Introduction

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The expression ‘civil forfeiture of criminal property’ can evoke a number of different responses. First there is the common response of ‘what the hell is it?’. This is sometimes followed by the question, ‘does it have something to do with terrorism?’. It is not easy to answer the first question simply, and as for the second question civil forfeiture includes and goes beyond the forfeiture of property used to finance terrorism. Most countries which now have a regime of civil forfeiture had either adopted or decided to adopt the regime well before the tragic events of 11 September 2001. These regimes are a response to domestic and international organized crime generally. They primarily target the profits and proceeds of serious and organized criminal activities as a means to eliminate such activities.

The aged and wise may wonder why we are still discussing forfeiture of property when ‘it was abolished many years ago and is no longer legitimate’. While it is true that common law jurisdictions abolished the old punishment of general forfeiture for committing treason or a felony, this does not mean that modern forfeiture laws are illegitimate.¹ General forfeiture which deprived a traitor or felon of all of his personal property (and sometimes his real property as well) was clearly disproportionate punishment on the offender and his family members. Such punishment also denied victims the opportunity to obtain money damages from the wrongdoer. General forfeiture in today’s world is also inconsistent with the goals of rehabilitating offenders and reintegrating them back into society.

Modern forfeiture laws are concerned not so much with punishing individuals for their past wrongs but with achieving specific criminal justice objectives including disgorging offenders of their ill-gotten gains, disabling the financial capacity of criminal organizations, and compensating victims of crime. These laws respond to the increasing sophistication of profit-motivated crime that transcends borders and uses every innovative means to

¹ See Forfeitures for Treason and Felony Act 1870 (UK); Criminal Law Act (Northern Ireland) 1967, s. 7(7); Criminal Procedure Ordinance (Cap. 221), s. 69 (HK). See generally Arie Freiberg and Richard Fox (2000), ‘Fighting Crime with Forfeiture: Lessons from History’, *Australian Journal of Legal History*, 6, 1.

obfuscate the trail of criminal income. In modern societies such laws will typically have procedural and substantive safeguards that protect due process interests and legitimate property rights of individuals.

A common law lawyer may wonder whether the ‘civil’ in ‘civil forfeiture’ refers to the civil law legal system that exists in continental Europe and other places. The answer is no. As Jorge Godinho remarks in Chapter 11, civil forfeiture is ‘so unfamiliar to lawyers trained in the civil law tradition that most probably have never heard of it’. Modern civil forfeiture originated in the United States in the 1970s and 1980s and has since proliferated in predominantly common law jurisdictions. Québec, a civil law jurisdiction within Canada, is undergoing an interesting experiment. As Ontario lawyers, James McKeachie and Jeffrey Simser, observe in Chapter 6, Québec’s 2007 law ‘attempts to wed common law ideas somewhat anchored in admiralty concepts to a different civil system’.

The lack of universality of civil forfeiture explains the ambivalence of international treaties on drug trafficking, organized crime and corruption in mandating civil forfeiture of criminal property.² While these treaties impose obligations on states parties to have laws that allow for the restraint and confiscation of proceeds of crime and other criminal property, they stop short of specifying what form such laws should take. Parties are left a margin of discretion to determine whether they wish to implement such obligations within their existing criminal justice system or by other means including the adoption of a civil forfeiture regime.

If ‘civil’ refers to the distinction between civil and criminal law, the common law lawyer may still remark that civil forfeiture is rather a strange animal when compared to a typical civil lawsuit as between private persons. The hallmark of civil forfeiture is its *in rem* character at all stages of the process, from application to enforcement. It is also a branch of public law because invariably it is the state seeking to have private property forfeited pursuant to legislation with high public policy content. The proceeding is brought against property and not property owners. While notice is usually given to persons with an interest in the targeted property, a significant amount of civil forfeiture proceeds uncontested, either because no one has come forward to contest the government’s claim or a settlement has been reached with all the relevant parties.³

² See the development of this point in Chapters 11 and 10 of this book.

³ Stefan Cassella notes in Chapter 2 that about 80% of the United States forfeiture cases in drug matters are uncontested and resolved by way of administrative forfeiture. Federal prosecutors follow a policy that civil forfeiture settlements are not to be made for the purpose of obtaining an advantage in a criminal case. Prosecutors should not agree to release forfeitable property to coerce a guilty plea or agree to dismiss

Criminal lawyers may not be any more familiar with civil forfeiture than civil practitioners. While civil forfeiture bears a resemblance to its sibling, criminal forfeiture, it instinctively resists any attempt to classify it as general criminal law or procedure. When countries began enacting modern forfeiture laws, it was generally done first within the confines of the criminal justice system. Forfeiture was part of a sentence which a convicted person received. Forfeiture could be *in rem*, against the offender's property, or *in personam*, in the form of a confiscation or penalty order, or a combination of both to most effectively make the offender account for all of his ill-gotten gains.

The experience of criminal forfeiture in many jurisdictions revealed its inherent limitations to achieving its objectives. The sentencing process was an unsatisfactory forum to confiscate *all* of the proceeds that may have been generated from the commission of the offence. Achieving such an outcome would usually require that a person of sufficiently high rank in the criminal organization be convicted of a scheduled offence and sufficient evidence be adduced to connect the property to the offender or the offences for which he was convicted. Adding a financial dimension to already complex criminal investigations and prosecutions was an added burden to law enforcement and prosecutorial agencies. A new breed of financial investigators and asset forfeiture prosecutors had to be cultivated and trained, a process which was bound to be slow at the beginning and impeded unless sufficient resources were dedicated to this new dimension of law enforcement.

Civil forfeiture emerges in response to the shortcomings of the criminal forfeiture model. It is the second generation of modern forfeiture laws. The *in rem* character of civil forfeiture which avoids the need to prove a person's guilt beyond a reasonable doubt has obvious appeal to policy makers. Some countries such as Ireland and South Africa were driven to enact civil forfeiture laws given the very visible face of organized crime in those societies at the time. Other jurisdictions such as the United Kingdom, Commonwealth Australia and Canada adopted a civil forfeiture regime after a careful review of domestic laws and processes and a consideration of overseas experience. But even where there is a political will to adopt civil forfeiture, the process of enactment is not always easy or expeditious. A case in point is New Zealand where in March 2004 the Minister of Justice was given the green light by Cabinet to develop a detailed policy proposal to introduce civil forfeiture. The first bill was tabled in June 2005, but did not receive a first reading that year as the result of pressure on House time before a general election. A replacement bill was introduced and read for the first time in

charges to coerce a forfeiture settlement. See The US Department of Justice, *United States Attorneys' Manual*, paras 9–113.100 and 9–113.106, March 2001.

March 2007, but as of August 2008 had only passed a review by a parliamentary select committee.⁴

Inevitably the question is asked whether civil forfeiture is really ‘criminal forfeiture dressed up in sheep’s clothing’? A common criticism is that civil forfeiture achieves the same objectives as criminal forfeiture but without the procedural safeguards and human rights protections that apply to criminal proceedings. International human rights treaties and constitutional bills of rights do not often provide a clear indication of what procedural and substantive norms should apply to civil forfeiture. These instruments bifurcate the world of adjudication into criminal and non-criminal proceedings, with the former given superior rights protections and the latter only minimal ones. In this bifurcated world, civil forfeiture sits well in neither of the two realms. Strained arguments to bring civil forfeiture within the criminal realm have been made in courts around the world but have generally failed.

Civil forfeiture has managed to survive human rights challenges mostly because of the foresight of policy makers and legislators who included an abundance of discretion in the laws to enable courts to do justice in individual cases. A good example of this is in several of the Canadian provincial laws that provided a power in the court to refuse to order forfeiture if it was not in the ‘interests of justice’.⁵ Courts have also had to step in to ensure that human rights principles guide the application of the law. For example, as Raylene Keightley notes in Chapter 4, South African courts have adopted a proportionality analysis to the forfeiture of instruments of crime, although the judges there have not always agreed on how the safeguard should be applied. In Australia, where there is no constitutional bill of rights, it was held that by virtue of statutory implication and common law principles derivative use of information obtained by an examination order under the Proceeds of Crime Act 2002 was not allowed.⁶ Similarly, in Ireland and Hong Kong, courts have insisted that discovery processes and production orders be limited by undertakings or conditions that protect an individual’s right of silence.⁷ In addition

⁴ See the Criminal Proceeds (Recovery) Bill, No. 81-1. New Zealand was originally meant to be covered in a chapter in this book but unfortunately due to uncertainties about aspects of the proposed recovery scheme in the bill it could not be included.

⁵ For more details, see Chapter 6 of this book and particularly the laws in Ontario, Nova Scotia, Manitoba, Saskatchewan and British Columbia. A similar safeguard appears in the laws of Ireland, and in Australia courts retain the power to stay proceedings if it is in the interests of justice; see Chapters 3 and 5 respectively in this book.

⁶ See *DPP (Cth) v. Hatfield* [2006] NSWSC 195, mentioned by Sylvia Grono in Chapter 5 of this book.

⁷ See Chapters 3 (Ireland) and 10 (Hong Kong) of this book.

to legislative and judicial safeguards, law enforcement agencies have had to adopt special processes and barriers to ensure high standards of fairness and an impermeable separation between the criminal and civil routes of proceeding.

At the end of all these questions, the cynical observer will ask whether civil forfeiture is 'really worth it', in other words, 'does it work?'. There is no doubt that civil forfeiture substantially increases government revenue (whether general revenue or in the form of a special fund), but this does not necessarily mean that it is achieving its objectives, a matter that is much more difficult to measure. Civil forfeiture laws are not a panacea. Criminal forfeiture continues to exist, and the two regimes must work together to co-ordinate efforts. Deficiencies in either regime or in effective co-ordination and co-operation will inevitably impair the overall impact of forfeiture laws. Impact largely depends on how well the laws are being enforced, and effective enforcement depends on having sufficient government resources.

It is misleading to measure impact or performance by a simple calculus of cost based on the total amount of dedicated resources and benefit based on the total amount forfeited. The United Kingdom's Assets Recovery Agency attracted criticism based on this kind of thinking after its first five years of operation.⁸ But actual impact in disrupting and deterring criminal enterprises may require a longer time frame to measure. Less easily quantifiable benefits that come from having safer cities, fewer victims of crime, increased utilization of property to produce lawful income, etc, must be taken into account in the balance of costs and benefits. The authors of many of the chapters in this book tend to see their civil forfeiture regime as having achieved on balance some measure of the regime's objectives. But for some of these jurisdictions the full impact of civil forfeiture has yet to be realized.

Academic writing on civil forfeiture is growing in volume but is still very much in its early days. Legal practice in this area remains a specialty, especially in jurisdictions outside the US. Those who are most knowledgeable and experienced are usually government prosecutors and policy researchers who work in the area but have limited time to publish academic writing on the topic.

This book which grew out of a project to study the need for civil forfeiture in Hong Kong has become something more. It attempts to capture the development of the major international civil forfeiture regimes in the past 10 to 15 years. These chapters are written by the leading practitioners (both government and non-government) working in each of the respective jurisdictions.

⁸ See Chapters 7 and 8 of this book, and also Richard Girling, 'The battle to break Britain's crime lords', *The Sunday Times*, 17 February 2008.

The book is also forward looking with an awareness of the serious problems with money laundering in Asia. With reform in mind, the book examines the practice of asset confiscation in Chinese societies where the rate of wealth accumulation (both legitimate and illegitimate sources) is unlike anywhere else in the world. There is no single answer to the likely prospect of introducing civil forfeiture in the four Chinese societies. Each has a unique response to this issue given their fundamentally different political and legal systems.

The book begins with an introductory chapter by Jeffrey Simser who answers the initial question of ‘what the hell is it?’ in a clear and concise overview piece entitled ‘Perspectives on civil forfeiture’. Simser reminds us of the historical origins of civil forfeiture in the law of admiralty and in protecting US territory from piracy. He traces the development of US civil forfeiture law and highlights its influence and inspiration for jurisdictions around the world.

Part II of this book, entitled ‘Global Proliferation of Civil Forfeiture Laws’, contains the core chapters that describe and analyse the civil forfeiture regimes in major jurisdictions including the US, Ireland, South Africa, Australia, Canada and the United Kingdom (UK). The chapters are arranged in this order to try to present an historical picture of the development and spread of these laws; however, the introduction of civil forfeiture in the last three jurisdictions occurred around the same time in 2002. Part II is essential reading for policy makers and legislators around the world in jurisdictions that are contemplating and researching the possible adoption of a civil forfeiture law.

Chapter 2, ‘An overview of asset forfeiture in the United States’, is written by one of the foremost experts, both academic and in practice, on the US asset forfeiture system. Stefan Cassella has written ‘the book’ on US asset forfeiture law and from his text he has contributed this chapter which provides a lucid outline of the current federal law. His discussion of notable cases demonstrates the power and extent of civil forfeiture, particularly in respect of the forfeiture of facilitating property. In his discussion of the objectives of forfeiture, Cassella admits that forfeiture can constitute ‘a form of punishment or retribution exacted by the criminal justice system’. The passing of the 2000 Civil Asset Forfeiture Reform Act reminds us of the need for safeguards in a civil forfeiture regime especially in respect of administrative forfeitures. A highlight of the chapter is his review of the practical advantages and disadvantages of civil forfeiture, noting that with civil forfeiture there is no net saving of efforts to be expended and that possible interference with criminal proceedings is real.

Chapter 3 turns to Ireland where civil forfeiture laws were enacted in 1996 in record speed following two shocking murders committed by organized crime gangs. Felix McKenna and Kate Egan provide a comprehensive review of the legal regime, the abundant amount of case law that has resulted, and the

workings of the Criminal Asset Bureau (CAB), of which McKenna was bureau chief until his retirement in 2006. As the title of the chapter indicates, the CAB practises a multi-agency approach to forfeiture which has proven to have significant advantages over traditional single-agency approaches. The authors highlight the use of the taxing power to attack criminal wealth which is a controversial measure but has been demonstrated to be an effective instrument in Ireland. The chapter contains a useful summary of the valuable human rights jurisprudence on civil forfeiture that has developed in that jurisdiction.

Poor implementation of criminal forfeiture legislation prompted South Africa to adopt civil forfeiture to curtail the rising levels of organized crime in that jurisdiction. But, as Raylene Keightley notes in Chapter 4, it was not only the new law that was essential but also the establishment of a specialist agency, the Asset Forfeiture Unit (AFU), 'to ensure that the innovations introduced by POCA 1998 were implemented'. Keightley details the ups and downs of the AFU in litigating the new legislation over the past decade. South Africa has had some interesting battles over the forfeiture of instrumentalities. The chapter concludes noting that while some of the fundamental constitutional issues have been settled, the courts have not always provided a clear majority view on the law and many other issues have yet to be raised and considered.

In Chapter 5, Sylvia Grono helps us to understand and see clearly the complex Proceeds of Crime Act 2002 which now applies in Commonwealth Australia. Like the US, Australia has different civil forfeiture regimes at both the federal and state levels. One of the reasons for the complexity of the federal law is its comprehensive nature, providing multiple means for law enforcement to recover ill-gotten gains as fully as possible. Unlike other regimes, the Australian law allows for both *in rem* and *in personam* orders in both the conviction and non-conviction streams. Grono believes that the civil forfeiture provisions which came into effect on 1 January 2003 has made a difference as it has allowed for earlier restraint orders, quicker interdiction of proceeds of foreign offences, and the possibility for action where the criminal cannot be located or is residing in a place from which extradition is not possible.

Canada might have had civil forfeiture legislation earlier than 2002 if it was not for uncertainty as to which level of government could and should enact such legislation. Under the Canadian Constitution, the federal Parliament has legislative authority over criminal law and procedure in criminal matters, while provinces have an exclusive power to legislate on property and civil rights. James McKeachie and Jeffrey Simser describe in Chapter 6 how the daring move by Ontario in 2001 to introduce civil forfeiture triggered a chain reaction across provinces to introduce their own civil forfeiture legislation. The Supreme Court of Canada will hear a case in late 2008 to determine

whether all these pieces of legislation are constitutional. Charter of Rights and Freedoms issues have also been raised, but as McKeachie and Simser note, so far the schemes have been found to be Charter compliant.

Chapters 7 and 8 provide different and contrasting perspectives on the UK's Proceeds of Crime Act 2002. Angela Leong, a former investigator with the Assets Recovery Agency (ARA) and now a notable scholar in this area, provides a comprehensive and critical overview of the new scheme. There are many lessons to be learned from the early years of the UK regime. Leong notes three factors that have hindered the progress in these early years: litigation arising in several court challenges; lack of understanding and experience among law enforcement agencies and interim receivers; and the lack of international powers. She also expresses concerns about whether the merger of the ARA into the Serious Organised Crime Agency (effective 1 April 2008) will give rise to new problems of administration and enforcement.

Sara Dayman provides us with a unique glimpse of the operations of the UK regime from the perspective not of a lawyer but of an accountant serving as a highly experienced management receiver. The UK regime relies upon independent receivers to play an active role in the preservation and investigation of assets pending recovery. Dayman counters the criticisms that have been made against the ARA by noting that the public agency was under funded, had unrealistic targets and was given insufficient time to meet its objectives. She highlights the importance of the work of the interim receiver in the UK system, particularly in the ability of receivers to seize assets in foreign jurisdictions (something which the ARA cannot do given the lack of international powers) and in assisting the court with its independent report. Her experience confirms the short-sightedness of the regime's initial policy, which was later changed, to deny access to restrained property in order to pay reasonable legal expenses, as such policy had delayed proceedings unnecessarily and affected the completeness of the receiver's report.

Part III of this book provides a different dimension to the topic. It examines the asset forfeiture laws in major Chinese jurisdictions in Asia with a view to determining if civil forfeiture already exists and, if not, the prospects of introducing such laws. Chapter 9, by Xing Fei and Kung Shun Fong, looks at the confiscation system in Mainland China. As one sees from the chapter, China is in a state of transition. The state's powers to confiscate both criminal property and property as punishment are wide and historically entrenched. However, with increased economic wealth and power in international trade, the country has moved towards greater protection of private property rights. It also strives to be an international partner in both anti-corruption and anti-terrorism measures. The authors argue that modern civil forfeiture laws have yet to be adopted even though there exists a power in the civil court to order confiscation in disputes between private parties. Despite mostly academic crit-

icism of the overbreadth of existing confiscation laws (which are reminiscent of the old common law general forfeiture power) the authors conclude that the reform of these laws does not appear to be on the government's agenda.

Hong Kong, on the other hand, is in a more realistic position to reform its laws which are still based on the old English criminal confiscation model. Chapter 10 reviews the history of asset confiscation before making out a case for reforming the law and enforcement processes. With profit-motivated crime rates still high and a poor performance record in interdicting proceeds of crime, I argue that the case for reform is a strong one, although there is some uncertainty in the government and legislature's will and resolve to adopt such laws.

Whereas Hong Kong is the common law face of China, Macau represents the continental civil law jurisdiction of China. Jorge Godinho begins Chapter 11 with the point made earlier that civil forfeiture is generally unknown to civil law jurisdictions. He explains that in Macau there exists two main confiscation powers: one for proceeds of crime but requires proof of unlawful activity beyond a reasonable doubt, and the other for instrumentalities which does not require proof of unlawful activity. There is also an unjustified wealth provision that requires civil servants to justify the lawful origins of any wealth they possess beyond their declared assets, or else they stand to have any unjustified wealth confiscated. In critiquing this latter provision on the basis that it interferes with an accused's presumption of innocence, Godinho has broader concerns about whether a civil forfeiture regime would be consistent with fundamental human rights norms in Macau.

Taiwan is the last Chinese society to be discussed and an important one given the strong economic and human ties with mainland China, Hong Kong and Macau. Lawrence Lee in Chapter 12 observes that while criminal and administrative confiscation exists for breaches of criminal laws and administrative regulations, civil forfeiture has yet to be adopted. His chapter highlights anomalies in the existing law and administrative difficulties in the pre-forfeiture management of assets. He argues for a wholesale review of the status quo and reform along the lines of the US model. With the new Kuomintang President elected in 2008, President Ma Ying-jeou, who has a doctorate from Harvard Law School, more US influence on Taiwanese law is foreseeable.

In the coming years there is little doubt that the world will see even more civil forfeiture laws. There is no indication at all that the jurisdictions that have adopted it thus far are likely to backtrack. Countries with entrenched crime problems including vulnerability to money laundering will find civil forfeiture an appealing measure to supplement (rather than replace) existing measures for dealing with profit-motivated crime. However, any measure that potentially increases 'public' finances is vulnerable to abuse by governments. In adopting the laws and procedures of other jurisdictions, governments must

also adopt the human rights safeguards that exist in those jurisdictions, particularly the safeguard that places the confiscatory power in the authority of the judiciary and not purely in the hands of the executive.

It awaits to be seen whether civil law jurisdictions will be able to reconcile civil forfeiture with their own domestic human rights norms and traditions. But if common law experience is any indication, civil forfeiture is destined to spread to civil law jurisdictions, though with modifications necessary to suit their unique circumstances. For some countries, such as mainland China, it is hoped that the question of adopting civil forfeiture will become part of a broader reform exercise that sees the reduction if not repeal of indiscriminate forfeiture as punishment for criminal and administrative offences.

Another development to watch for in the coming decade is whether new international and regional treaties or declarations on crime will make specific mention of civil forfeiture as a means to interdict criminal property. If a consensus emerges on the effectiveness of civil forfeiture it may well develop into an international standard. Related to this question is whether and when international tribunals will include powers of civil forfeiture in their constitutive document. For example, the Rome Statute of the International Criminal Court only provides at present for forfeiture after a person has been convicted of a crime in the statute.⁹

When seen from a broader historical timeline, this book provides foundational reading on civil forfeiture in its early years. It tackles the questions of what it is, why and how it spread across the common law world, and what basic jurisprudential and operational issues it faced in its first 10–15 years. As these existing regimes continue to evolve and develop, one hopes that a body of critical and in-depth academic scholarship will accompany their evolution and development.

⁹ See Article 77(2)(b) of the Rome Statute of the International Criminal Court.