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ANALYSIS

Justifying the Civil Recovery of Criminal Proceeds

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INTRODUCTION

The UK's Proceeds of Crime Act 2002[1] created a new civil right of action to enable the state to sue in the High Court for the recovery of property which has been obtained through conduct contrary to the criminal law.[2] This new right is exercisable solely by the Director of the Assets Recovery Agency.[3] In so providing, the 2002 Act is following what appears to be a global trend to move beyond criminal confiscation measures and utilise civil forfeiture proceedings[4] as a means of combating organised crime. However, such proceedings have been viewed by some as controversial. This paper examines the trend to use civil forfeiture proceedings as an alternative mechanism to criminal processes for removing the proceeds of crime and presents an overview of whether the arguments sometimes used against such civil regimes possess any substance.[5]

THE CIVIL–CRIMINAL DICHOTOMY

Most legal systems distinguish between the criminal and the civil, generally using separate courts, different procedures and different evidential rules.[6] The traditional view is that crimes are public wrongs and that the criminal law addresses those who harm society through morally culpable acts in order that punishment may be imposed and potential offenders may thereby be deterred from committing similar offences. Criminal proceedings are therefore 'officially designated ceremonies of guilt designation'[7] and the label 'criminal' carries with it a social stigma which is not imposed on the losing party in a civil action. Because of this stigma and the potential punishment which may be imposed by a criminal court, legal systems provide procedural protections above those available to a respondent in a civil case. For example, criminal proceedings require a higher standard of proof than that normally applied in civil proceedings.

Generally it is the state which brings criminal proceedings. However, this is not an absolute rule since many jurisdictions also allow private individuals to initiate criminal prosecutions. In *Customs and Excise Commissioners v City of London Magistrates' Courts*[8] Lord Bingham summarised the position as follows:

> 'It is in my judgment the general understanding that criminal proceedings involve a formal accusation made on behalf of the state or by a private prosecutor that a defendant has committed a breach of the criminal law, and the state or the private prosecutor has instituted proceedings which may culminate in the conviction and condemnation of the defendant.'

The bringing of civil proceedings is, by comparison, primarily the forum for a wronged private individual. Nevertheless this too is not an absolute position, as the state also may sue in the civil courts as a wronged individual: for example, in respect of a contractual dispute with a multinational company.

Civil law does not aim to punish, but rather is designed to provide two types of remedy. First, it provides a remedy requiring a return to the way things were, the *status quo ante*, so as to restore the position of an injured party. Secondly, it provides a remedy to compensate an injured party for harm done to him.

While the traditional view of civil and criminal proceedings might be described as neighbouring countries divided by a common border, this dichotomy is not as distinct as that metaphor might suggest. In recent years there has been a growing homogeneity between criminal and civil procedures. Criminal cases now often involve civil, or quasi-civil, procedures and some civil litigation has become quasi-criminal. Indeed it has been said that almost every attribute associated with the criminal law also appears in civil law and vice versa.[9] So much is this the case that the High Court has observed:

> 'What are criminal, as opposed to civil, proceedings is a matter which can be difficult to determine. There is no one overriding test within our domestic law for determining whether proceedings are civil or criminal. To some extent it is like describing an

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elephant; it is recognised when seen but it is difficult effectively to describe '[10]

This 'significant disintegration of the wall between criminal and civil proceedings'[11] has occurred on a number of fronts and is due, at least in part, to the fact that multiple strategies are now used to deal with crime An early example was the use of injunctions to protect victims of domestic violence, even though, to obtain such an injunction, the plaintiff may be alleging the commission of a criminal assault. A more recent instance of this trend to use civil proceedings is the making of anti-social behaviour orders,[12] whereby a person may be ordered not to enter a certain location where he has previously committed criminal acts. Using a similar approach, one local authority has obtained an exclusion order against crack-cocaine dealers under legislation which allows councils take action against persistent nuisances and which is more generally used to force railway companies to clean pigeon droppings from bridges.[13] A further example of the trend to use civil orders is the football banning order [14] In these examples, the civil remedy is clearly linked to underlying criminal activity but is an alternative to a criminal prosecution for specific criminal acts.[15]

The use of multiple strategies by regulatory agencies is particularly notable. In dealing with US securities fraud it has been commented:

> 'Were solely criminal remedies available — as is the case in much of the world — we believe the difficulties of prosecution would make the likelihood of conviction unacceptably low, and render the enforcement system entirely inadequate to meet the aim of overall deterrence '[16]

This trend has been followed in UK regulatory law. Under the Financial Services and Markets Act 2000, a new civil regime for market abuse operates in the UK in a way which complements the criminal regime. The Financial Services Authority has the potential to use the market abuse offence to deprive certain market abusers (not to be categorised as 'criminals') of their gains. The civil sanctions include unlimited fines and public censure This civil regime complements the criminal offence of insider trading under Part V of the Criminal Justice Act 1993.

Rather than the traditional dichotomist perspective therefore, legal proceedings might be better seen as a continuum, with distinctly civil proceedings at one end and clearly criminal proceedings at the other. Between the two ends of the continuum is a range of possibilities, each of which may be more or less criminal or civil

A TREND TOWARDS CIVIL FORFEITURE

The traditional approach to serious criminality has been arrest, followed by the institution of criminal proceedings with a view to conviction and imprisonment. In recent years, such has been the wealth generated from economic crime and, in particular, from drug-related crime that a confiscation or forfeiture element has been added to the criminal process in many jurisdictions. In the UK this has involved the introduction of civil proceedings, for example a restraint order to freeze assets or the appointment of a post-conviction receiver to realise assets, which are ancillary to the criminal proceedings. However, the impact of this confiscation element has been limited by the necessity to obtain sufficient evidence to obtain a criminal conviction as a prerequisite for confiscatory action. The need for a broader response than a solely criminal one was recognised by the US President's Commission on Organized Crime as long ago as 1986:

> 'To be successful, an attack on organised crime in our mainstream economy cannot rely solely on the enforcement of federal criminal laws . . The Commission believes that a strategy aimed at the legitimate economic base of organized crime must build upon the recent successes of law enforcement, and must be based upon intervention measures as broad based as the nature of the threat posed by organized crime. A strategy in this area should also rely upon civil and regulatory measures tailored to the specific problems confronted '[17]

Although pioneered in the USA, there now appears to be a global trend to use stand-alone civil proceedings as a means of recovering the proceeds of crime in the hope that they will be more effective than proceedings which are ancillary to, and dependent on, a criminal prosecution. Recent examples of jurisdictions which have introduced civil forfeiture legislation include Italy,[18] Ireland,[19] South Africa,[20] Australia,[21] the Australian States of Western Australia,[22] Victoria[23] and New South Wales,[24] and the Canadian Provinces of Alberta[25] and Ontario [26]

This trend towards civil forfeiture has been

prompted by the nature of organised crime. Organised crime heads use their resources to keep themselves distant from the crime which they are controlling and to mask the criminal origin of their assets. For this reason it has become extremely difficult to carry out successful criminal investigations leading to the prosecution and conviction of such individuals, with the result that finances derived from crime are often effectively out of the reach of the law and are available to be used to finance more crime. Such peaceful enjoyment of the proceeds of crime damages public confidence in the rule of law and provides harmful role models [27] This has led to a recognition that criminal confiscation regimes may be inadequate and ineffective in certain cases.[28] In *M v Italy*[29] the Italian government argued that civil forfeiture was an essential weapon in the battle against Mafia-type organisations. In *Director of the Assets Recovery Agency v Walsh* the court held:

> 'It is clear that Parliament intended the civil recovery procedure implemented by Part 5 of the POCA to fulfil a similar role in the public interest in support of the struggle against organised crime, paramilitary and otherwise, which currently holds in thrall many sections of the community in this jurisdiction.'[30]

Similarly, in Australia there has been a recognition of 'the need for wider and more intrusive confiscatory reach to counter increasingly well-organised and sophisticated criminal activity' [31]

Civil forfeiture represents a move from a crime and punishment model of justice to a preventive model of justice It seeks to take illegally obtained property out of the possession of organised crime figures so as to prevent them, first, from using it as working capital for future crimes and, secondly, from flaunting it in such a way as they become role models for others to follow into a lifestyle of acquisitive crime. Civil recovery is therefore not aimed at punishing behaviour but at removing the 'trophies' of past criminal behaviour and the means to commit future criminal behaviour [32] While it would clearly be more desirable if successful criminal proceedings could be instituted, the operative theory is that 'half a loaf is better than no bread' [33]

However, this trend has not been without controversy. The US civil forfeiture legislation has been the subject of intense debate in terms of the balance it strikes between civil liberties and the needs of law enforcement;[34] and the introduction of civil recovery procedures in the UK proceeds of crime field has been described as marking 'a troubling loss of faith in criminal law'.[35]

IS CIVIL FORFEITURE TRULY CIVIL?

Is civil forfeiture, however, truly civil? As indicated above, it is sometimes difficult to determine whether proceedings are criminal or civil in nature. Although different jurisdictions will explore the question utilising different tests, a number of common issues will generally be examined when the nature of a civil forfeiture regime is being explored

First, there is the issue of what investigative powers exist in the regime. In respect of the UK's civil recovery regime, no police powers are available to the Director of the Agency.[36] In particular, the Agency's investigators have no power of arrest Although there are a number of additional intrusive features provided in terms of investigative powers, it cannot be argued from an examination of the powers alone that the regime is quasi-criminal

Secondly, there is the issue of what procedural rules are used in the regime. The civil recovery regime has clearly been designed to fit within the existing civil law principles and procedures with which the courts are familiar.[37] Thus, the forum for the proceedings is the High Court, which has no original criminal jurisdiction, and the document which commences the proceedings is a claim form, not an indictment used in criminal proceedings. Further, the rules of evidence which apply are those applicable in civil rather than criminal proceedings.

Thirdly, there is the issue of what remedies are available under the regime. Crucially, imprisonment is not an available option in the UK and there are no at-large fines. Liability for an individual is limited to the recoverable property which can be identified. Civil recovery orders cannot be entered on a person's criminal record, nor does an order permit an individual's fingerprints to be taken. Civil recovery is therefore not the imposition of a punishment in a civil setting. The fact that the recovery of property from an individual may have a severe impact upon him is not sufficient to classify the regime as criminal. In *McCann* the Court of Appeal for England and Wales observed that many injunctions in civil proceedings operate severely upon those against whom they are ordered [38] For example, in matrimonial proceedings a husband may be ordered to leave his home and not

to have contact with his children. By way of comparison, under the New South Wales Criminal Assets Recovery Act 1990, the proceedings are not truly *in rem*. They are aimed at persons who have committed criminal acts. Once a person can be proved on the balance of probabilities to have committed a serious offence, then that person's property is all liable to forfeiture unless the person proves it was lawfully acquired. There is no need to prove that the assets were derived from criminal conduct. This regime focuses therefore on the conduct of the individual rather than the origin of the property.

Fourthly, there may be relevant organisational features to be taken into account in classifying the regime. In *McCann* the fact that proceedings to obtain an anti-social behaviour order were not instituted by the Crown Prosecution Service was a factor taken into account by the courts as an indicative factor that the proceedings were civil in nature. Various jurisdictions have chosen different organisational arrangements when it comes to operating a civil forfeiture regime. In Ireland, the Criminal Assets Bureau is clearly a police agency, headed by a Chief Superintendent of the Irish police service. The agency which handles civil forfeiture in New South Wales is the New South Wales Crime Commission, an agency with a number of criminal investigative functions.[39] Civil recovery proceedings in the UK are, however, not brought by the Crown Prosecution Service, or another prosecuting authority, but by the Assets Recovery Agency, which does not have functions in relation to the prosecution of offences. This points towards a civil classification.

Fifthly, legislative intent may be taken into account in classifying the regime. In *McCann*[40] Lord Woolf noted that the object of making the proof of conduct which is anti-social more easy to prove would be defeated if in fact the proceedings were criminal. The Court of Appeal agreed, stating that it was apparent from the Act itself that its purpose was to adopt a novel method of attacking anti-social behaviour, and that it could properly be implied that the reason for so doing was that the existing provisions of the criminal law were not proving adequate for this purpose.[41] The House of Lords recognised in the same case that Parliament intended to adopt the model of a civil remedy of an injunction, backed up by criminal penalties.[42] The US courts similarly look at legislative intent when considering such classifications.[43]

The issue as to whether the Irish civil forfeiture regime was civil or criminal in character was considered by the Irish Supreme Court in *Murphy v G.M., P.B., P.C. Ltd, and G.H.*[44] The court considered specific features of the Irish legislation, together with decisions of the US courts as to the nature of civil forfeiture litigation, before rejecting the argument that the proceedings were criminal in nature. The court was satisfied that the US authorities lent considerable weight to the view that *in rem* proceedings for the forfeiture of property, even where accompanied by parallel procedures for the prosecution of criminal offences arising out of the same events, were civil in character and that this principle was deeply rooted in the Anglo-American legal system.

In some jurisdictions, however, including the UK, the issue as to whether proceedings are criminal or civil must also be examined within the framework of the European Convention on Human Rights (ECHR). An argument which will undoubtedly be advanced in respect of civil recovery proceedings is that, although civil in name, they should be classified as criminal under the Convention. If successful, this would have significant consequences including a limitation on using the provisions retrospectively to order recovery of any property which had been obtained before the coming into force of the legislation.

Whether proceedings are classified as civil or criminal under the Convention depends on a range of factors.[45] First, the court will take into account the way in which the state itself classifies the law in question, although it will not regard this as definitive. To do otherwise would be to risk allowing states to recategorise offences so as to avoid the application of Articles 6 and 7 guarantees. In any challenge to civil recovery it would be argued that, since the practical *indicia* of criminal proceedings, for example arrest, search of the person, charge and custody, are all lacking in civil recovery proceedings, they are not therefore an attempt to impose a badge of criminality in a civil context.

Secondly, the court will have regard to the nature of the 'offence' and how the matter is regarded in other contracting states. In this regard, the fact that civil forfeiture legislation exists in Italy and Ireland is significant. It is also important to note that there is no constitutional bar on the determination in civil proceedings of matters which constitute elements of criminal offences. Civil proceedings have been instituted by rape victims where, in order to gain damages for trespass against the person, the victim proves to the civil standard of proof that the respondent has

committed rape.[46] The fact that the background to the complaint will very often be the alleged commission of a number of criminal offences does not mean that the complaint constitutes the charge of a criminal offence Section 52(2) of the Children (Scotland) Act 1995 provides that a child may have to be subjected to compulsory measures of supervision when he 'has committed an offence'.[47] Although the initiation of proceedings does indeed intend to show that the child concerned committed an offence, this is not for the purpose of punishing him, but in order to establish a basis for taking appropriate measures for his welfare. That being so, the child who is notified of grounds for referral setting out the offence in question is not thereby 'charged with a criminal offence' in terms of Art. 6 Similarly, although civil recovery proceedings may require the Agency to show that a person committed an offence which procured the property, this would not be for the purpose of punishing him but rather in order to allow steps to be taken to remove working capital from the criminal economy and thereby lead to a reduction in crime.

Thirdly, the court will pay attention to the sanction imposed. Imprisonment as a penalty is generally perceived as belonging to the criminal sphere[48] and the absence of imprisonment in civil recovery proceedings is therefore highly significant.

The European Court on Human Rights has already ruled in a number of cases that civil forfeiture should be classified as civil proceedings In *M v Italy*[49] the applicant's case included the argument that the civil forfeiture amounted to punishment without a conviction and thus breached Art 6(2) of the convention. The Commission considered that it had to look beyond appearances and decide whether the applicant acquired the status of an accused person. It concluded that the successful forfeiture proceedings did not imply a finding that he was guilty of a specific criminal offence and thus rejected this part of his application In *Riela v Italy*[50] a forfeiture order had been granted in respect of land, buildings, vehicles and company shares. The proceedings were preventive measures and based on evidence from a *pentito* that the applicants were members of a criminal organisation based in Sicily. The application was found to be inadmissible as the criminal element of Art. 6 did not apply. In *Arcuri v Italy*[51] forfeiture proceedings were taken on a preventive basis against land, shares and vehicles using evidence which included statements from Mafia *pentiti* and telephone intercept material. The application was declared inadmissible as it did not involve a criminal sanction under Art. 6. In *Butler v United Kingdom*[52] the applicant claimed that civil forfeiture of cash represented a severe criminal sanction handed down in the absence of the procedural guarantees afforded under Art. 6. The court rejected this argument, holding that the forfeiture order was a preventive measure and could not be compared to a criminal sanction since it was designed to take out of circulation money which was presumed to be bound up with the trade in illegal drugs. The proceedings therefore did not involve the determination of a criminal charge.

The UK courts have been robust in their decisions as to the civil–criminal classification under the Convention. In general, they have recognised that an extensive interpretation of what is a criminal charge under Art 6(1) would, by rendering the injunctive process ineffectual, prejudice the freedom of liberal democracies to maintain the rule of law by the use of civil injunctions.[53] In particular, there is now an important line of domestic decisions holding that forfeiture proceedings have a civil classification For example, in *Gora and Others v Customs and Excise Commissioners*[54] the forfeiture of alcohol on which excise duty had not been paid was held not to involve the determination of a criminal charge. The determination has also been made by the UK courts that confiscation proceedings following a criminal conviction do not represent a criminal charge under the Convention.[55] It was therefore unsurprising that, in *Director of the Assets Recovery Agency v Walsh*, the first UK decision on the nature of civil recovery proceedings, the Northern Ireland High Court held that they were civil proceedings for Convention classification purposes.[56]

LACK OF PROPORTIONALITY?

A fundamental issue in respect of civil recovery is whether, as a legislative response, it is proportional to an existing societal problem. This issue will arise in the context of Art. 1 of the First Protocol of the ECHR., which provides:

> 'Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law The preceding provisions shall not, however, in any way impair the right of a state to enforce such laws as it deems necessary to

control the use of property in accordance with the general interest or secure the payment of taxes or other contributions or penalties.'

This issue of the proportionality of civil forfeiture has previously been raised in other jurisdictions. In the Irish case of *Gilligan v The Criminal Assets Bureau*[57] the state maintained that civil forfeiture legislation had been enacted to support a compelling public interest and was reasonably required by the common good. The court considered whether the operations of organised crime posed a sufficient threat to the community or to the common good to justify the impairment of rights to enjoy property. After hearing evidence from two senior police officers, who painted a picture of a new type of professional criminal who organised rather than committed crime and who therefore rendered himself virtually immune to the ordinary procedures of investigation and prosecution, the court concluded that, as a matter of proportionality, the legislature was justified in enacting civil forfeiture legislation. Similarly, the introduction of civil forfeiture legislation in South Africa was justified on the basis that 'its community fabric was in danger of being torn asunder by the prevalence of crime'.[58] In *Raimondo v Italy*,[59] a decision concerning the compliance of the Italian civil forfeiture regime with the Convention, the European Court stated that it was fully aware of the difficulties encountered by the Italian government in the fight against the Mafia. It recognised that the organisation had an enormous financial turnover which was subsequently invested in the real property sector and concluded that the civil forfeiture regime, which was designed to block movements of suspect capital, was 'an effective and necessary weapon against this cancer' and therefore appeared proportionate to the aim pursued.

While the existence of civil forfeiture regimes in other jurisdictions will be of assistance, the primary background against which the courts will make an assessment as to whether the UK legislation is proportional will inevitably focus on the circumstances existing in the UK and is likely therefore to include the annual National Crime Intelligence Service (NCIS) threat assessment in respect of serious and organised crime. This paints a picture of criminal infrastructures, engaged in a wide range of criminal activities, which are quick to adapt to opportunities and challenges. Most are involved in drugs trafficking and use a range of tactics to promote and defend their criminal business, including coercion, collaboration with others, deception and corruption.[60] This represents a serious social problem, one where the criminal law is proving to be of limited effectiveness. If this were allowed to continue, confidence in the rule of law would be undermined.

The UK courts have previously considered proportionality in the context of proceeds of crime legislation. In *McIntosh v Lord Advocate*[61] the UK's criminal confiscation regime has previously been found by the courts to be proportionate. In that case Lord Hope said:

'People engage in this activity [drug trafficking] to make money and it is notorious that they hide what they are doing. Direct proof of the proceeds is often difficult, if not impossible. The nature of the activity and the harm it does the community provide a sufficient basis for the making of these assumptions [ie the statutory assumptions that property held, received or expended by the accused could in certain circumstances be assumed to have been the proceeds of drug trafficking.] They serve a legitimate aim in the public interest of combating that activity. They do so in a way which is proportionate. They relate to matters which ought to be in the accused's knowledge, and they are rebuttable by him at a hearing before a judge on the balance of probabilities. In my opinion a fair balance is struck between the legitimate aim and the rights of the accused.'

In *Hughes and Others v Customs and Excise Commissioners*[62] the Court of Appeal held that, in the event that a defendant was ultimately acquitted in a criminal trial, he could not recover the costs incurred by a management receiver and paid out of his restrained assets. The argument that to deprive an unconvicted defendant of his assets to pay for the costs of the receivership was a disproportionate measure in the fight against crime and thus a breach of Art. 1 of the First Protocol of the Convention was therefore unsuccessful. Given the general societal context and these findings of proportionality in relation to the confiscation regime, the civil recovery regime is also likely to be found to be a proportional response in general terms. Nevertheless the issue of proportionality must also be considered at an individual case level. Is it possible to apply civil recovery provisions in a manner where the recovery of the property was disproportionate to the underlying criminal conduct? The US Civil Asset Forfeiture Reform Act 2000 provides a gross disproportionality

standard for determining whether an individual civil forfeiture application is constitutionally excessive.[63] However, proportionality at an individual case level arguably applies only where the case concerns forfeiture of an instrumentality of crime. It arguably does not apply where the state seeks to forfeit the proceeds of crime.

QUICK AND CHEAP (AND THEREFORE NASTY)?

Some commentators suggest that civil recovery is being introduced as a 'quick and cheap' method of going after criminal assets.[64] Similarly, civil responses in respect of anti-social behaviour orders have also been criticised on the grounds that they represent a 'less expensive' alternative [65] In the USA, the use of civil proceedings as an alternative to using the criminal process has been described as 'a naked attempt to avoid criminal procedural guarantees'.[66] One commentator has concluded:

> 'Police and prosecutors have embraced civil strategies not only because they expand the arsenal of weapons available to reach antisocial behaviour, but also because officials believe that civil remedies offer speedy solutions that are unencumbered by the rigorous constitutional protections associated with criminal trials, such as proof beyond a reasonable doubt, trial by jury, and appointment of counsel.'[67]

The implication of such criticism is that, while criminal procedural protections tend to be expensive and time consuming, they ought nevertheless to be continued with when the removal of property is being considered By way of response, it may be suggested that there is a moral imperative on governments to take action to remove the proceeds of crime from the hands of those who possess them. Although it may be argued that it is cheaper and easier for the state to deal with suspected criminal activity in the civil courts, this begs the question: should the state not be allowed to choose the speediest and least expensive option to achieve this objective as long as it provides sufficient protections for the rights of the individuals who may be affected? Indeed, is the state not morally obliged to its taxpayers, in the interests of efficiency, to use the most cost-effective, human rights-compliant mechanism to accomplish every legitimate public policy goal?

Although criminal procedural protections, even though expensive and time-consuming of the state's resources, must obviously be continued with in a criminal context, it is arguable that they are unnecessary in a civil context where the liberty of the individual is not at risk.[68]

The 2002 Act is unique amongst civil forfeiture legislation in that it provides a statutory hierarchy which ensures that primacy is given to the initiation of criminal proceedings if such are possible.[69] This ensures that civil recovery proceedings will not be instituted in circumstances where the evidence is sufficient to bring criminal proceedings followed by a confiscation hearing. This hierarchy avoids the possibility of a respondent claiming that he has been deprived of the protections which would have been afforded to him in a criminal trial

SUFFICIENTLY PROTECTIVE OF HUMAN RIGHTS?

A crucial issue in respect of civil forfeiture is whether a system can be devised which is fundamentally fair and does not fall below minimum human rights standards. The implementation of non-conviction based civil recovery in the UK has been described as 'tantamount to an over zealous totalitarian-like state which disregards notions such as privacy and the principle of minimum intrusive state interference in the conduct of people's daily lives'.[70] But is this valid criticism? Does civil recovery threaten the rights of citizens? There is a need to strike a balance between the civil rights of the individual and ensuring that the state has the tools to protect society by tackling organised crime effectively.[71] Parliament may properly legislate on issues of rights as long as these do not drop below certain guaranteed minimums and from time to time it legislates to adjust the human rights balance as the social context in which rights operate changes. For example, after the events of 11th September, 2001, it adjusted the rights balance to allow greater information and evidence gathering powers for law enforcement agencies as they sought to deal with new terrorist challenges.

Different jurisdictions have calibrated the human rights balance in different ways, introducing a range of different safeguards to ensure protections of the rights of those whose property might be the subject of civil forfeiture proceedings. The civil recovery regime has a number of safeguards. First, the court may not make in a recovery order any provision

which is incompatible with any of the rights contained in the European Convention on Human Rights.[72] Secondly, the civil recovery regime has what is often referred to in US jurisprudence as an 'innocent owner' defence. This arises in two ways. If a person receives recoverable property in good faith, for value and without having notice that it was recoverable property, then it is not recoverable property.[73] However, even if the person did not pay value for the property, the court may not make a recovery order if each of four conditions are met and the court considers that it would not be just and equitable to do so. These conditions are that the person obtained the recoverable property in good faith; that before or after the person obtained the property he took action which he would not have taken if he had not anticipated receiving or had not received the property; that when he took action he had no notice that the property was recoverable; and that the making of a recovery order would be detrimental to him due to the action he had taken in relation to the property.[74] Thirdly, following a recommendation by Liberty that, since civil procedures usually contained a limitation period because over time the fairness of proceedings was compromised by the difficulty in adducing evidence, there should be a time limit on the period after the alleged criminal conduct during which property might be recovered, the government agreed to the insertion of a limitation period so that, once property has been held for 12 years, it is no longer capable of being subject to a recovery order.[75]

One particular issue in the human rights balance of forfeiture regimes is the place of compulsory questioning powers: questions which must be answered under pain of prosecution for failure to do so. The Western Australian model has been criticised for placing respondents in an insidious position of being compelled to give a detailed explanation in a civil forfeiture hearing, prior to a related criminal trial.[76] In the UK, while there is a right to silence in criminal proceedings, there is no right to silence in a civil recovery context if a Disclosure Order has been granted. A respondent may therefore be required to 'incriminate' his property.

A fundamental human rights question is whether there is a right to hold property which is the proceeds of crime. It has been suggested that a logical interpretation of Art. 1 of the First Protocol of the European Convention on Human Rights is:

> 'Everyone is entitled to own whatever property they have (lawfully) acquired . . .'[77]

hence implying that they do not have a right under Art. 1 to own property which has been unlawfully acquired. This point was argued in the Irish High Court in *Gilligan v The Criminal Assets Bureau*,[78] namely that where a defendant is in possession or control over assets which directly or indirectly constitute the proceeds of crime, he has no property rights in those assets and no valid title to them, whether protected by the Irish Constitution or by any other law. A similar view seems to have been expressed earlier in a dissenting opinion in *Welch v United Kingdom*: 'in my opinion, the confiscation of property acquired by crime, even without express prior legislation is not contrary to Article 7 of the Convention, nor to Article 1 of the First Protocol.'[79] This principle has also been explored in US jurisprudence. In *United States v Vanhorn*[80] a defendant convicted of fraud and money laundering was not entitled to the return of the seized proceeds since they amounted to contraband which he had no right to possess. In *United States v Dusenbery*[81] the court held that, because the respondent conceded that he used drug proceeds to purchase a car and other personal property, he had no ownership interest in the property and thus could not seek a remedy against the government's decision to destroy the property without recourse to formal forfeiture proceedings. The UK government has impliedly adopted this perspective, stating that:

> '. . . it is important to bear in mind the purpose of civil recovery, namely to establish as a matter of civil law that there is no right to enjoy property that derives from unlawful conduct.'[82]

The Parliamentary Joint Committee on Human Rights has, however, disagreed, stating that as a matter of domestic law (apart from the new civil recovery provisions), there was no general principle that prevents everyone in the world from asserting a right to enjoy property merely because it derived directly or indirectly from criminal conduct. Indeed, on the contrary, the general position was that people were entitled to enjoy property in their possession unless and until someone with a better title laid claim to it.[83]

There are difficulties with both sides of the argument. The argument is clearly correct in respect of a stolen painting discovered in the possession of the person who stole it, as he cannot have obtained good title to it. However, the argument is less convincing in other circumstances. Where a drug trafficker owns a house, having bought it from the previous owner with drug trafficking cash which he has

successfully laundered through his offshore bank account, it is arguable that the house is his and that he has obtained good title to it. This is so unless one takes the view that the 2002 Act has fundamentally changed the position in relation to property ownership. This is an issue which will be the subject of much debate.

PUNITIVE, PREVENTIVE OR REPARATIVE?

A further issue in respect of civil forfeiture proceedings is whether their true purpose is punitive action against the property owner. The Performance and Innovation Unit (PIU) Report clearly recommended that the UK civil recovery scheme should be preventive and reparative.[84] Preventive, because it would remove assets which were intended for use in committing crime and reparative because it would remove from individuals that which was never legally owned by them. The report therefore articulated that civil recovery was not intended as a punitive measure.[85] There are a number of features of civil forfeiture regimes, both in the UK and elsewhere, which support the view that such proceedings are not punitive in nature.[86]

One indicator of a non-punitive purpose is that civil forfeiture legislation is not interested in *mens rea*, that element of intent which is so important in criminal law. The criminal law is interested in analysing whether particular conduct was committed intentionally, recklessly, knowingly, wilfully, maliciously, fraudulently or dishonestly and seeks to punish conduct more severely where a more reprehensible mental state was present. Civil law generally is based much more on objective liability, either disregarding the mental element completely, or requiring only negligence. Civil forfeiture reflects this with its focus on the origin of the property concerned.

A second indicator of a non-punitive purpose is that civil forfeiture is about a return to the *status quo ante*. The court is not being required, nor indeed is it permitted, to consider what an appropriate sanction would be for any reprehensible past conduct of the property owner.

A particular indicator of a non-punitive purpose behind the civil recovery regime is that the 2002 Act provides that the Director of the Agency must exercise her responsibilities in a way which she considers is best calculated to contribute to the reduction of crime.[87] Recovering the proceeds of crime cannot therefore be seen as a punitive end in itself; rather it must be seen as a means to an end. While other jurisdictions may agree with this philosophical approach, the UK is the only jurisdiction to put it on a statutory basis. In *Director of the Assets Recovery Agency v Walsh* the court held:

> 'The purpose of the legislation is essentially preventative in that it seeks to reduce crime by removing from circulation property which can be shown to have been obtained by unlawful conduct thereby diminishing the productive efficiency of such conduct and rendering less attractive the 'untouchable' image of those who have resorted to it for the purpose of accumulating wealth and status '[88]

The courts in a number of other jurisdictions have also concluded that civil forfeiture is not punitive in nature. In the USA, the forfeiture of drug proceeds has been held to be inherently remedial rather than punitive in nature.[89] The position in relation to civil forfeiture of the instrumentalities of crime is more complex. In *Austin v United States*[90] the Supreme Court concluded that forfeiture generally, and statutory *in rem* forfeiture in particular, have historically been understood, at least in part, as punishment.[91] However, in *United States v Bajakajian*[92] the court revised the view of civil forfeitures which it had expressed in *Austin*. The analysis in *Bajakajian* significantly limited *Austin*'s apparent conclusion that traditional *in rem* forfeitures generally are punitive to some degree. However it did note that, because some recent federal forfeiture laws had blurred the traditional distinction between civil *in rem* and criminal *in personam* forfeiture, not all modern civil *in rem* forfeitures were non-punitive.

The Irish courts have also accepted the non-punitive purpose of their proceeds of crime civil forfeiture legislation:

> 'It seems to me that I am clearly entitled to take notice of the international phenomenon, far from peculiar to Ireland, that significant numbers of persons who engage as principals in lucrative professional crime, particularly that referable to the illicit supply of controlled drugs, are alert and effectively able to insulate themselves against the risk of successful prosecution through deployment of intermediaries, and the Act is designed to enable the lower probative requirements in civil law to be utilised in appropriate cases, not to achieve

penal sanctions, but to effectively deprive such persons of such illicit financial fruits of their labours as can be shown to be the proceeds of crime.'[93]

In Canada, although no case law yet exists giving the courts' views on the purpose of the proceedings, some jurisdictions have clearly emphasised the remedial element of their civil forfeiture regime. The Victims' Restitution of Compensation Payment Act 2001 in Alberta places a significant focus on the civil compensation of victims of crime. Even where there was no specific victim, the forfeiture can take place on behalf of a set of victims not specifically involved

Of course it must be acknowledged that while, as a matter of theory, civil forfeiture proceedings are preventive and reparative, this may be of no comfort to a respondent in a civil recovery action whose property is the subject of a recovery order

DILUTING THE STANDARD OF PROOF?

A core philosophical question is whether it is morally justifiable to forfeit property on a balance of probabilities that it derives from crime.[94] One of the clear attractions for law enforcement of a civil forfeiture regime is that proceedings do not require proof beyond a reasonable doubt. The Australian Law Reform Commission, in its in-depth study of proceeds of crime arrangements, reported that:

> 'In the Commission's view therefore it is incorrect to view the recovery of the profits of unlawful activity as part of the criminal justice process and, as such, justifiable only on the basis of a prior finding of guilt according to the criminal standard of proof beyond a reasonable doubt.'[95]

The Commission therefore found civil forfeiture of the proceeds of crime had a sound basis in principle.[96] This conclusion does not, of course, find favour with everyone. During the consultation process on the 2002 Act, Liberty expressed the view that it was wrong to give the state a power to opt for extensive confiscation of defendants' assets in circumstances where it did not have sufficient evidence to prosecute them in the criminal courts.[97] Liberty suggested that civil recovery was a partial return to the archaic principle of *in rem* forfeiture, which disappeared from English law in the 17th century because of the absurdity of the legal fiction upon which it was based.[98] Another commentator suggested that the use of the *in rem* 'fiction' enabled the state to take action against individuals on the basis of 'ill-defined criminal allegations'.[99]

In civil recovery proceedings the burden is on the Director to prove that, on the balance of probabilities, the property was obtained through unlawful conduct.[100] Prior to the passing of the 2002 Act, there was considerable debate as to the appropriateness of this standard as compared with 'the standard applicable in civil proceedings' Liberty expressed concern that the standard had the potential to interfere with a long line of cases that articulated the flexible standard where criminal allegations were made in civil cases.[101] JUSTICE considered that it was questionable whether the very low standard of proof was adequate to protect defendants from the arbitrary or discriminatory use of the civil recovery powers.[102] During the parliamentary debates the government were firmly of the view that a bare balance of probabilities would be sufficient in civil recovery proceedings In rejecting an opposition amendment the Parliamentary Under Secretary of State observed:

> 'If their amendment were accepted, and we replaced the balance of probabilities with the civil standard, we would send the courts the clear message that we want a higher standard or the criminal standard to apply in certain circumstances. We should avoid that confusion.'[103]

This position can be contrasted with that in respect of anti-social behaviour orders, where the House of Lords in *McCann* adopted a pragmatic approach and decided that, while such orders were civil in nature, the criminal standard of proof should apply on the basis that this approach would facilitate correct decision making and should ensure consistency and predictability.[104] Lord Hope considered that there were good reasons, in the interests of justice, for applying the higher standard when allegations were made of criminal or quasi-criminal conduct which, if proved, would have serious consequences for the person against whom they are made

If the UK courts determined that the appropriate standard of proof in civil recovery cases was a standard which would 'for all practical purposes be indistinguishable from the criminal standard',[105] this would undermine the entire civil recovery regime. The presenting problem which led to the legislation was that law enforcement had recognised that there were

cases in which they could not produce sufficient evidence to meet the criminal standard. The imposition by the civil courts of a criminal standard of proof would therefore have the practical effect of making successful civil recovery proceedings difficult, particularly due to the effect of the statutory hierarchy. Given that Parliament has provided that criminal proceedings must be brought where possible, it follows that, where evidence sufficient to prove a case beyond a reasonable doubt exists, criminal proceedings must in general be instituted. It therefore seems that in practical terms one can have the hierarchy or the flexible standard of proof but not both. This may, however, be too pessimistic a conclusion. Lord Steyn observed in *McCann* that, in satisfying the criminal standard in civil proceedings, the use of hearsay evidence would often be of crucial importance.[106] Furthermore, under the 1990 and 1994 cash forfeiture schemes, most cases appear to have been decided on the balance of probabilities test.[107]

If the courts decided, however, that the standard of proof was a bare balance of probabilities, this must not be seen as 'rough justice'. Justice in the civil courts, delivered on the balance of probabilities, cannot be criticised as somehow lesser in quality than the justice delivered by the criminal courts. To do so would logically call into question the standard of justice in all civil cases as somehow deficient

BREACHING THE PRESUMPTION OF INNOCENCE?

It is a fundamental tenet of all human rights-based legal systems that there should be a presumption of innocence. This means that all defendants in criminal cases are presumed to be innocent until proven guilty beyond a reasonable doubt. It has been argued that civil recovery proceedings may be exceptionally damaging to the reputation of a respondent who may effectively be branded a criminal because he is in possession of assets obtained through unlawful conduct.[108] The argument that it is the property rather than the person which is the subject of proceedings has been described as 'not entirely convincing'.[109] Liberty argued that the pursuit of property involves direct or indirect findings of guilt on the part of the property holder or persons connected to the property and that civil recovery thus undermines the presumption of innocence. The danger is that people will be 'convicted' by the civil courts in the eyes of the public without protections which would be available in the criminal courts.[110] Civil recovery therefore contravenes the spirit of the presumption of innocence by providing an expedient path to findings of guilt but with lesser protections.

The government has replied to this by arguing that an allegation that a person holds recoverable property does not amount to an allegation that he has committed an offence. Civil recovery proceedings may be brought against any person who holds recoverable property, whether that person is the person who committed the unlawful conduct or not. Even where the evidence is that the holder of the recoverable property himself committed the unlawful conduct which generated the property, this does not mean that the proceedings are criminal as understood in Convention terms There are many types of civil proceedings which involve allegations that conduct has been committed which constitutes a criminal offence, for example civil fraud proceedings.[111]

Could civil forfeiture proceedings have a by-product of damaging a person's reputation without the protections of a criminal trial? Even if this is not the intention of the proceedings, could it be the result? One means of preventing the attaching of a stigma to an individual would be to impose some degree of reporting restrictions. Such measures might range from a complete prohibition on reporting the proceedings to a restriction on publishing the full name or personal details of the respondent.

DOUBLE JEOPARDY?

The PIU Report recommended that in certain cases it might be appropriate to invoke civil forfeiture after an acquittal[112] and it is clear from the parliamentary debates that there may be circumstances where civil recovery proceedings will follow on from an unsuccessful criminal prosecution. The government did not accept that an acquittal in criminal proceedings in relation to alleged unlawful conduct should automatically bar civil recovery of the property allegedly obtained thereby.[113] While it did not believe that civil recovery would be used routinely against people who had been acquitted of criminal offences, the government nevertheless did not accept that the Agency should be deprived of that ability It considered that in some instances, despite the failure of criminal proceedings, civil recovery would be the 'glaringly obvious route' to take.[114] A related proposal that Parliament should fetter the Director's discretion and provide that, where confiscation proceedings had

been brought and failed, civil recovery proceedings could not be brought unless there was new evidence, also failed.[115]

Opponents of civil forfeiture have expressed concern that proceedings in such circumstances in some way breach the double jeopardy rule. This rule is the fundamental principle that a person should not be prosecuted twice for the same offence.[116] A second set of criminal proceedings will be barred by the courts on the well established common law principle that, where a person has been convicted and punished for an offence by a court of competent jurisdiction, the conviction shall be a bar to all further criminal proceedings for the same offence and he shall not be punished again for the same matter.[117] The principle also extends to situations where the crime charged is in effect the same or substantially the same as one in respect of which the person has previously been acquitted or convicted. The question whether civil recovery proceedings may represent a breach of the double jeopardy rule revisits the issue of classification of the proceedings. The simple answer is that in civil recovery proceedings there is no indictment, the respondent is not a defendant, and his liberty is not at risk. Since civil recovery proceedings are not criminal proceedings, the issue of double jeopardy does not, therefore, arise.

However, it has been suggested that, even if civil recovery proceedings do not formally breach the double jeopardy rule, they breach it in spirit. Such proceedings amount to being 'pursued for the same offence by the back door'.[118] The Agency may be perceived as an organisation which is allowed to take 'a second bite of the cherry' after criminal proceedings have failed.[119] It has been suggested such proceedings would be 'a collateral attack on an acquittal'.[120] Liberty recommended that the regime should give the courts the power to prevent proceedings where a defendant had recently been acquitted of criminal charges which then form essentially the same subject matter of the Director's application.[121] Again, the answer to such suggestions must be that criminal and civil recovery proceedings are different and have different objects, and that there is no breach of the double jeopardy rule, even in spirit.

The jurisdiction with the most extensive jurisprudence on this issue is the USA. In *United States v Ursery*[122] the US Supreme Court held that a criminal conviction for manufacturing marijuana, following a civil forfeiture action seizing property used to facilitate the same offence, did not violate the Double Jeopardy Clause of the Fifth Amendment to the US Constitution because civil forfeitures did not constitute punishment for the purposes of the Clause. In *Ursery* the court noted that, since the earliest years of the nation, Congress had authorised the government to seek parallel *in rem* civil forfeiture actions and criminal prosecutions based upon the same underlying events.

Of course a defendant may face criminal proceedings in one jurisdiction and civil forfeiture in another. This is simply a potential consequence of international money laundering which leaves an individual open to criminal proceedings in multiple jurisdictions (which also would not breach the double jeopardy rule) and/or civil proceedings following criminal proceedings in another jurisdiction. However, practical problems may arise when parallel civil and criminal proceedings are pursued. Where parallel proceedings are possible, a defendant may allege that he is forced to act in one set of proceedings in a way which compromises him in the other. Of course the difficulties created by parallel proceedings may not always be to the detriment of the property owner. In *Degen v United States*[123] the government argued that the criminal prosecution against Degen might be compromised by his participation in the forfeiture case. It considered that, because of the differences between the discovery privileges available to Degen in each case, he might use the rules of civil discovery in the forfeiture proceedings to gain an improper advantage in the criminal matter. The Supreme Court considered that the court was capable of exercising its discretion to manage the civil litigation in a way which avoided interference with the criminal case.

AN EFFECTIVE SOLUTION?

The reason for the introduction of civil recovery legislation is simply because of the ineffectiveness of the criminal confiscation legislation. The Home Office Working Group on Confiscation concluded in 1998 that, while the UK's criminal confiscation scheme had had some effect in depriving criminals of their proceeds, it had not been as successful as originally anticipated.[124] A 1998–99 report in Scotland said that the results from confiscation were disappointing and significantly disproportionate to the money realised by crime.[125] Michael Levi has argued that the UK criminal confiscation system was never designed for the complexities of national or international recovery of criminal proceeds from high-level offenders.[126] Arguably it was designed only to take property from

offenders whom the authorities, using the criminal law, could effectively prosecute. Since the heads of organised crime gangs are frequently beyond the reach of the criminal law, the failure of the confiscation regime to impact on them should therefore not be surprising.

This raises the question of whether civil recovery is likely to be more effective in practice. It is clearly not desirable to introduce a system which is destined to be ineffective The evidence in respect of the relative effectiveness of civil forfeiture is, however, currently only anecdotal Indeed, as Levi suggests, the evaluation of the impact of asset forfeiture on the criminal marketplace is extremely difficult.[127] Certainly the total figures for US forfeiture revenue are impressive, as are the Irish figures.[128] However, there are no available data in respect of the proportion of criminal assets removed from circulation or studies on the impact of forfeiture on criminal organisations It would therefore be extremely desirable for some serious research to be done into the effectiveness of civil recovery.

The effectiveness of civil recovery will depend to a significant extent on the quality of the financial investigations and the cogency of evidence obtained as a result. One noteworthy issue in relation to evidence concerns the admissibility of telephone intercept material. The Australian Federal Police Association told an Australian Senate Committee that the civil forfeiture regime would be unworkable without telephone intercept evidence.[129] In the UK such material is not admissible in any court proceedings.[130] There is now, however, the beginnings of a public debate on the issue, with a former Director of Public Prosecutions for England and Wales having observed that it was a damaging restriction which was weakening the fight against organised crime, drug trafficking and terrorism.[131]

The trend to utilise civil proceedings in the fight against organised crime means that jurisdictions now require the ability to assist each other's civil forfeiture investigations and recognise and enforce each other's civil forfeiture judgments. International cooperation cannot be limited to criminal matters if it is to be effective.

Effectiveness may be understood in broader terms than merely removing significant amounts of criminal proceeds The Irish Criminal Assets Bureau has reported that the introduction of civil forfeiture legislation led to the flight from the jurisdiction of the heads of six organised crime groups.[132] It is not clear whether these individuals simply now organise criminal activities in Ireland from overseas. Nevertheless such flight may be counted as a limited success for the legislation, inasmuch as they no longer serve as bad role models within Irish society

Effectiveness of civil recovery must also be considered in terms of not just how much money it removes but from whom it is removed. While it is important that the activities of the 'Mr Bigs' of crime are affected, it is also important that those who act as criminal role models in local communities are likewise affected It has been suggested in Canada that organised crime consists mostly of 'small time operators with short career life-expectations whose earnings are generally modest and almost always blown on fast living, leaving little or nothing left to seize Forfeiture will, at best, fill the coffers with the trailer homes, cars and motor boats of ordinary citizens with no sign of the narco-barons' mansions, yachts or gold-plated bathtubs'.[133] There is therefore a strategic balance to be struck between longer-term investigations into the origin of property held by those believed to be directing the activities of organised crime and the easier, low-hanging fruit in smaller cases.

CONCLUSION

There is a global trend, due in part to an increase in organised crime activities, to utilise civil remedies as a means of removing both the trophies of past criminal misconduct and the potential working capital of criminal activity from those who hold them. Civil forfeiture legislation complements criminal confiscation and money laundering legislation as an important means of taking the profit out of crime

The Agency can anticipate significant legal challenges to its civil recovery litigation. All of the arguments reviewed above and many more can be expected to be raised in one form or another. Indeed, the experience in Ireland was one of judicially disapproved-of 'obstructive tactics' by defendants whose property had been the subject of proceedings by the Criminal Assets Bureau. Indeed, many of the cases were characterised by multiple, repeated and over-elaborate preliminary applications, all funded through legal aid. While the legislation was relatively new and arguably involved difficult questions of law, this did not provide a full explanation for the 'bogged-down, cluttered-up, confused and near stagnant state' of the court list of civil forfeiture cases [134] The experience of other jurisdictions which have introduced civil forfeiture laws has been similar

Much will depend on the way the courts apply the legislation In South Africa, prior to the introduction of civil forfeiture legislation, overseas experts in the field warned that some judges would be reluctant to implement the law on the grounds that they saw it as draconian The South African experience confirmed this and the courts delivered 'some initial judgments which appeared to be unsympathetic to the principle of asset forfeiture'.[135] The Irish experience is lacking in 'unsympathetic' judgments, perhaps because of the massive public groundswell against organised crime which led to the passing of the legislation in Ireland. The political consensus regarding the need for such legislation undoubtedly gave rise to tremendous social pressure for its robust implementation. In the UK civil recovery legislation has been government-driven rather than driven by social and political consensus. This may lead to its being implemented more conservatively by the courts, at least initially [136]

While it will be some time before an assessment can be made as to whether the civil recovery regime has proved an effective tool against organised crime groups, what can be said now is that the arguments raised by those opposed to civil recovery legislation, while superficially attractive, are, on closer examination, without substantive merit

References

(1) Hereafter referred to as 'the 2002 Act' in the text and 'POCA' in the footnotes

(2) Home Office (2001) 'Proceeds of Crime: Consultation on Draft Legislation', p 226

(3) Hereafter referred to as 'the Director' and 'the Agency' respectively

(4) In this paper the term 'civil forfeiture' is used as a general description of asset forfeiture proceedings in a civil law forum The term 'civil recovery' is used to describe the UK model of civil forfeiture as provided for by POCA POCA also provides a separate regime for the civil forfeiture of cash by the Magistrates' Court which is outside the scope of this paper

(5) Each of the principal issues dealt with in this paper is capable of being the subject of a paper in itself Nevertheless there is merit in providing a general overview of the issues involved

(6) For example, one might observe the differences between the Civil Evidence Act 1995 and Police and Criminal Evidence Act 1984

(7) Cheh, M. M (1991) 'Constitutional Limits on Using Civil Remedies to Achieve Criminal Law Objectives'. 42 *Hastings LJ*, 1325, p. 1329

(8) [2000] 1 WLR. 2020, 2025

(9) Mann, K (1992) 'Punitive Civil Sanctions: The Middleground Between Criminal and Civil Law'. 101 *Yale LJ*, p 1795.

(10) *R (McCann and Others) v Crown Court at Manchester* [2001] 1 WLR. 358

(11) Klein, S. R. (1999) 'Redrawing the Criminal–Civil Boundary'. 2 *Buff. Crim LR* 679

(12) Crime and Disorder Act 1998, s 1.

(13) Section 222 of the Local Government Act 1972. 'Law Intended for Dirty Pigeons is Used to Ban Crack Dealers'. *Independent*, 29th April, 2003

(14) See *Gough v Chief Constable of Derbyshire* [2001] 4 All ER 289

(15) It has been observed that 'the mixing of civil orders and procedures is emerging as a hallmark of New Labour's approach to criminal policy': Rutherford. A (1998) 'Confiscation without Conviction'. *New Law Journal*. 4th December

(16) Newkirk, T C and Brandriss, I L (1998) 'The Advantages of a Dual System: Parallel Streams of Civil and Criminal Enforcement of US Securities Laws', 16th Cambridge Symposium on Economic Crime, 19th September

(17) President's Commission on Organized Crime, Report to the President and the Attorney General (1986) 'The Edge: Organized Crime, Business and Labour Unions', s 11. pp. 1–2, Washington DC

(18) Act No 646 of 13th December. 1982

(19) Proceeds of Crime Act 1996

(20) Prevention of Organised Crime Act 1998

(21) Proceeds of Crime Act 2002

(22) Criminal Property Confiscation Act 2000

(23) The Confiscation Act 1997

(24) Criminal Assets Recovery Act 1990.

(25) Victims' Restitution and Compensation Payment Act 2001

(26) Remedies for Organized Crime and Other Unlawful Activities Act 2001

(27) Home Office (2001) 'Proceeds of Crime: Consultation on Draft Legislation', p 226.

(28) *Ibid*

(29) Application No 12386/86. decision of 15th April, 1991 Although the English translation of the Italian legislation and the case report in *M v Italy* use the term 'confiscation', this term describes what would be termed 'civil forfeiture' in this jurisdiction Under s 2(3) of Act No 575 of 31st May, 1965, 'confiscation' is possible where the authorities have introduced circumstantial evidence concerning the unlawful origin of the property and the defence has not been able to discharge its burden of rebuttal

(30) (Unreported) Coghlin, J . 1st April, 2004

(31) 'Confiscation that Counts', Australian Law Reform Commission Report No 87, Canberra. 1999. para. 4 169.

(32) Systems of civil forfeiture fall into two types: those which deal with the proceeds of crime and those which deal with the instrumentalities of crime. This is nevertheless a legal distinction rather than a factual one. The proceeds of past crimes may also be the instrumentalities of future crimes. The cash forfeiture provisions in POCA permit forfeiture of both cash proceeds and cash instrumentalities The civil recovery provisions permit forfeiture only in respect of proceeds

(33) Cheh, ref. 7 above

(34) 'Recovering the Proceeds of Crime', Report by the Performance and Innovation Unit, Cabinet Office, June 2000, para 5 10 Hereafter referred to as 'the PIU Report'

(35) Corker, D (2002) 'Developments in Criminal Liability and the Proceeds of Crime Bill'. *Money Laundering Bulletin*. April

(36) POCA. s 313.

(37) Home Office (2001) 'Proceeds of Crime: Consultation on Draft Legislation', p 227

(38) *R (McCann and Others) v Crown Court at Manchester* [2001] 4 All ER. 264

(39) New South Wales Crime Commission Act 1985
(40) [2001] 1 WLR 358
(41) [2001] 4 All ER 264
(42) *R (On the Application of McCann) v Manchester Crown Court; Clingham v Royal Borough of Kensington and Chelsea* [2002] 4 All ER 593
(43) *United States v Ward* 448 US 242 (1980) and *Hudson v United States* 522 US 93 (1997)
(44) [2001] IESC 63
(45) *Engel v The Netherlands* (1976) 1 EHRR 647
(46) 'Hotelier Loses Plea Against Civil Court Verdict of Rape', *The Times*, 22nd November, 1995 and 'Wife Raped by Husband Wins £14,000 Payout', *The Times*, 10th September, 1997
(47) *S v Miller* (2001) SC 977
(48) *Engel v Netherlands* (1976) 1 EHRR 647 and *Campbell and Fell v United Kingdom* (1984) 7 EHRR 165
(49) Application 12386/86, decision of 15th April, 1991
(50) Application 52439/99, decision of 4th September, 2001
(51) Application 52024/99, decision of 5th July, 2001
(52) Application 41661/98, decision of 27th June, 2002
(53) *R (On the Application of McCann) v Manchester Crown Court; Clingham v Royal Borough of Kensington and Chelsea* [2002] 4 All ER 593.
(54) [2003] All ER (D) 208 (Apr). Other cases include *R (Mudie and Another) v Dover Magistrates' Court and Another* [2003] QB 1238 and *Goldsmith v Customs and Excise Commissioners* [2001] 1 WLR 1673
(55) *R v Benjafield, Leal, Rezvi and Milford* [2001] 2 All ER 609.
(56) Coghlin, ref 30 above
(57) (1998) 3 IR 185 The issue was raised in the context of Article 43 of the written Irish Constitution, which protects individual property rights, rather than an ECHR context, as it has been clearly established by the Irish Supreme Court that the Convention does not form part of Ireland's domestic law: *In Re O'Laighleis* [1960] IR 93
(58) *National Director of Public Prosecutions v Meyer*. High Court of South Africa, 29th July, 1999.
(59) (1994) 18 EHRR 371
(60) 'The Threat from Serious and Organised Crime', NCIS, 2001, paras 1 6 to 1 8
(61) [2001] 2 All ER 638
(62) [2002] 4 All ER 633
(63) Civil Asset Forfeiture Reform Act 2000, s 2
(64) Liberty submission to the Consultation on Proceeds of Crime draft clauses, para 7 4
(65) Smith, S (2000) 'Civil Banishment of Gang Members: Circumventing Criminal Due Process Requirements?', 67 *U Chi L Rev* 1461.
(66) Klein, ref 11 above
(67) Cheh, ref 7 above
(68) Despite this theoretical argument, however, civil recovery may nevertheless prove in practice to be an expensive and time-consuming remedy with many built-in procedural protections open to respondents
(69) POCA, s 2
(70) Response of the Criminal Law Committee of the Law Society to the Third Report of the Home Office Working Group on Confiscation
(71) PIU Report, para 5 22
(72) POCA, s 288
(73) *Ibid*, s 308(1)
(74) *Ibid*, s 266
(75) *Ibid*, s 288. Other jurisdictions have also inserted limitation periods in their models. For example, s 3(5) of Ontario's Remedies for Organized Crime and Other Unlawful Activities Act 2001 provides a 15-year limitation period from the date when the proceeds of unlawful activity were first acquired as a result of unlawful activity
(76) Clarke, B (2001) 'Confiscation of Proceeds of Crime: An Australian Response', ICC, Durban 3rd–7th December
(77) Heffernan, L with Kingsyton, J (1994) *Human Rights: A European Perspective*, The Round Hall Press, Dublin, p 291.
(78) *Gilligan v The Criminal Assets Bureau* (1998) 3 IR 185
(79) (1995) 20 EHRR 247 Dissenting opinion of Mr H G. Schermers
(80) 296 F 3d 713 (8th Cir 2002).
(81) 223 F 3d 422 (6th Cir 2000)
(82) Joint Committee on Human Rights. Eleventh Report. 4th February, 2002, Appendices to the Minutes of Evidence. Home Office Memorandum, para 24
(83) Joint Committee on Human Rights. Eleventh Report. 4th February, 2002, para 19
(84) PIU Report, para 5 12
(85) *Ibid*, para 5 13
(86) A number of orders such as football banning orders, anti-social behaviour orders and sex offender orders have now been viewed as preventive measures rather than punishments: *Gough v Chief Constable of Derbyshire* [2002] 2 All ER 985 It is, however, important to recognise that many orders made by the courts possess both punitive and preventive characteristics.
(87) POCA, s 2(1)
(88) Coghlin, ref 30 above
(89) *United States v Salinas* 65 F 3d (6th Cir 1995).
(90) 509 US 602 (1993)
(91) *Austin* concerned the attempted forfeiture of a mobile home where the respondent had stored cocaine and a car body shop from where he sold the drugs
(92) 524 US 321 (1998)
(93) *M v D* [1998] 3 IR 175
(94) Levi, M (2000) 'Financial Measures against Illegal Drugs: An Overview', *Police Foundation*, p 4
(95) 'Confiscation that Counts'. Australian Law Reform Commission. Report No 87, Canberra, 1999, p 75
(96) *Ibid*., p 76
(97) Liberty submission to the Consultation on Proceeds of Crime draft clauses, para 1 2
(98) *Ibid*, para 7 2
(99) Corker, D (2002) 'Developments in Criminal Liability and the Proceeds of Crime Bill', *Money Laundering Bulletin*, April
(100) POCA, s 241(3)
(101) See ref 97 above, para 11 2
(102) JUSTICE submission to the Consultation on Proceeds of Crime draft clauses, p 7
(103) Hansard, House of Commons, Standing Committee B, 13th December, 2001
(104) *R (On the application of McCann) v Manchester Crown Court; Clingham v Royal Borough of Kensington and Chelsea* [2002] 4 All ER 593
(105) *B v Chief Constable of Avon and Somerset Constabulary* [2001] 1 WLR 340
(106) *R (On the application of McCann) v Manchester Crown Court; Clingham v Royal Borough of Kensington and Chelsea* [2002] 4 All ER 593
(107) These were provided by the Criminal Justice (International Cooperation) Act 1990 and the Drugs Trafficking Act 1994 See *Butt v HM Customs and Excise* [2001] EWHC Admin 1066
(108) Hansard, House of Commons, Standing Committee B, 11th December, 2001, col 619
(109) Response of the Criminal Law Committee of the Law Society to the Third Report of the Home Office Working Group on Confiscation

(110) Liberty submission to the Consultation on Proceeds of Crime draft clauses, paras 7 3 and 7.4
(111) Joint Committee on Human Rights. Eleventh Report. 4 February, 2002, Appendices to the Minutes of Evidence. Home Office Memorandum
(112) PIU Report. para 5 43
(113) See ref. 108 above. col 631
(114) *Ibid* . col 633
(115) *Ibid* . col 629
(116) *Connelly v Director of Public Prosecutions* [1964] AC 1254. 1305
(117) *Wymyss v Hopkins* (1875) LR 10 QB 378. 381
(118) Hansard. ref. 108. col 630
(119) *Ibid* . col 628
(120) Opinion of Clare Montgomery QC, Matthew Ryder and Danny Friedman. 24th May. 2001. obtained by Liberty
(121) Liberty submission to the Consultation on Proceeds of Crime draft clauses. para 8 3
(122) 518 US 267 (1996)
(123) 517 US 820 (1996).
(124) Home Office Working Group on Confiscation. Third Report. 'Criminal Assets', November 1998
(125) 'Making Crime Pay: Confiscation of Criminal Assets in Scotland', Her Majesty's Inspectorate of Constabulary for Scotland, 14th June. 2000. para 1 4
(126) Levi, ref. 94. p 16
(127) *Ibid*.. p. 34
(128) Levi questions whether the early gains under the Irish system will be sustained in later years. Some respondents will have been caught by the sudden change in Irish law but it seems likely that the more devious criminals will try to cover their financial tracks in more complex ways. *Ibid* . p 29
(129) Evidence of Australian Federal Police Association to Australian Senate.
(130) Regulation of Investigatory Powers Act 2000, s 17
(131) 'Juries "Should Hear Phone Taps"', *Observer*. 8th September, 2002, and 'MI6 Fights to Block Phone Tap Evidence', *Guardian*. 14th October, 2003
(132) PIU Report. para. 5 9
(133) Ontario Hansard. Second Reading Debate of the Remedies for Organized Crime and Other Unlawful Activities Act 2001. 1st October, 2001.
(134) 'Judge Critical of Defendants' "Obstruction" in CAB Cases', *The Irish Times*. 18th February. 2000
(135) National Prosecuting Authority. Annual Report 1999–2000. Pretoria, p 18
(136) The US experience has been one which indicates a clear evolution of civil forfeiture before it arrives at a settled state: Cassella. S (2003) 'The Development of Asset Forfeiture Law in the United States', *Acta Juridica*. p 314

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