracing the proceeds of crime requires a multi-sectored approach.

Law enforcement officers should therefore, involve various sectors and institutions to gather intelligence and evidence that enable identifying and tracing of assets. Identifying and tracing of assets involve locating the assets and linking them to the crime and the offender through accessing various sources. Such sources may include gathering information from, among others, individual persons (whistleblowers),[171] law enforcement and other government agency databases as well as accessing public registers namely, company records, tax records, land registry, vehicle registration register, criminal records, register of bank accounts, immigration records, border

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[170] Rick, R., "Asset Recovery US," *Lawyer Monthly*, December 2013, *Source*: *www.lawyer-monthly.com,* accessed on 18th June, 2017.

[171] Whistleblowers play a fundamental role in exposing criminals who are associated with illicitly acquired assets. Therefore, they need adequate legal protection. The enactment of the Whistleblower and Witness Protection Act, 2015, Act No. 20 of 2015, in Tanzania is a step forward towards achieving that goal.

crossing and customs records, business information and records. In such instances, a very comprehensive investigation should be carried out. It is through investigation that proceeds and instrumentalities of crime are revealed; especially when they are concealed with a view to hiding their origins.

In addition to often providing evidence of criminal intent and identifying otherwise unknown accomplices, tracing through tracking the ownership trail may also lead to the seizure of property constituting illegal proceeds.[172] It is therefore important to rapidly locate and freeze assets reasonably believed to have been criminally acquired lest they dissipate.

The Proceeds of Crime Act, which is the main law to govern criminally acquired assets in the country, provides for both substantive and procedural aspects of recovering proceeds and instrumentalities of crime located within and outside the country.[173] The Act provides for investigative powers to a police officer to identify and trace any property believed to be tainted property.[174] As such a police officer may enter into any premises and conduct a search if he believes on reasonable grounds that there is tainted property on such premises.[175] The officer may seize any property found in the course of the search which the officer believes, on reasonable grounds, to be tainted property.[176] The Act mandatorily requires a police officer to seek and obtain

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172 Atkinson, P., "Introduction," in International Centre for Asset Recovery, *Tracing Stolen Assets: A Practitioner's Handbook*, Basel Institute on Governance, Basel, 2009, pp.19-22, p.19.

173 See Mbagwa, A.A., *The Role of Procedural Laws in Asset Recovery: A Roadmap for Tanzania*, Research Paper Submitted in Partial Fulfilment of the Degree of Masters of Laws: Transnational Criminal Justice and Crime Prevention - An International and African Perspective, University of the Western Cape, South Africa, 2014, p. 49.

174 Cap. 256 [R.E. 2019], s. 31(1).

175 Cap. 256 [R.E. 2019], s. 31(2).

176 *Ibid*., s.31(3).

a search warrant from court before conducting a search.[177] It is apparent that a search warrant, being a written authority, is, generally speaking, a condition for validating the search. The police officer must have it duly and properly issued. The High Court of Tanzania has had the opportunity to address its mind on what a regular search should be in the case of *Exad and Obedi v. R.*[178] where Kwikima, Ag.J. (as he then was) stated that:

It seems to me that there is only one condition for a search to be regular and it is this; that the police officer conducting the search must have a warrant duly and properly issued. Although it is in the interest of those searching to call independent witnesses, there is no legal provision calling for such procedure."

Katiti, J. echoed similar words in the case of *Wilfred Mahendeka v. R.*[179] when he stated that: PW.4 as Police Officer went to search the appellant's house, forcefully, but the appellant's condition precedent for his house being searched, was mainly the presentation of a search warrant, and the presence of his ten-cell-leader, and none of these were available. We no doubt appreciate that a Police Officer has the obligation and duty to take steps for the keeping of peace, for the prosecution of crime, for detection of crime, and bringing the offenders to justice, and protecting property from criminal injury. While this is very true, does the law play laiss'ez-faire, allowing indiscriminate violation of the citizens privacy - in his own kingdom – his house, in the pursuit of the above objectives? It seems, the law of this country under section 118 of the Criminal Procedure Code, does treat certain areas, like a building, or house with respect, and may be searched, by a Police Officer when armed with a search warrant, issued by the Court, where it has

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177 *Ibid*., s.32.

178 (1971) HCD n.283. On the need for a search warrant duly signed, see the case of *Mathew Stephen @ Lawrence v. R.*, Court of Appeal of Tanzania at Arusha, Criminal Appeal No.19 of 2007 (Unreported).

179 [1981] TLR 81, 84.

been proved on oath to the Court, that in fact, or, according to reasonable suspicions, property or anything, in respect of which an offence has been committed, for which investigation is necessary, is in the said building. The requirement on oath signifies that, on no trivial ground, should a building or a house be searched, presumed as it should be, that one taking an oath is serious.[180]

However, a Police Officer may enter into premises and conduct a search and seize a tainted property without the authority of an order of the court or a court warrant where he believes on reasonable grounds that it is necessary to do so in order to prevent the concealment, loss or destruction of the tainted property, or circumstances of the seriousness and urgency require and justify immediate intervention.[181] On this note, sometimes search and seizure may be carried out even in the absence of the accused as it happened in the case of *Rajabu Athumani v. R.*[182] In this case the accused was convicted of burglary and stealing. The main matter raised on appeal was his contention that the conviction should be quashed because it was based upon the finding of the stolen property in his house when he was not present. It was not contended that the search was invalid in any other way. It was held that absence of accused does not invalidate search of premises. Hamlyn, J. stated that:

It is desirable but not necessary that a search by a police to private premises be conducted in the presence of the owner or inhabitant. But the fact that

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[180] Practice, however, shows that police officers hardly apply for search warrants in court. Given the nature of criminality, the time factor matters a lot. Sometimes any slightest delay may impede, inhibit or even defeat successful investigations. It is on this ground that a police officer in charge of a police station is allowed under section 35 of the Police Force and Auxiliary Services Act, Cap. 322 [R.E. 2002] to issue a written authority namely, a search order to any police officer under him.

[181] The Criminal Procedure Act, Cap. 20 [R.E 2019], s.42 and Cap. 256 [R.E. 2019], s. 34.

[182] (1967) HCD n.449.

the owner was not present at the time does not invalidate the search. It is of course a simple safeguard for the searching officer to be accompanied by independent persons of the locality, who can be called to give evidence that the search was properly and fairly conducted and that no question of 'planting' any property on the premises can be raised.

A police officer is further empowered to enter into and search any premises for any property-tracking document in relation to a serious offence; and seize any document found in the course of the search which he believes, on reasonable grounds, to be a property-tracking document in relation to the serious offence.[183] The document is very important to the investigator because it is relevant to identifying, locating and quantifying a tainted property or any property of an offender of a serious offence.[184] Entry and conducting of the search by the officer should be authorised by court order. Furthermore, where a police officer has reasonable grounds to suspect that a person has in his possession or control a property-tracking document, he may apply to a court for an order directing the person to produce to the police officer a document prescribed in the order.[185] A person against whom a production order is issued cannot refuse to produce it on the ground that its production might tend to incriminate him or make him liable to a penalty or would be in breach of any obligation or privilege not to disclose the existence or contents of the document.[186] Where a document is produced to the police officer, he may inspect, take extracts from, make copies of or retain the document.[187] The provision is a breakthrough in asset recovery as it denies criminals the opportunity to conceal illicit assets and evidence on the

[183] *Ibid.*, s.62.
[184] *Ibid.*, s.3.
[185] *Ibid.*, s.58(1).
[186] *Ibid.*, s.58(8).
[187] *Ibid.*, s.58(6).

basis of confidentiality, thereby clearing the way for the recovery of illegal assets.[188]

(ii) Investigation of a Bank Account

Part of proceeds of crime usually ends up as deposits in domestic or foreign banks or is concealed by acquiring other assets. Moreover, when assets flow through the financial system, the transfer of funds in and out of the accounts usually leaves an audit trail, which can be tracked and detected.[189] Therefore investigators need to have access to bank accounts and bank records of persons who are alleged to have assets that were acquired through criminal activities. Access to a bank account by an investigator who is conducting asset identification and tracing is of fundamental importance. It, *inter alia,* enables the investigator not only to have real-time financial surveillance of the ongoing suspicious transactions but also to establish trend and pattern of activities and identify new accounts, which are connected with the one under investigation. Investigation of a bank account may also reveal other persons who might be connected with facilitating concealment of criminally acquired assets. In case of large cash withdrawals, it may also present opportunities for cash seizure as the locations will be revealed.[190]

The Proceeds of Crime Act provides access to investigators to have access to bank account of any person who has been involved in the commission of a serious offence, a predicate offence or money laundering and where there is likelihood of finding evidence on the commission of such offence in a bank account kept by that person, spouse or child or of any person reasonably believed to be a trustee or agent of such person.[191] In such a situation, the Inspector General of Police (IGP) or the Director of Criminal Investigation

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188 Mbagwa, *op cit*., p.51.

189 Monteith, C. and Dornbierer, A., *op cit*., p.13.

190 Brun, J-P. *et al., Asset Recovery Handbook: A Guide for Practitioners*, StAR Initiative, Washington DC, 2011, p.53.

191 Cap. 256 [R.E. 2019], s. 63A.

is empowered to authorise and direct a police officer of or above the rank of Assistant Superintendent of Police to investigate the bank account.[192] Such authorisation is sufficient to warrant the production of the bank account for scrutiny by that police officer.[193] The authorisation also warrants the police officer to freeze a bank account and seize any document from that bank or financial institution for fourteen days during which leave of the court for continued seizure and freezing shall be obtained.[194]

The law mandatorily requires bank officials to cooperate with the investigator lest they risk penal sanctions against them. Any person who fails to produce a bank account when required to do so or obstructs a police officer from scrutinising the bank account or take copies of any relevant entries from the bank account commits an offence punishable to a prison term not exceeding two years or a fine of not less than one million shillings or both.[195]

Furthermore, the court, upon application by the DPP, may issue a monitoring order directing a financial institution to give information to the IGP about financial transactions conducted through an account held by a particular person with that financial institution for a period specified in the order.[196] A financial institution so directed is compelled to comply with the order. Failure to do so through contravening an order or providing false or misleading information is punishable by law.[197]

It is upon the Inspector General of Police or other officer authorised by him to arrange for the seized property to be kept under safe custody and ensure

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192 Cap. 256 [R.E. 2019], s. 31A as amended by section 95 of the Written Laws (Miscellaneous Amendments) (No.2) Act, 2018, Act No.7 of 2018.
193 *Ibid.*
194 *Ibid.* s.31A.
195 *Ibid.*, s.63A (3).
196 *Ibid.*, s.65 (1) and (2).
197 *Ibid.*, s.65 (5).

that all reasonable steps are taken to preserve it. The aim of so keeping the property is twofold: (a) to preserve its evidential value before it is tendered in court as an exhibit; and (b) to preserve the economic value of the property for both realisation and returning it to its legitimate owner where no forfeiture order is made against it.[198]

Tracing Assets Overseas: The Need for Mutual Legal Assistance

As mentioned in the preceding chapters, some of the illegally acquired assets cross borders such that investigation thereof should inevitably be multi-jurisdictional. Therefore, investigations which involve "follow the money" trail may at times require going beyond national jurisdiction. In this instance, investigators often will require assistance in tracing the flow of the money through foreign jurisdiction in order to identify the assets and link them to the predicate offence, which is subject to the investigation.[199] It has been noted that:

Identifying the proceeds of crime is often a complex and time consuming process that frequently crosses national borders, as evidence and assets are not always found exclusively in the state conducting the investigation, prosecution or judicial proceedings. As a result, one state will normally require the assistance of other states in locating offenders, witnesses, evidence and, in particular, assets. Stolen assets are usually quickly removed abroad to try to get them out of reach of the investigating jurisdiction where

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198 *Ibid*., s.35. See also Diwa, Z.M., *Managing the Proceeds of Crime: A Critical Analysis of the Tanzanian Legal Framework,* Research Paper Submitted in Partial Fulfilment of the Degree of Masters of Laws: Transnational Criminal Justice and Crime Prevention - An International and African Perspective, University of the Western Cape, South Africa, 2013, p.48.

199 Zinkernagel, G.F. *et al., The Role of Donors in the Recovery of Stolen Assets,* International Centre for Asset Recovery and Anti- Corruption Resource Centre, Chr. Michelsen Institute, U4 Issue, December 2014 No.8, p.15.

the predicate offence takes place - hence the particular importance of international cooperation in identifying, locating and seizing stolen assets.[200]

However, there are difficulties that are linked to the situation in the requesting state. From a strictly legal perspective, the most frequently encountered difficulties stem from ignorance on the part of the requesting authorities of the conditions which the requested state imposes on investigations by its national authorities.[201] Action by those authorities is usually subject to the principle of dual criminality, according to which the requested state will only act if the crime which gave rise to the assets to be seized, and then confiscated, also constitutes a criminal offence under its national law.[202]

Tanzania being part and parcel of the globe is increasingly dependent upon assistance from foreign jurisdiction in seeking to investigate and prosecute criminals. This is in full recognition of the fact that foreign countries are often destinations of criminally acquired assets. Hence, the country requires transnational cooperation in tracing of the assets. The legal and institutional framework in the country is geared to increase cooperation with foreign law enforcement and jurisdictions in order to facilitate mutual assistance in criminal matters. The enactment in 1991 of the Mutual Assistance in Criminal Matters Act,[203] which should be read together with the Proceeds of Crime Act,[204] in this respect provides an avenue through which seeking assistance from foreign jurisdiction in the fight against criminally acquired assets can be

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200 Institute for Asset Recovery, *Illegal Assets: A Practitioner's Guide,* Basel Institute on Governance, Basel, Switzerland, 2015, p.53.

201 Bertossa, B., "What Makes Asset Recovery so Difficult in Practice?: A Practitioner's Perspective," in Pieth, M. (Ed.), *Recovering Stolen Assets*, Peter Lang, Oxford, 2008, pp.19-27, p.24.

202 *Ibid.*

203 Cap. 254 [R.E. 2002].

204 Cap. 256 [R.E.2019].

effected.[205] The Act, which is the main piece of legislation that governs international cooperation in all criminal matters, authorises the DPP to seek assistance in foreign countries in respect of the identification and tracing of tainted property if there are pending criminal proceedings or criminal investigation in Tanzania in relation to a specified offence.[206] Matters on which the DPP requests for assistance include a search warrant for tainted property, an interdiction, a production order in respect of a property-tracking document, a search warrant in respect of a property-tracking document, or a monitoring order.[207]

Securing the Assets

As noted above, the stages towards full realisation of asset recovery are related, connected and interdependent. This can be seen from the discussion on identification and tracing the assets where thorough investigation is involved. The discussion necessarily touched on freezing and seizure of the assets alleged to have been acquired through criminal activities. In fact freezing and seizing of the assets are provisional measures to preserve assets pending forfeiture.[208] Having done so, the discussion now goes into detail of this second stage namely securing the frozen and seized assets, which is in essence preserving the evidence obtained. It needs to be appreciated that at times organised crime and asset tracing investigation may take a long time to complete. As such possibilities of assets being dissipated or transferred

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205 The long title of the Act states that this is an Act to provide for mutual assistance in criminal matters between Tanzania and foreign countries; to facilitate the provision and obtaining by Tanzania of such assistance and to provide for related matters. This explains that this Act is the main piece of legislation that governs international cooperation in all criminal matters.

206 Cap. 254 [R.E. 2002], s.31. Under section 8 of the Act, any request by Tanzania for assistance in any criminal matter in terms of this Act shall be made by the DPP.

207 *Ibid.*

208 According to UNODC, *op cit.*, p.2, the term "freezing" is defined as temporarily prohibiting the transfer, conversion, disposition or movement of property, usually on the basis of an order issued by a court or a competent authority. The term is used interchangeably with "restraining", "attachment", "preservation" or "blocking."

cannot be ruled out altogether. Therefore, provisional preservation measures are taken for the purpose of securing the assets from being wasted, lost or improperly disposed of until forfeiture proceedings are instituted. All this is done to ensure that the assets are available to satisfy a final forfeiture order.[209]

Restraining Order

According to the Proceeds of Crime Act, securing of assets is effected through a restraining order issued by court upon an application made by the DPP.[210] As noted above, the order is aimed at ensuring that the proceeds and instrumentalities of crime are not dissipated by an accused person before a forfeiture order is made by the court. Ordinarily, applications for restraint orders are made against property of a person who has not been charged but is expected to be charged,[211] or has been charged but is not yet convicted[212] or has been convicted of a serious offence.[213] Persons affected by a restraint order are deprived of property rights pertaining to property to which the restraint order applies.[214] They are prohibited from dealing in any manner with the property.[215]

The restraint order issued by a court remains in force until the criminal charge against the person in relation to whom the order was issued is withdrawn or

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209 See Adekunle, A., *Proceeds of Crime in Nigeria: Getting our Act Together,* Inaugural Lecture Series, Nigerian Institute of Advanced Legal Studies, Lagos, Nigeria, 2011, p.18.

210 Cap. 256 [R.E. 2019], s. 38(1). See specimen of a Restraining Order in Appendix "I" on pp. 363-364 of the Thesis for illustration.

211 *Ibid*, section 38(1) and 39(4).

212 *Ibid*, section 38(1) and 39(3).

213 *Ibid*, section 38(1), 39(1) and (2). See also Mganga, B.E.K.., "Confiscation of Proceeds of Crime: The Law and Practice in Tanzania," *National Prosecutions Service Journal*, Issue No. 002 April-June 2013, pp.14-15.

214 Basdeo, V., "The Law and Practice of Criminal Asset Forfeiture in South African Criminal Procedure: A Constitutional Dilemma," *Potchefstroom Electronic Law Journal/Potchefstroomse Electroniese Regsblad [PELJ/PER]*, 2014 Vol.17 No.3, pp.1048-1069, p.1053. Source: *http://dx.doi.org/10.4314/pelj.v17i3.06*, accessed on 25 March 2017.

215 *Ibid.*

such person is acquitted of the charge.[216] Also the order ceases to have effect when the confiscation order is satisfied or discharged.[217]

Forfeiture through Court Process

The third stage in the asset recovery process is the forfeiture of identified assets that are said to have been acquired through criminal activities. Forfeiture is effected through court due process. As already noted in the foregoing chapters, forfeiture under the Proceeds of Crime Act is generally conviction based. It means that a conviction for commission of a serious offence is a precondition for forfeiture.[218]

Application for Forfeiture Order

Under Part II of the Proceeds of Crime Act, where a person is convicted of a serious offence, the DPP may, within six months of the conviction of a person of a serious offence, apply to the convicting court for a forfeiture order against any property that is tainted property in respect of the offence.[219] Upon application, the DPP has to give notice to the person convicted and to any other person interested in the property to be forfeited.[220] The purpose of the notice so given is to enable the person convicted and any other person interested in the property to be forfeited to appear and resist the application.[221] The court is empowered under the Act to exclude interest of the person from the property that is subject to forfeiture upon satisfaction that he was not in any way involved in the commission of the offence concerned; or at the time he acquired his interest or after the commission of

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216 Cap. 256 [R.E. 2019], s. 52(1).

217 *Ibid*., s.52(2).

218 According to the Written Laws (Miscellaneous Amendments) Act, 2007, Act No.15 of 2007, which amended, among other laws, the Proceeds of Crime Act, Cap. 256 [R.E. 2019], the term "serious offence" means money laundering and includes a predicate offence.

219 Cap. 256 [R.E. 2019], s. 9(1).

220 *Ibid*, s.10.

221 *Ibid*.

the offence he did not have knowledge that the property was tainted property.[222] Tainted property means any property used in, or in connection with commission of the offence; or any proceeds of the offence.[223] The court may grant a forfeiture order if it is satisfied that the property is tainted property.[224] The standard of proof to obtain a forfeiture order is on a balance of probabilities.[225] The standard of proof regarding balance of probabilities is well articulated in the English case of *Miller v. Minister of Pensions*[226] where Lord Denning states that:

That degree is well settled. It must carry a reasonable degree of probability, not so high as is required in a criminal case. If the evidence is such that the tribunal can say: "*we think it more probable than not*", the burden is discharged, but if the probabilities are equal it is not.

Enforcement of a Forfeiture Order

When the court grants a forfeiture order, the said order has to be enforced. The DPP is empowered under the National Prosecutions Service Act[227] to take any appropriate measures to enforce the forfeiture order. The enforcement of the forfeiture order is effected domestically and in foreign jurisdictions using mutual legal assistance. In other words, assets that are located outside the country can be forfeited through making a formal request to the foreign country to that effect. It means that if the assets are located in a foreign jurisdiction, a mutual legal assistance request must be submitted. It

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222 Cap. 256 [R.E. 2019], s. 16(6).

223 *Ibid*., s.9(1).

224 *Ibid*., s.14(1). See the case of *Director of Public Prosecutions v. Jackson Sifael Mtares and Three Others*, High Court of Tanzania, Dar es Salaam Registry at Dar es Salaam, Criminal Application No.42 of 2019 (Unreported), where forfeiture orders were granted.

225 *Ibid.,* s.75.

226 [1947] 2 All E.R.372.

227 Cap. 430 [R.E. 2019]. s.12.

is well settled under the Mutual Assistance in Criminal Matters Act[228] where the assets are in a foreign country, the DPP may request the foreign country to enforce it.[229] The order may then be enforced by authorities in the foreign jurisdiction through directly registering and enforcing it.[230] Normally the forfeited property is vested in the United Republic of Tanzania and is registered in the name of the Treasury Registrar on behalf of the United Republic of Tanzania.

Return of Assets

An enforcement of a forfeiture order in a foreign jurisdiction following a court order opens room for arrangements in respect of returning of forfeited assets to the requesting jurisdiction. The United Nations Convention against Corruption (UNCAC) makes it a mandatory obligation to State Parties to return illicitly acquired assets to the requesting or victim state.[231] Tanzania takes into account this international obligation through making use of the provisions of the Mutual Assistance in Criminal Matters Act to request the foreign jurisdiction where the looted wealth is hidden to be returned.[232] In the same vein, the Act empowers the DPP to order the return of forfeited property located in the country or its value to the requesting or victim state.[233] The Act, however, makes it optional for the DPP to order the return of forfeited property to the requesting countries. This is quite contrary to what is envisaged in UNCAC, where State Parties are mandatorily obliged to return the forfeited assets to the requesting states. All in all, it is imperative that state parties are obliged to return proceeds of crime that are hidden in their

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228 Cap. 254 [R.E. 2002], s.4.

229 *Ibid*., s.4.

230 See United Nations Convention against Corruption (UNCAC), art.54 and 55; United Nations Convention against Transnational Organised Crime (UNTOC), art.13; United Nations Convention against Narcotics Drugs and Psychotropic Substances, art.5; and the Terrorist Financing Convention, art.8.

231 UNCAC, Art.57.

232 Cap. 254 [R.E. 2002], s.4.

233 *Ibid*., s.32A.

jurisdictions to requesting or victim states. Short of that is tantamount to declaring victory to the criminals.

It should, however, be noted that enforcing asset recovery is often very complex. There are some difficulties that emerge in the course of the repatriation process. One of the glaring examples is the return dilemma that is prevalent in the requested countries and the international community as a whole whereby they do not want to see repatriated assets embezzled or mismanaged all over again. Such concern was raised by Switzerland during the asset recovery case of General Sani Abacha of Nigeria.[234] Also in Peru the funds gained from Montesino's concealed accounts around the world were not optimally used.[235]

4. CONCLUSION

This article has appraised the legal and institutional framework on asset recovery, which is in place in the country. It has gone into some details on what is offered by the law and the expected roles to be played by institutions that are involved in the whole asset recovery process. In the course of the discussion, challenges that face some of the institutions were revealed. From the discussion, it is apparent that an adequate legal and institutional framework on asset recovery has to be in place in order to have better performance. To achieve all this, all stakeholders to the asset recovery process need to play instrumental roles. It should be noted at this end that better performance in the asset recovery process cannot be achieved single handedly.

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234 Kingah, S., "The Effectiveness of International and Regional Measures in Recovering Assets Stolen from Poor Countries," *University of Botswana Law Journal*, Volume 13, December 2011, pp.3-26, at p.18.

235 *Ibid.*

5. RECOMMENDATIONS

Basing on the above conclusion, the following recommendations are made with the view to improving performance of the current legal and institutional framework on asset recovery in Tanzania:

5.1 The Need for Adequate Funding of Law Enforcement Agencies and other Actors

Budget constraints have been for a long time hampering law enforcement agencies (LEAs) and other actors in the whole asset recovery processes and mechanisms. As has been noted, asset recovery is very costly. In order for the state to expect successful results, it is important that those who are involved in all stages of dealing with asset recovery cases should be allocated enough funds. It should be noted that investigation and prosecution of financial crime cases are somehow different from ordinary cases because the former involves some technical issues, which have financial implications, for instance in terms of travelling and such other matters.

5.2 Enhanced Capacity Building to Officials of all Key Institutions that are Involved in the Administration of Criminal Justice

There is no doubt that in order to make the legal-institutional framework on asset recovery operative, several institutions in the administration of criminal justice should be in place. Those institutions have a shared responsibility of ensuring that they effectively perform their respective duties. Officials of all grades in those institutions should be given capacity in terms of training and equipment so that they undertake matters pertaining to asset recovery without any hesitation.

The main objective is to ensure that they are all knowledgeable on asset recovery issues so that they fully and effectively involve themselves in the whole asset recovery process.

5.3 Reforming Laws

There is an urgent need to review the existing laws in order to ensure that they take pace with an emergence of criminality generally and the way asset recovery should be addressed in particular. In order to have a better law to cater for asset recovery issues, law reform bodies and other stakeholders should review the current laws on asset recovery to that effect.

5.4 Enhancing Effective Cooperation and Collaboration among LEAs and Institutions that are involved in Asset Recovery

It is strongly recommended that cooperation and collaboration among all stakeholders, ranging from LEAs, institutions, to other actors who in one way or the other deal with asset recovery issues should be enhanced. They should be well coordinated to facilitate quick sharing of information in areas such as joint investigation and prosecutorial efforts. It is argued that so far inter-banking links and working relations are still poor, particularly in recovering assets in the monetary forms.

5.5 Encouragement of Tanzanians to Adopt Cashless Based Economy

There is an urgent need for Tanzanians to transact in cashless ways so as to reduce the possibility of dealing with hard cash, which gives favourable conditions for criminals to make their dirty money exchange hands unnoticed. The Bank of Tanzania Act, 2006[236] should be amended to put a limit to cash payments. It has been noted that most elites in urban centres accept cash payments as a way to avoid paying income tax and those in rural areas lack access to formal banking institutions. Initiatives to adopt digital payment systems should therefore be enhanced. Banks and financial institutions as well as policy makers should take up the matter to tap into "the vast amount of cash/liquidity outside the banking system."[237] This should,

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[236] Act No.4 of 2006.

[237] An address by Prof. Benno Ndulu, then BoT Governor, that he made to the 18th Conference of Financial Institutions on 24th November, 2016 in Arusha. Source:

however, be preceded by strengthening banking and financial institutions. Otherwise an adoption of a cashless based economy is the best option for not only enabling citizenry to pay taxes effectively but also enhancing identifying and tracing of proceeds of crime.

5.6 The Need for Shared Common Understanding among LEAs

More efforts are needed to develop a shared common understanding among LEAs and other stakeholders in the whole asset recovery process so that they perform effectively and efficiently. It is upon doing so, that stakeholders, actors and other institutions that have a role to play in law enforcement can provide support in terms of technical expertise and knowledge, financial and other logistical support.

5.7 Consolidation of Institutions that Deal with Asset Recovery into One Body

There is a need to consolidate the institutions that deal with asset recovery in order to have one body in the country. The current legal and institutional framework is to the effect that Tanzania has so far several institutions on asset recovery whose lines of responsibilities tend them to work more or less independently on their mandates. It becomes difficult to hold each of them responsible when addressing asset recovery issues. Thus, a single and comprehensive body will undertake asset recovery issues responsibly.

Guardian Newspaper, Friday, 25th November, 2016, The Guardian Limited, Dar es Salaam, p.1.