THE HISTORY OF IN REM FORFEITURE –
A PENAL LEGACY OF THE PAST

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1 Introduction

*In rem* or civil forfeiture sanctions the confiscation of a defendant's property before a criminal conviction has been obtained. As such, it violates the notion that ownership is an absolute right. Ownership in Roman law was, however, never absolute – it tolerated restrictions. Similarly, it is generally accepted today that legislative measures have resulted in key limitations of the traditional concept of ownership.

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1 An *in rem* civil action is an action against the property as opposed to an *in personam* action which is against a person. In the context of forfeiture this implies that two different actions for the same offence may be taken against a defendant: one against his person, the criminal action, and one against his property, the *in rem* action.

2 S 1 of the Prevention of Organized Crime Act 121 of 1998 (hereafter "POCA") defines the term "defendant" as "a person against whom a prosecution for an offence has been instituted irrespective of whether he or she has been convicted or not ...". This section further favours a broad definition of property. It defines property as "money or any other movable, immovable, corporeal or incorporeal thing and includes any rights, privileges, claims and securities and any interest therein and all proceeds thereof" (my emphasis). "Interest" is defined in s 1 as any right that a person may have.


4 Visser “The ‘absoluteness’ of ownership: the South African common law in perspective” 1985 *Acta Juridica* 48 n 7; Birks “The Roman law concept of dominium and the idea of absolute ownership” 1985 *Acta Juridica* 1; Van der Walt “The South African law of ownership: a historical and philosophical perspective 1992 De Jure 446; Hahlo & Kahn (n 3) 579. In addition, although s 25 of the Bill of Rights in the Constitution of the Republic of South Africa (Act 108 of 1996) sanctions the protection of property, the Constitutional Court has on occasion, after reviewing the legality of an expropriation, found that there is “an appropriate relationship between means and ends, between the sacrifice the individual is asked to make and the public purpose this is intended to serve” (*First National Bank of SA Ltd t/a Wesbank v Commissioner for the South African Revenue Services* 2002 4 SA 768 (CC) par 98 per Ackerman J). Circumstances may exist when it is permissible and in the public interest to confiscate property without compensation (Chaskalson J and Lewis J in *FNB v Minister of Finance* [2002] 7 BCLR 844 (SCA) paras 66-100; *National Director of Public Prosecutions v Cole* [2004] 3 All SA 745 (W) 756E-757E; Rautenbach “Die reg op eiendom – arbitrêre ontneming, proporsionaliteit en die algemene beperkingsbepaling in konteks” 2002 *TSAR* 813 820-821). In *National Director of Public Prosecutions v Prophet* [2003] 8 BCLR 906 (C)) Erasmus J observed that forfeiture not only prevents further illegal use of property, but also imposes economic penalties by removing profits from an offender (917A-C). It should, however, be remembered that the effects of forfeiture should never be treated in a “predetermined, mechanistic manner” (Van der Walt “Civil forfeiture of instrumentalities and proceeds of crime and the constitutional property clause” 2000 *SAJHR* 45; *National Director of Public Prosecutions v Prophet* 917D). The fairness and justifiability of each case should be evaluated on its own merits and treated accordingly.

Civil forfeiture was introduced by POCA as a method to combat crime.\(^6\) Although the benefits of civil forfeiture, as opposed to criminal forfeiture, are undeniable,\(^7\) some doubts have been expressed about the balance the action strikes between civil liberties and the need for law enforcement.\(^8\)

In this article the historic purpose of civil forfeiture in English law is revisited\(^9\) to ascertain why applications for civil forfeiture may be entertained by our courts before criminal convictions have been obtained. The English origins of civil forfeiture law are analysed since POCA is based on the **American Racketeer Influenced Corrupt Organisations Act**\(^10\) and, in turn, American law of civil forfeiture derived from the ancient English premise that the forfeited property is guilty of an offence.\(^11\) The usefulness of a comparative approach in assessing civil forfeiture in South African law has been highlighted by the Constitutional Court in *National Director of Public Prosecutions v Prophet*.\(^12\)

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\(^6\) Ss 37-62 of the Act deals with civil forfeiture. The Preamble of POCA (n 2) states: “And whereas there is a rapid growth of organised crime ... (which) present(s) a danger to public order and safety and economic stability, and have the potential to inflict social damage; and whereas the South African common law and statutory law fail to deal effectively with organised crime ... legislation is necessary to provide for a civil remedy for the restraint and seizure, and confiscation of property which forms the benefits derived from such offence; and whereas no person should benefit from the fruits of unlawful activities, nor is any person entitled to use property for the commission of an offence ... legislation is necessary to provide for a civil remedy for the preservation and seizure, and forfeiture of property which is derived from unlawful activities or is concerned in the commission or suspected commission of an offence ...” (my emphasis).

\(^7\) Criminal forfeiture may be imposed only after the defendant has been convicted of a crime; whilst civil forfeiture entails civil proceedings against the property used in, or derived from, crime: *National Director of Public Prosecutions v Mohamed* [2002] 4 SA 943 (CC) pars 18C-D. Forfeiture legislation would have been redundant if not for a belief that criminals should not be allowed to profit from their crimes: *National Director of Public Prosecutions v Mohamed* pars 16B-C. Forfeiture legislation was promulgated in South Africa because the common law and existing statutory laws could not adequately deal with crime (see (n 6) above). Therefore, the need arose for a forfeiture action which provides the means to forfeit proceeds of crime, remove the incentive for crime, seize assets that facilitate crime, and remove all instrumentalities from criminal control: Erasmus J in *National Director of Public Prosecutions v Prophet* (n 4) 908A). Civil forfeiture does not focus on offenders but rather on the property used to commit a crime or which constitutes proceeds of crime. The guilt of the owner of property is not of primary importance to the proceedings since it aims for the removal of any benefit that a criminal retained due to his conduct: National Director of Public Prosecutions v Mohamed pars 17F-G.


\(^9\) As opposed to criminal forfeiture. S 39(1)(c) of the South African Constitution dictates that consideration of foreign law should be given by the courts in the interpretation of the Bill of Rights. Therefore, in evaluating the historic purpose of civil forfeiture, an action that results in the deprivation of property, also the established law of the United States will be reviewed where appropriate.

\(^10\) 1970 18 USC Ch 96. This Act was was passed in an effort to address the difficulties presented in tackling crime syndicates in the USA, Cf Palm *RICO forfeiture and the eighth amendment: When is everything too much?” 1991 University of Pittsburgh Law Review 1; Califa *RICO threatens civil liberties* 1990 Vanderbilt Law Review 807.


\(^12\) [2003] 8 BCLR 906 (C) 914E-H. This point was made also in *National Director of Public Prosecutions v Cole and others* [2004] 3 All SA 745 (W). At 752C-D Willis J noted in this regard that “I shall dwell briefly upon the [American] cases ... because they provide some contextual colour to the issues with which the South African Courts are having to grapple in
Civil forfeiture in South Africa is largely based on statutory provisions in the USA … The US in particular has had extensive experience with civil forfeiture. American case law may therefore be usefully studied comparatively. In rem forfeiture in the US has traditionally been based on the [English] theory that the property is guilty of an offence.

This article is not concerned with the constitutional arguments in favour of, or against, civil forfeiture. Rather, the existence of this drastic measure will be considered in light of the purposes it served historically.

With this in mind, the article is systematised as follows: First, the nature of civil forfeiture is highlighted and thereupon the origins of the action are discussed. A brief commentary concludes the article.

2 What is civil forfeiture?

In general, forfeiture renders property guilty of wrongdoing. Blackstone justifies the action’s existence as follows: Blackstone (Morrison Blackstone’s Commentaries on the Laws of England Vol 2 (1895) 267-268) describes forfeiture as “a punishment annexed by law to some illegal act, or negligence, in the owner of lands, tenements, or hereditaments: whereby he loses all his interest therein, and they go to the party injured, as a recompense for the wrong which either he alone, or the public together with himself, has sustained”. In National Director of Public Prosecutions v Mohamed (n 7) Ackerman J stated that the purpose of POCA (n 2) is not to punish criminals, but to remove the incentive for crime to ensure that they do not benefit from their offenses (par 16). The Constitutional Court explained that conventional criminal penalties are ineffective as methods of deterrence since crime leaders retain much of their criminal gains even when found guilty (pars 14-15). By repossessing the results or profits accrued due to crime, the incentive to commit crime is reduced (Williams & Whitney Federal Money Laundering (1999) 355-557). Moreover, removing the instrumentalities of crime destroys criminal organisations. In fact, the primary objective of forfeiture is not to punish criminals, but to remove the incentive to commit crime (National Director of Public Prosecutions v Mohamed (n 7) par 28). Another point to consider is the interest of the public. One must weigh the impact of forfeiture and the loss of property not only against the severity of crime but also against the interest that the public has in its prevention (758E-F). Forfeiture is designed to serve public interest. In National Director of Public Prosecutions v Cole (n 4) Willis J observed that the lawless nature of drug crimes and the devastation they inflict have resulted in the recognition of forfeiture as a necessary tool to fight “a seriously harmful evil” (759H-I ). Furthermore, the nature of an action in rem is not influenced by the language of the proceedings or by the fact that it may indirectly involve the owner of the relevant property. The fact that an owner of property may be brought before the court as a direct consequence of the in rem action does not alter the fact that it remains an action against property. Since the action in rem is a proceeding against an object its character is not changed if the confiscated property is given back to the owner by the provision of a substitute. Although it may resemble an action in personam due to the participation in the action of the owner of the property, it is nevertheless an action in rem.


14 Morrison (n 13) 382.
The natural justice of forfeiture is founded on this consideration: that he who hath thus violated the fundamental principles of government, and broken his part of the original contract between king and people, hath abandoned his connections with society, and hath no longer any right to those advantages which before belonged to him as a member of the community; among which social advantages the right of transferring property to others is one of chief.

Thus, property is confiscated as a penal measure for the offence for which the property was used, or to which it was connected.15

Civil forfeiture is recognised as a surrender or loss of property or rights without compensation.16 Hyde, too, defines forfeiture as the loss of a right or property, but adds that it amounts to a penalty for an illegal act.17 It is suggested that civil forfeiture is a legal action against an “inanimate object”18 and therefore constitutes a legal fiction.19 However, this description of a civil forfeiture action is inaccurate because it overemphasised the historical purpose of the action instead of the current purpose that its serves: by depriving a person of his property, the so-called “inanimate object”, the former is punished for his unlawful conduct. It is not the object of the civil forfeiture action that is held liable for the unlawful conduct but the person to whom it belongs. Therefore, the forfeited property is a mere means to an end – punishing a perpetrator for unlawful conduct.

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17 Hyde (n 8) 26.
19 Hofmeyr (n 18) 42; Redpath (n 12) 16; Gallant (n 16) 57.
20 See 3 below.
3  The history of civil forfeiture

3.1  The Roman legal connection

Forfeiture actions originated in Roman law, but some academics trace its roots back to Biblical times. The Roman action was received into English law after Julius Caesar’s invasion of Britain in 43 AD when England became a Roman province.

The Roman administration of Britain was maintained for five centuries before the withdrawal of Roman officials led to the end of Britain’s connections with Rome. A renewed interest in Roman law appeared from the twelfth century in England. Since the Corpus Iuris Civilis was favoured for its completeness, it competed with the English common law at English universities such as Oxford and Cambridge. Unfortunately, the adoption of Roman law in England was unpractical at the time because the courts already operated on common-law principles. Yet, despite this resistance, Roman law was sometimes referred to by the English courts during the thirteenth and fourteenth centuries. In addition, the commentaries of Bartolus, who was famous for his interpretation and commentaries of Roman legal principles, greatly influenced, inter alia, the English law of equity and the admiralty laws of the fifteenth and sixteenth centuries.

21  In Roman times, confiscation was part of the punishment for capital crimes (Curzon (n 19) 233-234). Confiscated goods were dedicated to God and destroyed. During the Imperial period, they were given first to the temple and later to the State treasury (Daams Criminal Asset Forfeiture – One of the Most Effective Weapons against (Organized) Crime? A Comparative Analysis (2003) 13-15).

22  See, eg, Finkelstein “The goring ox: some historical perspectives on deodands, forfeitures, wrongful death and the western notion of sovereignty” 1973 Temple Law Quarterly 180-183; Blackstone (Kerr The Commentaries on the Laws of England of Sir William Blackstone Vol 1 (1876) 301) who refer to Moses, saying that an ox, goring a man to death, must be stoned to death (Exodus 21:28-30) and Deuteronomy 19:5 (an ox that killed a bystander must be forfeited).

23  See Van Zyl Geskiedenis van die Romeins-Hollandsé Reg (1979) 279.

24  According to Van Zyl (n 23) 279, although Roman institutions slowly disappeared with the departure of the Romans, their traditions were firmly adopted by the Church which subsequently played a pivotal role in the continued acceptance of Roman culture in England. From 871 to 899 Alfred the Great of Wessex, who had a high regard for Roman culture, commissioned the translation of certain Latin works into English. The single most important factor that led to the reception of Roman law by the English was the arrival, in 1143, in England of the Roman law scholar, Vacarius, who came to study Roman law at Oxford University (Van Zyl (n 23) 280). Nevertheless, it is accepted that little reception of Roman law into English law occurred before the twelfth century.

25  Van Zyl (n 23) 280.

26  In fact, between 1216 and 1272 Henry III prohibited the studying of Roman law at Oxford University and in London (Van Zyl (n 23) 280). During his reign Edward I (1272-1307), the son of Henry III, likewise suppressed the acceptance of Roman law in England (Van Zyl (n 23) 280).

27  Van Zyl (n 23) 281. Yet Roman law left its mark on the English law, eg, the division of the law into public and private law is a Roman law concept.

28  Van Zyl (n 23) 84 282.
These early English laws impacted on modern forfeiture provisions too. As will now be discussed, English common law describes three kinds of forfeiture, namely forfeiture resulting from attainder, criminal or felony forfeiture and deodand forfeiture.

### 3.2 Attainder

The term “attainder” means to impose judgement of conviction and derives from the Latin word, “attinctus”, meaning “stained” or “blackened.” It refers to the legal state of a person after conviction of a capital offence. Attainder was an automatic consequence of sentencing and had three consequences for the offender. First, an offender’s estate was forfeited, including both his personal effects at the time of conviction and any land he owned at the time of the offence. Secondly, the offender acquired a tainted reputation that precluded his heirs from inheriting his estate. The third consequence of attainder was so-called “civil death” which disqualified a person from performing any legal act. It was subsequently abolished.

### 3.3 Forfeiture for felony

Forfeiture for felony is the predecessor of criminal or in personam forfeiture actions. The action originated in medieval times when the courts searched for a method of punishment in cases where tenants did not meet their obligations. The concept of a “felon” was consequently created and evolved to include criminal offenses such as murder, rape, arson or robbery which resulted in the offender’s property being forfeited to the Crown.

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29 See 3.2-3.4 below.
31 Curzon (n 19) 234; Morrison (n 13) 380.
32 Maxeinor (n 11) 770.
33 Known as “corruption of blood” (Morrison (n 13) 388).
34 The word “felony” derives either from the Latin word “fel”, meaning “poison” or “venom”, or from the words “fee” and “lon” meaning “property held under feudal tenure” and “a price” respectively (Curzon (n 19) 232). The concept of “felony” may also stem from the Teutonic words “feo” or “feud”, and thus indicates a crime punishable by the loss of the fee (Morrison (n 13) 94). Felony therefore suggests a crime for which the penalty is loss of property. Blackstone accepted, however, that felonies which are not capital crimes existed, and similarly, capital crimes which are not felonies (Morrison (n 13) 99).
35 In criminal forfeitures the loss of property is imposed only after the conviction of a defendant.
36 Curzon (n 19) 233.
Forfeiture of the property of felons and traitors derived from a belief that property ownership is a right that stems from society so that one who breaks the rules of society must lose the privilege of ownership.

In the American case *CJ Hendry Co v Moore* the court reviewed the historical development of civil forfeiture and explained that since feudal governments in the time of King Henry I profited from the seizure of property, the law was manipulated to raise benefits. A provision was consequently inserted in the *Magna Carta* which provided that the king may hold forfeiture land for a year and a day only after the offender’s death, whereafter it was returned to the latter’s heirs.

Subsequent forfeiture statutes relating to customs, shipping and revenue extended vicarious liability in England whilst the enactment of navigation acts in the seventeenth century led to the forfeiture of both illegal goods and the ship transporting it. Due to a belief that the ship’s owner should be blamed for entrusting the ship to the wrongdoer, the conduct of a seaman, even without the knowledge of a ship’s owner, often resulted in the forfeiture of the whole ship.

Proceedings in terms of the navigation acts were either *in personam* against the cargo’s owner, or *in rem* against the cargo itself. In *rem* proceedings were favoured because the burden of proof was on the ship’s owner to refute forfeiture. With *in personam* proceedings the Crown had to prove the forfeiture by establishing that the ship or its crew was not British.

### 3.4 Deodands

Forfeiture has existed for centuries in the form of civil forfeiture which originated from the practice of *deodand*. This is one of the oldest remedies of

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38 318 US 133 (1943) 137-138. In the twelfth century King Henry II (Baker *An Introduction to English Legal History* (2002) xliii) increased his revenues through the criminal forfeiture of property belonging to convicted fugitives. In 1352, treason was established as an offence which was punishable with the forfeiture of property. This resulted in both the enrichment of the King and the elimination of opponents. By the eighteenth century, sixty per cent of capital crimes in England included criminal forfeiture as punishment. Attainder (see 3.2 above) also served as a way of forfeiting property to the Crown.

39 Maxeinor (n 11) 744. These navigation acts greatly influenced forfeiture laws in the United States (Naylor (n 30) 258).

40 *Austin v United States* (n 11) 612-613.

41 *Austin v United States* (n 11) 776. Thus, in terms of the navigation acts the Crown had two options: First, it could prosecute the owner of the illicit cargo by starting a criminal action, the action *in personam*, against him. Only after a guilty verdict was obtained, could forfeiture proceedings be commenced against the cargo. Thus, first, the forfeiture of the cargo was dependant upon a guilty verdict against its owner; and secondly, and in contrast, the Crown could proceed with a civil forfeiture action, the action *in rem*, against the illicit cargo which, if successful, would result in the forfeiture of the cargo to the Crown irrespective of whether the cargo’s owner was criminally prosecuted.

42 According to Hyde (n 8) and Ronner (*Prometheus unbound: accepting a mythless
English law and may be traced back to early Church law and, before that, to ancient Greece and Rome. It is also a predecessor of *in rem* forfeiture actions.

It was mentioned earlier that *deodand* forfeiture actions endeavoured the forfeiture of objects due to their ability to cause harm. It derived from the idea that a thing that was capable of causing harm should be destroyed, the so-called personification theory. The personification theory, which holds an object accountable for its crimes, originated from maritime law and was used to advance a theory about the development of maritime liens. In terms of the theory a ship is personified and regarded as an entity capable to contract and to act. When damage was caused by a ship, it was regarded as the offender and subjected to forfeiture similar to property under the law of *deodands*.

Two other theories applicable to maritime law also account for *in rem* forfeiture. One theory, the procedural theory, explains that historically the reason for an arrest was to secure the appearance of the defendant in court. In the seventeenth and eighteenth centuries an action could be started by arresting a person or arresting any of his property. The other theory, the conflict theory, was developed as a result of the conflict between the common-law courts and the High Court of Admiralty. Since the latter was regarded inferior by the former, it could not establish jurisdiction *in personam* in an action. Thus, the High Court of Admiralty employed *in rem* procedures to establish jurisdiction which resulted in *in rem* forfeiture actions.

In *Calero-Toledo v Pearson Yacht Leasing Co* the American Supreme Court noted in an *in rem* action that

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43 Ronner (n 42) 670-671; Maxeiner (n 11) 770. The civilization of the second century BC convicted both animals and inanimate objects of wrongful acts in the Prytaneum (Hyde (n 8) 726).
44 The rationale for a *deodand* action lay in the assumption by the English King of the role of curator of values in the place of the Church (Finkelstein (n 22) 183).
45 See 3 1 above.
46 Kurisky (n 15) 249-250; Strafer “Civil forfeiture: protecting the innocent owner” 1985 University of Florida Law Review 842.
47 Austin v United States (n 11) 612; Thomas Maritime Liens – British Shipping Laws Vol 14 (1980) 6-8; Redpath (n 12) 16.
48 Redpath (n 12) 16.
49 Thomas (n 47) 9.
50 The prohibition did not, however, extend to objects or to bail money given in substitution of a defendant (Thomas (n 47) 9).
51 Ibid.
[T]he thing is ... primarily considered as the offender, or rather the offense is attached primarily to the thing ... [T]he practice has been, and so this Court understand the law to be, that the proceeding in rem stands independently of, and wholly unaffected by any criminal proceeding in personam.

This belief was subsequently expanded by a notion that the community, too, had to atone for an object's crime by providing compensation to the person responsible for keeping the peace, usually the king. So, forfeiting property to God for the benefit of the community was observed as forfeiting assets to the Crown for the good of England, a theory which became known as in rem forfeiture.

It is noteworthy that in rem civil forfeiture was used by the Admiralty Courts to punish foreign owners of pirate ships who escaped because they were outside their jurisdiction.

4 Modern dealings with the profits of crime

Following forfeiture for felony and deodand, the first attempt to deal with profits deriving from crime came in the late seventeenth and early eighteenth centuries. Numerous statutes, providing for the forfeiture of property that was used in statutory offences, were applied in in rem actions in the Exchequer. Other proceedings in rem were handled by justices of the peace in forfeiture cases that originated under customary laws.
Although the idea that other goods may represent the goods subject to forfeiture existed from early on, it only became significant in the twentieth century. Currently, five forfeiture models may be distinguished: criminal forfeiture; the forfeiture of things related to convictions; the forfeiture of objects *malem in se*; civil forfeiture; and contractual forfeiture in terms of which deposits or interest are forfeited due to breach of contract.

5 Commentary

Since Roman times, as a result of social, economic and political changes, the notion of ownership has altered. This is due to both limitations imposed by law and the conduct of property owners. It has been suggested that absolute ownership is problematic in light of the high prevalence of crime in society. However, the drastic consequences of civil forfeiture should not lightly be dismissed.

Historically, civil forfeiture was introduced as a penal measure, although it later evolved as a way to enrich the Crown. Current civil forfeiture measures are likewise born out of desperation to address crime and punish offenders. To this end, as was stated in the introduction to this article, civil forfeiture is described in *POCA* as a tool to combat crime. It was, moreover, acknowledged that conventional criminal penalties are ineffective as methods of deterrence because crime leaders retain much of their criminal gains even when found guilty. Nevertheless, the nexus between an offence, the property earmarked for forfeiture and the conduct of its owner should at no time be too far removed.
Limitations on the absoluteness of ownership should be understood as exceptions to the rule. In this sense, and in light of the incidence of crime currently experienced in South Africa, the inclusion in POCA of the ancient English *in rem* forfeiture practice, *deodand*, and its possible injustices should be seriously considered. One may even argue that attainder or “civil death” should be considered in cases where offenders are without means to forfeit. Obviously, the onus will be on the courts to ensure that drastic measures of this kind are imposed with circumspection and the necessary caution.

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69 Van der Walt & Kleyn (n 5) 162.
70 Ss 37-62 of POCA (n 2).
71 Which were not discussed in this article due to the vastness of the topic.
72 See 3 2 above.