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Article

A Rule of Law Analysis: Botswana's Non-Conviction-Based Confiscation and Forfeiture Regime Under the Proceeds and Instruments of Crime Act, 2014

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ABSTRACT

On its inception, the non-conviction-based asset confiscation and forfeiture regime attracted both praise and criticism. Using the Rule of Law as an analytic framework, this paper evaluates the non-conviction-based asset confiscation and forfeiture regime under Botswana's Proceeds and Instruments of Crime Act, 2014. The paper finds that whilst the regime has withstood constitutional attacks, it still retains some shortcomings. For instance, there is lack of clarity on the standards of proof, procedures and inadequate protection of third-party rights. The paper recommends reforms.

1. INTRODUCTION

Prior to 2014, Botswana's Anti-Money Laundering/Combating of the Financing of Terrorism (AML/CFT) regime was fragmented[1] and suffered from poor implementation.[2] Significant legal reforms to Botswana's AML/CFT regime were prompted by at least two critical incidents. In 2007, a Mutual Evaluation Report published by the Eastern and Southern Africa Anti-Money Laundering Group found that Botswana's AML/CFT regime had strategic deficiencies and called for reforms. When the country dragged its legs, the Financial Action Task Force (FATF)

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[1] The regime was governed by different laws and institutions. The Botswana Police Service (BPS), the Directorate on Corruption and Economic Crime (DCEC), Botswana Revenue Services (BURS) and the Bank of Botswana (BOB) all played a part in the regime.

[2] Eastern and Southern Africa Anti-Money Laundering Group (ESAAMLG), *Anti-money laundering and counter-terrorist financing measures—Botswana, Second Round Mutual Evaluation Report*, ESAAMLG (2007) <www.esaamlg.org/reports/me.ph> accessed 13 March 2022. Also see a summary of the evolution of the regime by Goemeone EJ Mogomotsi, 'An Examination of the Financial Intelligence Act of Botswana' (2019) 44 CODESRIA Afr Dev <www.jstor.org/stable/26873442> accessed 24 March 2022.

put Botswana in the watchdog's list of countries with strategic deficiencies in their AML/CFT regime. These incidents triggered a flurry of legislative and institutional reform in the country's AML/CFT regime. The outcome of these reforms culminated in the enactment of the Financial Intelligence Agency Act,[3] the Counter Terrorism Act,[4] and the Proceeds and Instruments of Crime Act (PICA)[5] and amendments to several other affected pieces of legislation. Amongst these laws, the PICA, the *lex specialis* of Botswana's confiscation regime, is one of the heavily litigated statutes which has also undergone constitutional challenges. One of the reasons for this is because the PICA introduces a novel system of asset confiscation and forfeiture that does not require a prior conviction. This system, which has attracted both praise and criticism, is the focus of this paper.

The PICA operates two systems of confiscation and forfeiture of proceeds and instruments of crime—a conviction-based system and a newly introduced non-conviction-based system.[6] The conviction-based system requires a court to order forfeiture of proceeds and instruments used in the commission of crime once the accused is convicted of a specified crime. Because of its basis on a conviction, that is, proof of criminal conduct beyond reasonable doubt, it has never attracted criticism. That, however, is not the case with the non-conviction-based system. Under this system, a court may order forfeiture of an individual's property based on suspicion of criminal conduct without any proof of criminal conduct beyond reasonable doubt. It is the most radical and intrusive measure yet devised to deprive individuals from reaping the fruits of their crimes. It has been condemned for being manifestly unfair, open to abuse, and draconian.[7] The approach in dealing with these concerns has predominantly entailed failed constitutional challenges. Despite its benefits, there is no scholarship that subjects the Botswana confiscation regime to the rigorous and reform-oriented standards of the Rule of Law (RoL).[8] However, similar regimes have been tested.[9] Using a higher standard of analysis—the RoL framework—this paper evaluates the PICA confiscation regime.

The paper is arranged as follows. First, the paper sets out the RoL analytical framework. Second, it examines the history of asset confiscation and its development in Botswana. Third, the paper interrogates the non-conviction-based system of confiscation and forfeiture of proceeds and instruments of crime and makes concluding remarks at the end. Lastly, the paper makes recommendations for reform.

2. THE ROL ANALYTICAL FRAMEWORK

Courts in Botswana frequently declare Botswana's respect for the RoL. In *Good* v. *The Attorney General*, the Court of Appeal stated that it '... is undisputed and beyond argument that Botswana has always respected the rule of law...'[10] Whilst the RoL is a familiar notion in Botswana, its theorical underpinnings and its exact content are hardly ever examined.[11] This leaves the content

[3] Act 11 of 2019, Laws of Botswana.
[4] Act 24 of 2014, Laws of Botswana.
[5] Act 28 of 2014, Laws of Botswana (PICA).
[6] Prior to PICA 2014, Botswana only applied the conviction-based system.
[7] Mpho Keleboge, 'The Battle against PICA Continues' *Sunday Standard* (Botswana, 5 August 2019) <www.sundaystandard.info/the-battle-against-pica-continuesoca/> last accessed on 10 March 2022.
[8] Goemeone EJ Mogomotsi, 'The Analysis of Non-Conviction-Based Property Confiscation and Forfeiture Regulatory Regime in Botswana' Statut Law Rev, 2021 only carries out a general discussion of the regime <academic.oup.com/slr/advance-article/doi/10.1093/slr/hmab012/6256016> accessed on 24 March 2022.
[9] V Mitsilegas and N Vavoula, 'The Evolving EU Anti-Money Laundering Regime: Challenges for Fundamental Rights and the Rule of Law' (2016) 23 Maastricht J Eur Comp L 261–93. See also Sir Ivan Lawrence QC, 'Draconian and Manifestly Unjust: How the Confiscation Regime has Developed' (The 26th Cambridge International Symposium on Economic Crime at Jesus College, Cambridge, 5 September 2008) <sas-space.sas.ac.uk/2065/1/Amicus76_Lawrence.pdf> accessed on 24 March 2022.
[10] *Good* v. *The Attorney General* (2) 2005 (2) BLR 337, 343 (CA).
[11] See, e.g., *Good* v. *The Attorney General* (n 10), *Petrus and Another* v. *The State* [1984] BLR 14, 36 (CA); *Attorney General and Others* v. *Tapela and Others* [2018] 2 BLR 118, 134 (CA); *Collins Newman & Co and Others* v. *Geniuspoint Investments* (Pty) *Ltd and Others* [2018] 2 BLR 140 HC.

of the RoL unexplained and results in an unsatisfactory application of the concept in case law. This section briefly explores the theorical underpinnings of the RoL, its content, and highlights the contested nature of the RoL.

The RoL has its origins in classical Greek thought.[12] Even though it is an 'exceedingly elusive notion',[13] the doctrine of the RoL provides a standard of excellence through which legal systems can be measured. Its basic intuition is that the law must be capable of guiding its subjects[14] and that 'all persons and authorities within the state, whether public or private, should be bound by and entitled to the benefit of laws publicly made, taking effect (generally) in the future and publicly administered by the courts'.[15] Thus, it provides procedural and substantive requirements for a fair legal system. That is why it has been referred by some as an honorific term.[16] In that sense, it is a political doctrine—it regulates political decision-making, the formulation and design of rules.[17] Like many concepts in law, it is a contested concept with clusters of meanings. For instance, there is disagreement amongst scholars as to whether it relates to process or outcome, whether its basis is natural law or positive law, what the ideal RoL should entail and fundamentally, whether there is a universal standard for all nations to comply with. Legal theory normally categorizes the requirements of the RoL into formal and substantive requirements. Even this classification is far from disputation.[18] Formal requirements,[19] which represent the dominant understanding of the RoL,[20] deal with the manner of enacting the law, the requirement of clarity of the law, and its temporal dimension—that is, whether laws should be retrospective or prospective. Substantive requirements govern the content of the law and address the concern that formal requirements of the RoL are devoid of content and fail to stipulate standards based on the content of the law. These conceptions incorporate notions of rights and democracy within the fabric of the RoL.[21] The RoL remains a significant norm. It has been held that there is a presumption that Parliament does not legislate contrary to the RoL.[22] The RoL forms part of the constitutions of some jurisdictions. For instance, the section 1 of Constitution of South Africa provides that it is founded on the values of supremacy of the constitution and the rule of law.[23] In addition, the RoL forms part of some important international law treaties such as the United Nations Declaration on Human Rights.[24]

As this paper applies the RoL as an analytical framework, it is important to be clear on what the content of the RoL is. Contemporary notions of the RoL appear to integrate both the formal and substantive requirements of the RoL. Tom Bingham lists eight ingredients of the RoL entail the following: the law must be accessible, intelligible, clear, and predictable; questions of legal right and liability should ordinarily be resolved by application of the law and not exercise of discretion; ministers and public officers must exercise the powers conferred on them in good faith;

[12] A history of this concept is comprehensively dealt with in Brian Z Tamanaha, *On the Rule of Law: History, Politics, Theory* (Cambridge University Press 2004) 1–47.
[13] Ibid at 3.
[14] Ibid at 93.
[15] Tom Bingham, *The Rule of Law* (Penguin 2011) 37.
[16] Peerenboom Randall, *China's Long March toward Rule of Law* (Cambridge University Press 2002).
[17] Sanne Taekema, 'Methodologies of Rule of Law Research: Why Legal Philosophy Needs Empirical and Doctrinal Scholarship' (2021) 40 Law Philos 33.
[18] Paul P Craig, 'Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework' [1997] Public Law 467–87; Brian Z Tamanaha, *On the Rule of Law: History, Politics, Theory* (Cambridge University Press 2004).
[19] Lon L Fuller and Joseph Raz are proponents of the formal requirements of the RoL. Long L Fuller, *The Morality of Law* (Yale University Press New Haven 1969) 33–39; Joseph Raz, 'The Rule of Law and Its Virtue' in J Raz (ed), *The Authority of Law: Essays on Law and Morality* (Oxford University Press New York 1979) 227.
[20] Brian Z Tamanaha (n 12) 111.
[21] The 'rights' dimension of the RoL was captured by Ronald Dworkin. See Ronald M Dworkin, *Political Judges and the Rule of Law* (The British Academy London 1980) 11–12.
[22] *R* v. *Secretary of State for the Home Department, ex p. Pierson* [1998] AC 539, 591.
[23] Constitution of South Africa, Act 108 of 1996.
[24] Assembly, UN General. 'Universal Declaration of Human Rights' *UN General Assembly* 302.2 (1948) 14–25.

means must be provided for resolving, without prohibitive costs or inordinate delay, bona fide civil disputes; adjudicative procedures provided by the state should be fair and lastly, the law must afford adequate protection of fundamental human rights.

The RoL is adopted as an analytical framework on account of the benefits it provides. It allows laws to be tested against some other authoritative criteria with its own intrinsic value aside from a constitution. Whilst constitutions serve primarily to preserve the principles of the RoL, some constitutions may fail to meet the formal and substantive principles of the RoL discussed above.[25] In such cases, the RoL, as a rich source of diverse norms, can function to fill this lacuna. Thus, the RoL provides a higher normative standard through which laws can be tested. Furthermore, since the analysis is not confined to interpretation of provisions in the constitution, applying the RoL standards frees the analysis from a text-centric evaluation and places it in a much richer and thicker value-laden inquiry.

The PICA, which carries Botswana's confiscation and forfeiture regime, is an outcome of major legislative reforms pursued to strengthen Botswana's AML/CFT regime. It also introduces the non-conviction-based system confiscation and forfeiture system which raised concerns from the legal fraternity. These concerns are partly exemplified by the unsuccessful attempts to challenge the constitutionality of some provisions of the PICA. This paper applies the formal notion of the RoL, which, as stated above, represents the dominant understanding of the RoL. Applying the formal notion of the RoL means that the concern is not with the law's compliance with the Constitution. Rather, the much higher and richer standard offered by the RoL is applied, this standard is able to unearth issues which usually fall in the blind spot of constitutional analysis. As will be seen below, the RoL framework can reveal these gaps and deficiencies in the law and build a case for judicial or legislative intervention.

3. HISTORICAL ROOTS OF ASSET FORFEITURE

Although the Botswana Court of Appeal[26] traces the origins of asset forfeiture to the United States, it has its origins in the law of Deodants under English common law. Deodand, whose etymology is Latin, comes from Latin phrase *deo dandum* or 'to be given to God'.[27] The rule was that any object which caused the death of a King's subject constituted a deodand and had to be forfeited to the Crown.[28] The instrument of death was the one that faced the accusation, not its owner.[29] The notion of levelling the accusation against the proceeds of crime originates here. Forfeiture of a convicted felons' property, real or personal, was also part of the English common law.[30] The 'basis of the forfeiture was that a breach of the criminal law was an offence to the King's peace'.[31]

Deodands did not become part of the law of the United States.[32] Rather, colonies relied on *in personam* forfeiture during the American Revolution which applied to the estate of a convict of the crime of loyalty to the King of England. In 1789, the US Congress passed a law that allowed forfeiture of ships used in the crime of piracy and slavery.[33] The underlying idea was that

[25] For instance, in Botswana the Constitution does not protect the right to legal representation in civil proceedings. See in this regard *Tirelo* v. *The Attorney General and Another* 2008 (2) BLR 38 (HC).
[26] *Directorate of Public Prosecutions* v. *Bakang Seretse and Others*, CLCGB-061-21 (Court of Appeal, unreported, 29 April 2022) para 3.
[27] *Calero-Toledo* v. *Pearson Yacht Leasing Co* 416 US 681 (1974). A more detailed discussion of the history of asset forfeiture is covered here.
[28] Ibid.
[29] Ibid.
[30] Ibid.
[31] Ibid.
[32] Ibid.
[33] Ibid.

it was the object that was the offender, and not its owner. In 1819, Congress, through legislation, extended American forfeiture law's reach beyond admiralty cases.[34] In its modern form, asset forfeiture is seen as an effective tool and has been adapted to deal with the war waged against terrorism, transnational organized crime, the international drug trade, corruption, and money laundering. Through international treaty law[35] and the recommendations of the FATF, asset forfeiture and confiscation were eventually ushered into the international plane.

4. HISTORY OF ASSET FORFEITURE AND CONFISCATION IN BOTSWANA: FROM PROCEEDS OF SERIOUS CRIME ACT TO PICA

Prior to the current PICA, Botswana's confiscation and forfeiture regime was governed by the Proceeds of Serious Crime Act of 1990 (PSCA).[36] The PSCA only made provision for a conviction-based confiscation.[37] To issue a confiscation order, a court was required to satisfy itself that the defendant had received or derived a benefit from the proceeds of a serious crime.[38] Legal reform to the PSCA was precipitated by the Anti-Money Laundering/Countering the Financing of Terrorism international campaign led by the FATF. In 2007, the World Bank produced the Mutual Evaluation Report[39] in which it exposed various strategic deficiencies in Botswana's Anti-Money Laundering Regime. The report found that the PSCA was underutilized in the prosecution of money laundering. By 2007, the prosecuting agency had only instituted a single case. By 2017, Botswana had addressed some of the deficiencies referred to in the 2007 Mutual Evaluation Report. The reforms carried out included changing the PSCA to the current PICA. It also heralded the introduction of the non-conviction-based asset confiscation and forfeiture system.

The operation of the PICA confiscation and forfeiture machinery is built around four types of criminal conduct: Confiscation offences,[40] serious offences,[41] serious crime-related activities (SCRA),[42] and foreign crime-related activities (FSCRA).[43] Based on these categories, the PICA establishes two systems of confiscation and forfeiture of proceeds and instruments of crime—a conviction-based system and non-conviction-based system. The conviction-based confiscation and forfeiture system entails pecuniary penalty orders (PPO) and forfeiture of proceeds and instruments of a convicted person. This paper focuses on the non-conviction-based confiscation and forfeiture system. Against the RoL principles discussed above, it

[34] M Fourie and GJ Pienaar, 'Tracing the Roots of Forfeiture and the Loss of Property in English and American law', (2017) 23 Fundamina 20. See also Steven L Schwarcz and Alan E Rothman, 'Civil Forfeiture: A Higher Form of Commercial Law?' (1993) 62 Fordham L Rev 287.

[35] See, e.g., the Single Convention on Narcotic and Drugs (adopted 30 March 1961, entered into force 13 December 1964) 520 UNTS 151 and the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (adopted 20 December 1988) 1582 UNTS 95.

[36] Proceeds of Serious Crime Act, Act 2 of 2007, Laws of Botswana (PSA).

[37] Ibid, s 3(1).

[38] Ibid, s 5.

[39] See Eastern and Southern Africa Anti-Money Laundering Group (ESAAMLG), (n 2).

[40] Section 2 of the PICA defines a confiscation offence as any offence under the Laws of Botswana.

[41] Section 2 of the PICA defines a serious offence as any offence of which the minimum penalty is a fine P2 000 or imprisonment of a period of two years or to both.

[42] Section 2 of the PICA defines a serious crime-related activity means any act or omission at the time of its commission, was a serious offence, whether or not the person has been charged with the offence or, if charged has been tried,
(a) has been tried,
(b) has been tried and acquitted or
(c) has been convicted.

[43] Under s 2 of the PICA, a foreign crime-related activity means any act or omission that at the time of the commission, was a foreign offence that if committed in Botswana, would has been a serious offence, whether or not the person has been charged with the offence and if charged—
(a) has been tried,
(b) has been tried and acquitted,
(c) has been convicted.

examines this system to establish whether it complies with the RoL principles and evaluates any safeguards put by Parliament.

5. ANALYSIS OF THE NON-CONVICTION-BASED CONFISCATION AND FORFEITURE SYSTEM

The non-conviction-based confiscation and forfeiture system consists of four main tools—the civil penalty order, civil forfeiture, administrative forfeiture, and a restraining order. A civil penal order (CPO) is an order that requires the respondent to pay an amount assessed by the court as the value of the benefits derived by the respondent from an SCRA.[44] A civil forfeiture order is an order *in rem*, meaning it is directed against the 'guilty' property; the legal proceedings are brought against the property that is alleged to be the benefit of wrongdoing to declare the property forfeited to the government.[45] Administrative forfeiture is carried out by a prescribed investigator.[46] The non-conviction-based confiscation and forfeiture system is a simple, easy-to-use, and less cumbersome procedure that has many advantages for the prosecution. As the proceedings are civil, the prosecution does not have to prove the guilt of the defendant beyond reasonable doubt. The prosecution may still recover the ill-gotten assets even where the suspect is not available due to death, has fled or has been acquitted in criminal proceedings. Three underlying policy reasons for non-conviction-based forfeiture have been advanced.[47] It is palpably in the public interest that individuals do not derive gains from illegal activity. Also, as a matter of policy, the state must suppress conditions that lead to unlawful activity. Finally, it has also been contended that conventional criminal penalties are inadequate.

As it operates outside the normal criminal trial constitutional guarantees, this method of confiscation has attracted controversy. The remedy of civil forfeiture has drastic implications for respondents. It involves confiscation of property without proof of wrongdoing and violates the spirit of the principle of the presumption of innocence. There is a great danger of reputational damage to the respondent, as an individual whose assets face confiscation proceedings may be viewed as guilty of some criminal conduct by the media and members of the public. Also, temporary restraining orders on an individual's property can occasion serious economic hardship. As a result, it has been a subject of several constitutional challenges. The Namibian High Court dealt with such a challenge in *Shalli* v. *The Attorney General*.[48] In this case, it was argued that this method of confiscation infringed the right to property, right to dignity, and fair trial because it sought to deprive a defendant of property without the need to prove commission of a crime beyond reasonable doubt. The High Court held, relying on decisions from the European Court of Human Rights,[49] Canada,[50] and English case law,[51] that civil forfeiture is civil in nature and therefore does not engage the constitutional guarantees applicable in criminal matters. In terms of Botswana law, the PICA puts the issue of the nature of the proceedings beyond doubt by affirming that the proceedings are civil in nature.[52] This, however, has not saved the PICA from constitutional challenges. Civil forfeiture was constitutionally attacked in *Directorate of Public Prosecutions* v. *Khulaco and Others*.[53] It was argued that the Director of Public Prosecutions

[44] See s 11, PICA.
[45] Ibid, s 25.
[46] Ibid, s 30.
[47] These policy reasons are discussed in detail in *National Director of Public Prosecutions* v. *Mohamed NO*, 2002 (4) SA 843 (CC).
[48] *Shalli* v. *The Attorney General* [2013] NAHCMD 5.
[49] *Phillips* v. *The United Kingdom* [2001] ECHR 437.
[50] *Chatterjee* v. *Ontario (Attorney General)* [2009] 1 SCR 624 (Supreme Court, Canada).
[51] *R* v. *Rezvi* [2002] UKHL 1, *Serious Organized Crime Agency* v. *Gale* [2011] 1 WLR 2760 and *Phillips* v. *The United Kingdom*.
[52] See s 69(1), PICA.
[53] *Directorate of Public Prosecution* v. *Khulaco and Others* [2019] 1 BLR 472 (High Court, Botswana).

(DPP) had no legal capacity to institute civil forfeiture proceedings. In addition, it was alleged that civil forfeiture violated the individual right to property because it constituted unlawful deprivation of property. Regarding the legal capacity of the DPP in civil forfeiture proceedings, the High Court rejected the argument and held that civil forfeiture proceedings were incidental to the DPP's mandate and reasonably necessary for the DPP's constitutional mandate. A similar conclusion was reached in the *Director of Public Prosecutions* v. *Kgori Capital (Pty) Ltd* where the High Court held that the dispossession of people of proceeds of crime is incidental to the powers bestowed on the DPP and that 'all that the DPP is using are the powers that he has been given by Parliament to ensure, on behalf of the general public, that any person who has benefitted from a criminal conduct or activity pays the price by surrendering his or her ill-gotten gains to the state. There is no other state entity that is more proximate than the DPP to bring the proceedings before the court'.[54] This suggests that the Botswana High Court has been reluctant to declare provisions of the PICA unconstitutional.

As it can be seen from the analysis above, as these constitutional challenges rely on provisions from written constitutions; as a result, the complaints are confined to the provisions of the applicable constitutions. Whilst these constitutional attacks invoke some of the RoL principles, the cases do not invoke all of these principles. Therefore, it is worth examining the confiscation regime to establish whether it complies with the RoL principles discussed above.

(A) Retrospectivity

The RoL prohibits retrospective laws. Tamanaha argues that a 'retroactive rule is an oxymoron, for it cannot be followed'.[55] Sampford accepts this prohibition—'it is unjust to disrupt the expectations which people have formed on the basis of the existing law'.[56] Admittedly, this prohibition is hard to reconcile with the reality that retrospective laws exist. Sampford concedes this and notes that retrospective laws may advance the goals of the RoL; thus, according to Sampford, the notion of the RoL needs to be reconsidered.[57] Section 87(6) of the Constitution of Botswana empowers Parliament to make laws with 'retrospective effect'. However, as argued above, retrospective laws may still remain objectionable on the basis of the RoL principles. Surely, whilst retrospective laws may be permissible,[58] such laws may be objectionable when they unjustifiably impose unfair burdens or cause unconscionable prejudice to individuals. After all, the RoL has contempt for unbridled power.

One of the unique features of the non-conviction-based forfeiture is that, contrary to the RoL's prohibition against retrospective laws, it applies to acts committed before the commencement of the Act.[59] The PICA entitles the DPP to obtain a CPO from a court requiring a person to pay to the Government the value of the benefits derived by the respondent from an SCRA that took place not more than 20 years before the application.[60] This period extends back prior to the commencement of the Act.[61] This means that individuals may be held accountable for conduct[62] that occurred 20 years earlier, before the enactment of the law.

[54] [2019] 1 BLR 105 (HC) 119.
[55] Brian Z Tamanaha, *On the Rule of Law: History, Politics, Theory* (Cambridge University Press 2004) 97.
[56] Charles Sampford et al, *Retrospectivity and the Rule of Law* (Oxford University Press 2006) 65.
[57] Ibid, 267.
[58] See Constitution of Botswana [Cap 01] Laws of Botswana. Section 87(6) empowers Parliament to make laws with retrospective effect.
[59] See s 13, PICA.
[60] Ibid, s 11(1).
[61] Ibid, s 13.
[62] In *Lameck and Another* v. *President of Republic of Namibia and Others* [2012] NAHC 3, 22, the Namibian High Court held that the conduct that is 'criminalised is the current possession, acquisition and use of the proceeds of unlawful activities and not the original conduct which rendered those proceeds as unlawful'.

That is exactly what occurred in *Director of Public Prosecutions* v. *Archbald Mosojane & Others* decided by the Botswana High Court.[63] The alleged acts of criminality had occurred in 2007 and 2009. The PICA came into force in 2015. The court confirmed that the Act applied retrospectively. In conclusion, it held that the DPP had proved on the balance of probabilities that the respondents had benefited financially from SCRA, and they were ordered to pay. The High Court did not raise any concerns with the retrospective nature of the law.

The approach of other courts appears to be that the retrospective nature of this law serves justifiable policy goal consistent with the RoL. It ensures that those who have reaped benefits through money laundering before the coming into operation of this law do not retain the fruits of their crimes. This is the conclusion that the Seychelles High Court reached in *Hackl* v. *Financial Intelligence Unit*.[64] However, in some cases the retrospective nature of this law may raise RoL implications. It may occasion severe prejudice to respondents going beyond the inherent inconvenience of legal process.[65] Institution of legal proceedings after undue delay may come at a time when evidence may have been lost, witnesses may be dead, or unable to recollect events. In such cases, it can be argued that the exercise of power by authorities would breach the RoL as it would be unfair or unjust. It remains to be seen how courts will treat such cases. One anticipates that the RoL principles will become part of the analysis.

The PICA provides some safeguards by limiting the scope of this provision—it cannot apply to benefits derived from conduct that did not amount to criminal conduct in the past. This mitigates the harshness of the provisions, and ensures that individuals are not punished for conduct that was not criminally punishable at the time of its occurrence. It also obeys the constitutional prescription of *nullum crimen, nulla poena sine lege* which is a feature of many constitutions.[66] The time limits also add to the safeguards—to the DPP, the sky is not the limit.

(B) Statutory Time Limits

Amongst the principles of the RoL is the requirement that means of dispute resolution be accessible, and disputes be resolved without inordinate delay. Under Botswana law, prosecutorial discretion to institute or withdraw criminal proceedings rests with the DPP. Subject to the constitutional rights of individuals to have their trials instituted and completed within reasonable time,[67] generally, Botswana law does not prescribe time limits for the exercise of the DPP's functions. One of the significant and positive development introduced by the PICA is timelines for the exercise of the DPP's discretion.

Under the PICA, the DPP has the right to apply for a civil penalty order (CPO) and for civil forfeiture.[68] The DPP's right to apply for these measures is subject to time limits. It ought to be exercised within 12 years of the date of the SCRA or FSC.[69] As regards the CPO, it can only relate to SCRA that took place not more than 20 years of the making of the application. Further, the CPO is subject to the once-and-for-all principle, a limit on the number of times that the DPP may apply for it in respect of the same offence. Except with leave of the court, the DPP has only one bite at the cherry.[70] The RoL benefit of this time bar is that it entrenches fairness in the

[63] *DPP* v. *Archbald Mosojane & Others* MAHFT-000135-17 (High Court, unreported, 21 November 2018).
[64] *Hackl* v. *Financial Intelligence Unit* [2012] SCCA 17.
[65] In *Basis Point (Pty) Ltd and Others* v. *the Director of Public Prosecution* [2019] 2 BLR 213 (CA), 214, the Court of Appeal appears to consider grave prejudice and inherence effect of the PICA.
[66] The Indian High Court has dealt with this issue in *M/S Obulapuram Mining Company Pvt Ltd* v. *Joint Director, Directorate of Enforcement* ILR 2017 KARNATAKA 1846.
[67] See Constitution of Botswana (n 57). Section 10(1) provides that 'If any person is charged with a criminal offence, then, unless the charge is withdrawn, the case shall be afforded a fair hearing within a reasonable time by an independent and impartial court established or recognized by law'.
[68] See s 11, PICA.
[69] See s 26(2), PICA.
[70] Ibid, s 11(4).

process by protecting respondents against repeated legal action.[71] It also limits the opportunity for abuse of prosecutorial discretion.

To accommodate other public policy interests, the timelines are not cast in stone. In respect of the once-and-for-all rule, the court may grant leave where the benefit was only derived, realized, or identified after the determination of the initial application, where the necessary evidence became available after determination of the initial application and where it is in the interests of justice to do so.[72] By providing for the use of value judgement, Parliament has left the courts room to do justice based on specific circumstance of each case. However, as this is an exception to the rule, it is hoped the courts will adopt a strict approach in dealing with additional applications by the DPP.

(C) The Right to Be Heard

The right to be heard is an integral component of the RoL and forms the cornerstone of every legal system. Before the DPP can obtain a CPO, the PICA grants the respondent the right to be heard. In a case where the respondent has been served with notice he is entitled to appear and adduce evidence at the hearing of the application unless he is an absconder or not amenable to justice.[73] Non-appearance of the respondent at the hearing does not prevent a court from making a final determination.[74] Since the law does not require the court to investigate the reasons for the respondent's non-appearance, this is likely to prejudice respondents.

In addition, there is lack of clarity in the process. Proceedings to obtain the CPO are by way of application.[75] By requiring the respondent to appear and adduce evidence at the hearing, the law combines motion proceedings and trial proceedings. This has the potential to create confusion. In motion proceedings, a party who is served with an application is entitled to file an answering affidavit.[76] In this case, there is no provision for the respondent to file an answer to the DPP's application. It is unclear whether this may be because the respondent has the right to appear at the hearing. For such a crucial matter, clarity of the law is paramount so that litigants have advance notice of what the law requires. The second problem lies here—where the respondent does not file any answering affidavit it is unclear if it is appropriate to allow the respondent to testify at the hearing. This is because the DPP would not have been given notice of evidence to be adduced at the hearing. On a literal reading of the Act, it can be argued that Parliament elected the hearing as the only method of responding to the application. However, the more sensible approach, which accords with practice and demands of fairness is that the court will permit the respondent to file answering affidavits. It will also follow that the DPP will file a replying affidavit. Such a procedure will help expedite the case, refine the issues, and give the respondent a fair opportunity to ventilate their case. The lack of clarity in the procedure to be adopted is unfortunate and needs attention.

The combination of motion and trial procedure raises a further problem in relation to the court determining how to deal with factual disputes. Motion proceedings are not designed to resolve factual disputes. However, this problem appears to have been resolved by the Court of Appeal. In *Kgori Capital* v. *Director of Public Prosecutions and Another*,[77] the Court

[71] This law encapsulates the entrenched criminal law principle of *non bis in idem*, which provides protection to an individual against multiple punishments or proceedings from the state and its organs.
[72] Ibid, s 11(5).
[73] Ibid, s 12(3).
[74] Ibid, s 12(4).
[75] Generally, the Botswana law recognizes two main methods of procedures, application procedure (also known as motion proceedings) where evidence is contained in affidavits and action procedure where a litigant pleads material facts and proves them during an oral hearing or at trial.
[76] Motion proceedings are governed by Order 12 of the Rules of the High Court, Statutory Instrument No 1 of 2011, Laws of Botswana.
[77] [2019] 3 BLR 165 (CA), 169.

of Appeal held that the *Plascon-Evans rule* applies where the court is unable to resolve factual disputes.[78] According to this test, allegations relied upon by the DPP can only be said to have become established facts where such allegations have been admitted by the respondent or the respondent's version consists of bald denials or the version is clearly an untenable one. Thus, despite the lack of clarity, the availability of the trial procedure acts as a safeguard in cases where there are serious disputes of fact. To put the matter beyond doubt, the circumstances when either procedure may be resorted to need to be clearly set out so that individuals are fully aware of their rights.

(D) Standards of Proof

Standards of proof are components of a fair trial. They are measuring instruments that assist the court and individuals to know the degree of evidence needed for the court to reach findings and to establish if an individual's conduct brings them within the operation of the law. Clarity of the law on the applicable standard of proof is vital. The use of inconsistent language by the PICA in prescribing the standard of proof is problematic and undesirable.

In relation to the CPO, if the court 'finds it more probable than not' that the respondent was at any time engaged in an SCRA, the court must assess the value of benefits derived from the SCRA and order the respondent to pay the Government a penalty equal to the value as assessed.[79] However, surprisingly, the language of the statute changes when expressing the standard of proof for granting a Civil Forfeiture Order (CFO). If satisfied 'on a balance of probabilities' that the property is proceed or instrument of SCRA or FSRA, the court may grant a CFO.[80] The use of 'more probable than not' in expressing the standard of proof here is confusing. This lack of consistency is probably attributable to inelegant drafting or blind importation of concepts from foreign laws.

Noting the language of the Act, the issue of the appropriate standard to apply in proceedings to obtain a CPO was addressed in *Kgori Capital Pty Ltd* v. *Director of Public Prosecutions*.[81] The Court of Appeal stated that a CPO requires proof on a balance of probabilities. Thus, the Court of Appeal equated 'to be more probable than not' with proof on a balance of probabilities. According to the Court of Appeal, proof required goes beyond reasonable belief or mere suspicion.

As stated above, clarity on what scale would be applied in measuring the amount of evidence is fundamental to fair process. Individuals are entitled to fully understand how evidence will be assessed in judicial proceedings. As the Court of Appeal has clarified the issue, it is submitted that on review, this issue should be clarified in the Act.

(E) Protection of Third Parties

The protection of third parties is fundamental to due process. It is inimical to the RoL that a party must be affected by litigation outcomes that he was neither a party to nor had knowledge of. In respect of both the CPO and civil forfeiture, the PICA does not provide any mechanisms for protection of the interests of third parties. For instance, in relation to these remedies, no provision is made for notice to be served on any person whom the DPP has reason to believe has an interest in the property. It is also not clear what defences, if any, may be raised by a third party. Thus, this may prejudice *bona fide* holders of interests in property that is the subject of a forfeiture. Without any legislative intervention, perhaps the approach in *James Sikapende* v. *the*

[78] The rule was laid down in *Plascon-Evans Paints Ltd* v. *Van Riebeek Paints Pty Ltd* [1984] ZASCA 51.
[79] See s 11(1), PICA.
[80] See s 27(1), PICA.
[81] See (n 71) 168.

People,[82] a decision of the Zambian High Court, provides apt guidance. In that case, the High Court established that the Environmental Management Act gave the Magistrate discretion to order forfeiture. This discretion could allow the Magistrate to release the property of innocent third parties. Likewise, through the use of the permissive 'may', section 27,[83] which empowers a court in Botswana to grant the remedy of forfeiture, gives the court discretion. As regards the right of a third party to join proceedings, the Rules of the High Court permit an interested party to do so (or a court to invite a third party to join).[84] However, a more concrete solution lies in the amendment of the PICA to provide for a clear mechanism that protects third parties.[85]

6. ADMINISTRATIVE FORFEITURE

Administrative forfeiture also raises significant RoL issues. It permits a prescribed investigator to seize 'currency or bearer negotiable instruments, precious or semi-precious stones or other classes of property considered appropriate for administrative forfeiture as may be prescribed...'.[86] The word 'seize' includes the act of taking possession of an article and the subsequent detention thereof.[87] The investigator is given the right to enter any place. There is no requirement for prior notice on the respondent. It is a fertile ground for arbitrariness. Seizure of an individual's property by an administrative body without notice or a warrant is a drastic and intrusive measure.

One of the safeguards that limits the arbitrary exercise of this power is that the investigator must have reasonable grounds for suspecting that the property is a proceed or an instrument of a confiscation offence or of a FSCRA.[88] However, the PICA does not provide guidance on the application of this limitation. Such guidance is only available in case law, which is not readily accessible to all individuals and officials who execute the law. According to the courts, the test is objective.[89] The test is whether a reasonable man in the investigator's position possessed of the same information would have considered that there were good and sufficient grounds for suspecting that the property is a proceed or an instrument of a confiscation offence or of an FSCRA.[90] In evaluating this information a reasonable man would bear in mind that the section authorizes drastic administrative action by permitting the seizure of property on the 'strength of a suspicion and without the need to swear out a warrant i.e. something which otherwise would be an invasion of private rights and … the reasonable man will therefore analyse and assess the quality of the information at his disposal critically, and he will not accept lightly or without checking it where it can be checked. It is only after an examination of this kind that he will allow himself to entertain a suspicion which will justify an arrest'.[91] Thus, it is not enough for the investigator to demonstrate that he honestly believed the property was proceed of crime.

[82] Appeal No 09/2018 (High Court, 22 May 2018) <APPEAL-NO-09-2018-JAMES-SIKAPENDE-vs-THE-PEOPLE-20-11-2018-KONDOLO.pdf> (judiciaryzambia.com), last accessed 29 July 2023.

[83] It provides that 'Subject to subsection (5), a magistrate's court or the High Court may grant a civil forfeiture order in respect of property or a part of the property as is specified in the order…'.

[84] See Order 16(9)(2) of the Rules of the High Court (n 70), which provides 'The judge may at any stage of the proceedings, either upon or without the application of either party, or upon the application of any party who claims to be interested, and on such terms as may appear to the judge to be just, order that …. the names of any parties, whether plaintiffs or defendants, who ought to have been joined, or whose presence before the judge may be necessary in order to enable the judge effectually and completely to adjudicate upon and settle all the questions involved in the cause, be added'.

[85] For a good model on protection of third parties, see Proceeds of Crime Act 2002 (United Kingdom), Prevention of Organised Crime Act, Act No 29 of 2004 (Namibia), Prevention of Organised Crime Act 121 of 1998 (South Africa).

[86] See s 30(1)(a) and (b), PICA.

[87] *Ntoyakhe* v. *Minister of Safety and Security* 2000 (1) SA 257 (CC).

[88] Section 30(1)(c), PICA.

[89] *Useya* v *The State* 1995 BLR 708 HC.

[90] *Mabona and Another* v. *Minister of Law and Order and Others* 1988 (2) SA 654, 658 E-G.

[91] *Director of Public Prosecutions* v. *Khato Civils Pty Ltd and Others* UCHGB 000266-16 (High Court, unreported).

Furthermore, the power must not be exercised in bad faith. It is fundamental that there be guidelines for the administrators to avoid abuse of the law and ensure that there is accountability in cases of abuse.

(A) Notice and Statutory Time Limits

The investigator is required 'as soon as practicable after the seizure of any property' to serve a copy of a seizure notice on the person from whom the property was seized[92] and any other located in Botswana whom the investigator believes has an interest in the property.[93] There is no indication of what the seizure notice must contain. Without being given notice of the relevant confiscation offences, it may be difficult for the respondent to prosecute their case. To aid in the effective exercise of the right to a fair trial, the courts must insist on the respondent being given the particulars of the offences in the seizure notice. Furthermore, to limit service of the notice to people located in Botswana may deny other equally interested parties their fair process rights simply because at the time of the seizure they were not in Botswana. Considering the drastic consequences of forfeiture, to set the determination of who an interested party on the simple subjective belief of the investigator is inappropriate. Here, the standard of 'reasonable belief' must be read into the provision. If no claim for the return of the property is made within 28 days, the property is forfeited to the Government.[94] The claim may be made by any person claiming an interest in the seized property.[95] This affords some protection to interested parties who may not have been served with the notice.

The DPP is entitled to apply for the proceedings to be adjourned for a period of up to six months to permit investigations to be conducted in the foreign country where the crime was committed.[96] It is submitted that the court should be slow to grant the full six months because the DPP must be expected to have conducted investigations prior to seizure. To do so will encourage investigators to seize property on a feeble basis, counting on a court-granted adjournment to beef up an otherwise weak case. The fact that an individual's property has been seized without a hearing militates against further delay. That is why the Act preserves the court's common law powers of postponement of matters.[97]

(B) Judicial Review

For an aggrieved individual, a restricted right to challenge the seizure of property in court exists. Within 60 days of making the claim, the claimant is required to file an application in the magistrate's court for determination of the claim[98] and serve it on the DPP.[99] Interestingly, the right of access to court is restricted. If the application is not filed within 60 days, all the property in the notice is forfeited to the Government.[100] Both timelines are prescriptive, as such, there is no room to allow the respondent to explain their reasons for default upon failure to file within the stipulated period. In addition, since jurisdiction is granted exclusively to the magistrate court, the respondent is also denied the choice of filing the application at the High Court. As magistrates were created to deal with claims of lessor value, concerns may be raised about their competence to deal with these issues.

[92] Section 30(2), PICA.
[93] Section 30(2)(b), PICA.
[94] Section 31(1), PICA.
[95] Section 31(2)(a), PICA.
[96] Section 33(4), PICA.
[97] Section 33(5), PICA.
[98] Section 32(1), PICA.
[99] Section 32(3), PICA.
[100] Section 32(2)(a) and (b), PICA.

Here, perhaps litigants can derive some consolation in that the High Court's common law judicial review powers have not been excluded. Judicial review, as used here, refers to the 'competence of the High Court, which arises from the common law, to review, in certain cases, the legality of decisions made by a lower courts, statutory bodies and other entities'.[101] In Botswana, the High Court may invoke its judicial review jurisdiction if any of these three grounds exist—Wednesbury unreasonableness, procedural impropriety, and illegality.[102] When Parliament has not either explicitly or implicitly excluded the High Court's judicial review powers, the High Court retains it. Accordingly, where any of these grounds can be proved, it appears that a respondent is entitled to institute judicial review proceedings.

Notwithstanding the reprieve offered by the availability of judicial review, this concern remains and ought to be noted. Whilst timelines ensure that judicial proceedings are expedited, in this case it makes little sense to severely limit the right of access to court. The law ought to create room for cases where respondents fail to comply with prescribed timelines on good cause in the same manner that such accommodation has been provided for the DPP. The failure to give the court the discretion to investigate a respondent's reasons for default is likely to produce harsh outcomes.

(C) Restraining of Property Subject to Confiscation

Aspects of provisions on restraining property subject to confiscation undermine the RoL. The DPP is entitled to apply for a restraining order at the High Court or magistrate's court.[103] A restraint order prohibits or limits the disposal of interest in property or dealing with such property.[104] The restraining order may restrain 'specified property of another person'.[105] It must state the purpose for which it is sought, that is, whether it is to satisfy PPO, CPO, forfeiture order, automatic forfeiture, and civil forfeiture.[106]

Unlike under provisions dealing with CPO and civil forfeiture, the law provides for protection of third-party rights in relation to proceedings for a restraining order. The court may require the applicant to give notice of the application to interested parties where it is in the interests of justice that notice be given[107] or if the giving of notice will not result in the risk of loss or dissipation of the property.[108] A person notified is entitled to appear and give evidence at the hearing.[109] Where a restraining order is made in respect of property of a person and notice of the application has not been served on that person, the DPP is required to give written 'notice of the making of the order' as soon as practicable.[110]

The *Director of Public Prosecutions* v. *Khato Civils Pty Ltd*[111] illustrates the importance of serving notice on interested parties. As argued above, there is potential prejudice from the institution of these proceedings. In this case, the respondent accused the DPP of malicious intent by insisting on service of the order *nisi* freezing the company's accounts in national and international media. According to the respondent, one of the senior officials of the Directorate of Corruption and Economic Crime (DCEC) knew the address of service where service could

[101] Helen Fenwick and Gavin Phillipson, *Sourcebook on Public Law* (Cavendish Publishing Limited 1997) 679. See also Bugalo Maripe, 'Judicial Review and the Public/Private Body Dichotomy: An Appraisal of Developing Trends' (2006) 4 University of Botswana Law Journal 23.
[102] *Attorney General and Another* v. *Kgalagadi Resources Development Company (Pty) Ltd* [1995] BLR 234 HC.
[103] Section 35(2), PICA.
[104] Section 35(1), PICA.
[105] Section 35(2)(e), PICA.
[106] Section 36(2), PICA.
[107] Section 40(1), PICA.
[108] Section 40(2)(b), PICA.
[109] Section 40(3), PICA.
[110] See s 42(1), PICA.
[111] UCHGB 000266-16 (High Court, unreported).

have been carried out. Since the DCEC failed to dispute this, the court found that there was malicious intent. The court is entitled to order that the proceedings be heard in camera, make orders as to who can attend the proceedings, and orders prohibiting the publication of the proceedings.[112] On account of the reputational damage inherent in these proceedings, this is a valuable safeguard for respondents who stand to suffer serious prejudice due to publication of the proceedings.

Here again, the issue of what the appropriate standard of proof is has posed problems. In *Director of Public Prosecutions* v. *Khato Civils (Pty) Ltd*,[113] the High Court had granted a provisional restraining order under the PICA restraining the respondent from accessing and using funds in its account. The respondents were given the opportunity to oppose the application which they did. The High Court discharged the provision restraining order holding that 'although the investigator had reasonable belief warranting the granting of the rule nisi, the respondents have on balance of probabilities explained the lawfulness of their conduct'. Thus, the High Court proceeded on the basis that the proper standard was proof on the balance of probabilities. Using the decision of the South African Supreme Court in *National Director of Public Prosecutions* v. *Rautenbach and Others*,[114] the Botswana Court of Appeal held that the proper standard was the lower standard of proof of reasonable belief, and the test was objective.

7. CONCLUSION

The PICA introduces some welcome developments. Through its remedies, it empowers the DPP to efficiently and effectively deprive individuals of the fruits of crime. It requires prompt prosecution of cases by the DPP which protects individuals' right to trial within a reasonable time. It has been noted that whilst the PICA introduces the non-conviction-based confiscation and forfeiture regime, it also contains some safeguards to mitigate the harshness of this drastic remedy. In addition, the Botswana courts have recognized the harshness of this remedy in their decisions. Nonetheless, the Botswana courts have been reluctant to declare unconstitutional the provisions of the PICA. Whilst the non-conviction-based confiscation and forfeiture regime has withstood constitutional challenges, this has not put to rest questions regarding the fairness of the regime. Through the RoL lens, this analysis indicates that there are shortcomings in the confiscation and forfeiture regime. Some of these shortcomings include unclear language on the applicable standards of proof and inadequate protection third-party rights. To ensure that individuals benefit from clear law, these shortcomings are better addressed through legislative intervention. In the meantime, courts ought to pay attention to the RoL principles to mitigate any grave injustices as the law develops.

[112] Section 40(4)(a), PICA.

[113] *Director of Public Prosecutions* v. *Khato Civils (Pty) Ltd* [2018] 2 BLR 158 CA. See also *Director of Public Prosecutions* v. *Seretse: In Re Ex Parte Director of Public Prosecutions* [2018] 1 BLR 23 HC, where the High Court dealt with a similar issue regarding the standard of proof in restraining orders.

[114] *National Director of Public Prosecutions* v. *Rautenbach and Others* 2005 (4) SA 603 (Supreme Court, South Africa).