Article:
Hendry, J orcid.org/0000-0002-4313-7280 and King, CP (2015) How Far Is Too Far? Theorising Non-Conviction-Based Asset Forfeiture. International Journal of Law in Context, 11 (4). 1. pp. 398-411. ISSN 1744-5523

https://doi.org/10.1017/S1744552315000269

How Far Is Too Far? Theorising Non-Conviction-Based Asset Forfeiture

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Abstract:
Non-conviction-based (NCB) asset forfeiture is a relatively recent addition to law enforcement's armoury in the fight against organised crime in the UK. It allows for criminal assets to be forfeited to the State even in the absence of criminal conviction, the stated objective being to undermine the profit incentive of criminal activity. Until now, NCB asset forfeiture has principally been critiqued from a criminological point of view, specifically concerning the Packer models and the civil / criminal dichotomy – aside from this, however, it remains rather underdeveloped theoretically. This paper addresses this lack of legal theoretical engagement with NCB asset forfeiture by providing an initial contribution from systems-theoretical perspective. This contribution makes use of systems theory's unique insights to critique the perceived 'failure of law' that gave rise to the NCB approach, and challenges the legitimacy of that approach in terms of procedural rights.

How Far Is Too Far?
Theorising Non-Conviction-Based Asset Forfeiture

Jennifer Hendry and Colin King[1]

'You follow drugs, you get drug addicts and drug dealers. But you start to follow the money, and you don't know where the f*ck it's gonna take you.'
– Detective Lester Freamon, *The Wire* (2002)

Inherent to the criminal process are certain procedural safeguards for the protection of a suspect or an accused. These safeguards include the presumption of innocence, the burden of proof resting with the prosecution, and the heightened standard of proof beyond reasonable doubt (see, generally, Roberts and Hunter, 2012; Jackson and Summers, 2012; Langbein, 2003), and are traditionally justified by reference to, *inter alia*, the relationship between the State and the individual, the imbalance of the State and defendant's respective resources, the potential consequences of a guilty verdict, the avoidance of wrongful convictions, and respect for individual dignity and autonomy (see, e.g. Lippke, 2013; Ashworth, 2006). This notwithstanding, increased concern about organized criminal activities[2] combined with the perception that such due process safeguards and liberal approaches have resulted in a 'failure' of criminal law to tackle such criminality effectively have, over the past two decades, brought about changes within the criminal process, changes which have tended both to implement an ideology of crime control and to display a sense of populist punitiveness. While it might have been assumed that such significant procedural

[1] Our grateful thanks to Liz Campbell, Andreas Philippopoulos-Mihalopoulos, Toby Seddon, Chris Thornhill, Tom Webb, and the two anonymous reviewers for their invaluable comments.
[2] Political discourse on organised crime regularly assumes that there is a hierarchical structure in place. It is not our intention in this article to engage with the organisation of organised crime groups, or networks. For discussion elsewhere see, e.g. Alach, 2011; Spapens, 2010; Easton and Karaivanov, 2009; Kenney, 2007; Paoli, 2002; and Coles, 2001. In *Local to Global: Reducing the Risk from Organised Crime* (HM Government, 2011: 10) it was recognised that 'Organised crime groups vary in their structure and capabilities. In the UK many organised criminals work with a core of associates, but often move in and out of networks depending on the criminal activity.'

changes would have had an impact upon concerns regarding the threat posed by organised crime, this was not the case; if anything, the perception of the inadequacies of existing criminal justice procedures for this task even increased. This prompted the development of an alternative approach that made use of civil processes to target criminal assets, contained in the UK Proceeds of Crime Act (POCA) 2002. Part 5 of this Act makes provision for civil recovery – also referred to as non-conviction based (NCB) asset forfeiture [3] – a 'follow-the-money' approach that allows for assets to be seized, *not only* in the absence of criminal conviction but also using the *civil* standard of proof. Given that Part 5 is purportedly a civil procedure, the rules of criminal evidence do not apply here; this opens the door to admission of different types of evidence that would not be admissible at a criminal trial, including inferences from silence, previous behaviour, illegally obtained evidence and abuse of process, and hearsay evidence (see Alldridge, 2014: 185 - 187). This new procedure was implemented in direct response to the perceived 'failure' of the criminal law in its fight against organized crime, as galvanisation of criminal justice's

[3] It must be acknowledged that there is often confusion as to the terminology used. The Hodgson Committee noted the lack of any "generally accepted terminology" and went on to distinguish between 'forfeiture', 'compensation', 'restitution', and 'confiscation'. The Committee defined forfeiture as "the power of the Court to take property that is immediately connected with an offence." Confiscation was defined as "the depriving of an offender of the proceeds or the profits of crime." (Howard League for Penal Reform, 1984: 4 - 5). In its Report on confiscation and forfeiture, the Scottish Law Commission (1994: 2) noted that 'forfeiture' (in its terms of reference) was used in two different senses: first, the power of a court to take property used for the purpose of committing, or facilitating the commission of, offences, and second the power of a court to deprive an offender of the proceeds of criminal activity and of property derived from such proceeds. The Scottish Law Commission went on to say that "'Forfeiture' likewise signifies both powers in American usage, while 'confiscation' is sometimes used to signify both in international conventions, and indeed is so used in the [Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime]." The Scottish Law Commission expressed its preference to use the term 'forfeiture' in the first sense and 'confiscation' in the second sense. Vettori (2006: 2) notes the distinction between the UK/ EU meaning of 'forfeiture' and its meaning in the US "where it has a much wider coverage." Vettori goes on to note that "still today the two terms – forfeiture and confiscation – are used interchangeably, so that the potential for confusion is high".

blunted weaponry, as a re-weighting of respective power dynamics, and as circumvention of the inherent procedural safeguards outlined above.[4]

Perhaps as a result of its novelty, both in terms of its unusual characteristics and its newness, NCB asset forfeiture remains somewhat under-theorised. Criminologists (e.g. Lea, 2004) have broken ground in this regard but their concerns have related mainly to the civil / criminal dichotomy and discussions of due process rights. This paper will target the lack of theorising in the legal field[5] by providing an initial systems-theoretical contribution, one that will explore the complex and unusual issue of NCB forfeiture as a means of combatting organised crime, particularly in terms of how far legal responses to organised crime impinge upon individual procedural rights. The advantages of a systems perspective here are not only that its emphasis on function and communication provides insights into structural patterns that might otherwise be overlooked, but also that its antihumanism is well suited to the evaluation of a crime control approach noted for its apersonal character.

This analysis will proceed in two parts. The first will explain why organised crime poses such a problem for criminal law enforcement, and then present this (initial) 'failure' of law as a disappointment of normative expectations that required a legal systemic response for their restablization – namely the resort to NCB forfeiture. The second part will chart this regulatory response and argue that it goes too far in its assault on procedural rights protections. By undermining these restrictions on

[4] It can be argued that civil processes are increasingly used in pursuit of criminal law objectives, an obvious example being Anti-Social Behaviour Orders. For discussion in the context of NCB asset forfeiture, see King (2012).

[5] The main theoretical contribution to the legal field is Campbell's (2007) article, '*Theorising Asset Forfeiture in Ireland*', which further critiques Packer's due process/ crime control models as well as considering issues of criminal administration and adaptation to reality.

State power, NCB forfeiture has the effect of facilitating systemic excesses, which in turn engender a subsequent 'failure' of law, this time one of the legal system's legitimacy instead of efficiency.

A 'Failure' of Law

As mentioned above, the threat posed by serious and organised crime (see, e.g. Home Office, 2004, 2006)[6] has motivated much legislative change within criminal law and evidentiary procedures since the mid-1990s. For example, the Criminal Justice and Public Order Act 1994 placed restrictions upon the right to silence, aimed specifically at professional criminals and terrorists (see Quirk, 2013; Jackson, 2001). After the turn of the millennium, the Criminal Justice Act 2003 overhauled the law governing admissibility of hearsay evidence in criminal proceedings (see Jones, 2010; Birch, 2004), the Serious Organised Crime and Police Act 2005 introduced a statutory framework for agreements with assisting offenders (Martin, 2013; de Grazia and Hyland, 2011), and the Coroners and Justice Act 2009 contained qualifications to anonymity provisions (see Ormerod, Choo and Easter, 2010), while since 9/11 there have also been numerous changes to anti-terrorism legislation (see, generally, Walker, 2009; Donohue, 2008). Common to each of these legislative changes is the reliance upon allegations of a failure of the criminal law's procedures to push them through, while the augmentation of those procedures invariably comes at the expense of individual rights. Hence, adverse inferences can potentially be drawn where an individual fails to answer questions at the police station or refuses to give evidence at their own trial, despite concern as to the evidential value of such

[6] For discussion of legal measures used against organised crime, see Campbell (2013a).

adverse inferences; hearsay evidence is more readily admissible, contrary to longstanding criticisms; evidence from accomplices is embraced in spite of the inherent dangers, not least that an accomplice might be trying to gain favour with the police or prosecutors; and, finally, anonymous witnesses can tender evidence, notwithstanding the obvious difficulties that the accused would face in raising a challenge to that evidence.

These examples are cited in order to illustrate the clear and concerted erosion of procedural safeguards afforded to a suspect or accused within the criminal justice process – a 'rebalancing' in favour of State power that continues even today (see, e.g. HM Government, 2011, 2013). The attack upon the financial assets of criminality manifest in POCA 2002 is a further instance of the State being afforded enhanced powers in tackling organised crime (see Murray, 2012; Sproat, 2009; Kennedy, 2005). Indeed, this targeting of criminal finances can be regarded as yet another move to weight criminal justice processes away from the individual and towards the State, on the assumption that classical forms and procedures were on their own unfit and inefficacious for the purpose of tackling organised crime. Falling under the collective title of a 'follow-the-money' approach, since the turn of the millennium measures concentrating on criminal finances have gained increasing prominence (see, e.g Performance and Innovation Unit, 2000; for discussion, Bullock and Lister, 2014: 48ff): anti-money laundering provisions, post-conviction confiscation, civil recovery absent criminal conviction, taxation of assets and counter terrorist financing measures have all came to the fore.[7] Our focus in this critique is civil recovery, also

[7] See Proceeds of Crime Act 2002. For discussion, see Gilmore, 2011; Rees *et al*, 2011; Alldridge, 2003. Similarly, on counter terrorist financing measures, see Terrorism Act 2000; Terrorist Asset-Freezing etc Act 2010; Donohue, 2008: ch.3.

known as NCB forfeiture.[8] While NCB forfeiture was presented as an alternative approach whereby the attention would be on criminal assets, it was in fact a further illustration of the prevailing crime control ideology, which – we will argue – served further to undermine the individual procedural rights inherent to the legitimate operation of criminal justice processes.

Before *in personam* confiscation of assets can occur under Part 2 of POCA, there must be a criminal conviction, subsequent to which civil rules are applied.[9] The underpinning normative rationale, namely that convicted criminals should not benefit from crime, is in this regard relatively uncontroversial.[10] The same, however, cannot be said for *in rem* NCB asset forfeiture: for example, under Part 5 of POCA, an individual may be subject to restrictions regarding dealing with specified property where the court is satisfied that said property comprises the proceeds of crime (for detailed rules see, e.g. Sutherland Williams *et al*, 2013; Rees *et* al, 2011). Moreover, the standard of proof to be applied in such cases is the civil one, namely the lower threshold of a balance of probabilities, as opposed to the more robust criminal standard of beyond reasonable doubt (POCA 2002, s241(3)), and the State's hand is strengthened all the more by the lack of any requirement that the individual be convicted of a criminal offence before their property is liable to become the subject of such proceedings.[11]

[8] See n.3 for discussion of definitional issues.
[9] There must first be a criminal conviction, with guilt established to the high criminal standard – beyond reasonable doubt. While the confiscation proceedings themselves are criminal in nature, the standard of proof is the civil one – the balance of probabilities. The rules of evidence are, apparently, those of a sentencing hearing (Alldridge, 2014: 173 – 174; see also Rees et al, 2011: 21).
[10] Though see Bullock and Lister (2014) for a critique of post-conviction confiscation in the UK.
[11] This 'civil' process has consistently been upheld by higher courts in the UK (e.g. *Gale v SOCA* [2011] UKSC 49; *Director of ARA v Walsh* [2004] NIQB 21) and in other common law jurisdictions (e.g. *Chatterjee v Ontario (Attorney General)* [2009] 1 SCR 624 (Canada); *GM, PB, PC Ltd, GH; Gilligan v CAB* [2001] 4 IR 113 (Ireland)). For critique of ECHR jurisprudence, see King (2014b).

But what is it about organised crime that makes it such a problem for criminal law enforcement, and why the emphasis on its financial proceeds? The main difficulty facing law enforcement agencies appears to be the disconnected or cumulative nature of the criminal activity, which provides the 'organisers' with a degree of distance from the 'coalface', as it were, and thus a certain level of immunity from successful police investigation, prosecution and conviction.[12] As Lord Goldsmith stated during the passage of the Proceeds of Crime Bill:

> Someone at the centre of a criminal organisation may succeed in distancing himself sufficiently from the criminal acts themselves so that there is not sufficient evidence to demonstrate actual criminal participation on his part. Witnesses may decline to come forward because they feel intimidated. Alternatively, there may be strong evidence that the luxury house … the yachts and the fast motor cars have not been acquired by any lawful activity because none is apparent. It may also be plain from intelligence that the person is someone engaged in criminal activity, but it may not be clear what type of crime. It could be drug trafficking, money laundering or bank robbery. However, the prosecution may not be able to say exactly what is the crime, and thus the person will be entitled to he [*sic*] acquitted of each and every offence. If, in a criminal trial, the prosecution cannot prove that the person before the court is in fact guilty of this bank robbery or that act of money laundering, then he is

[12] For discussion of the adoption of NCB measures to tackle organized crime in different common law jurisdictions see, for example, Gallant (2014), King (2014a), Campbell (2010), and Meade (2000). See, also, the views of the Working Group on Confiscation (1998)).

> entitled to be acquitted. Yet it is as plain as a pikestaff that his money has been acquired as the proceeds of crime.[13]

Lord Goldsmith's frustrations here concern the evident lack of criminal justice tools suitable for dealing effectively with such criminality, hampered as they were by procedural safeguards frequently seen as providing excessive protection for criminals who, by virtue of operating at a remove, do not risk getting their own hands dirty.[14] The apparent 'failures' of the criminal law here are clear to see: police time and public money are wasted on the arrest and prosecution of easily replaceable foot soldiers, while those at the upper echelons of the criminal enterprise remain insulated against criminal liability (Simser, 2009: 20).

These issues of the criminal law's fitness for purpose and efficacy can be articulated systems-theoretically as a failure of the legal system to achieve its primary function, namely the stabilization of normative expectations in society. The role of a functionally differentiated legal system in society is to enable society to differentiate between communications that are lawful or legal, and communications that are unlawful or illegal. To this degree, it makes it possible for society to establish what will meet with legal censure or legal approval, and what will be subject to legal sanction: as Luhmann (2004: 148) states, 'law deals with the function of the stabilization of normative expectations by regulating how they are generalized in relation to their temporal, factual, and social dimensions'. Expectations allow for both the evolution and smooth operation of the system while simultaneously

[13] House of Lords Debate, Proceeds of Crime Bill, 25 June 2002, vol.636, cc.1270-71, per Lord Goldsmith.
[14] For analogous discussion in the context of international crimes, see Ambos (2009); van der Wilt (2009).

providing for its connection with previous operations and selections; they build up over time, facilitating systemic 'learning' by reducing the number of possible selections created under conditions of uncertainty. Indeed, without this reduction or 'condensation', 'the burden of selection would be too great for connecting operations' (Luhmann, 1995: 96). To restrict this analysis for the moment to the criminal law, the (normative) expectations here are that social communications comprising illegal behavior will be designated as such, which is to say, will generate the systemic operations familiar to us as the criminal justice process: police action, arrest, charge, prosecution, proof, conviction, and proportionate sanction. These operations can be conflated into a single core expectation, namely that the legal system will counteract and punish criminal – and thus illegal – activity within society. On this basis, therefore, it would appear that the increased 'inapplicability' of criminal law procedures to the complexities of organized crime comprises the *disappointment* of these expectations.

It is the reaction of the legal system to such disappointed normative expectations that drives its evolution and maintains its autonomy (Rogowski, 2013: 4). Its cognitive openness to the environment means that the legal system is not restricted to applying established normative standards, although it does retain that option; it can either follow this route – namely one of counterfactual stabilization – or it can learn from the disappointment and recalculate its expectations on that basis. Different socio-legal examples can be cited of each of these legal-systemic options: for instance, no matter how many homicides are committed, repeated disappointment of the normative expectation that people should not kill others has not prompted any alteration of the legal prohibition, while the decriminalization of suicide by the Suicide Act 1961 illustrates a legislative change being implemented

where the illegal act was considered apocryphal.[15] The case of organized crime appears, however, to have given rise to a third option, one which, we submit, is premised upon the apparent 'failure' of law outlined above – a 'failure', one should note, of procedural efficacy (*Leistung*) as opposed to the systemic function (*Funktion*). The legal system in this situation counterfactually stabilizes those disappointed normative expectations – crime should not pay, illegal behavior should be punished – while simultaneously effecting changes to its system-internal programming (*Konditionalprogramme*) targeting those aspects restricting its smooth and effective operation, which in this case can be identified as the established procedural safeguards within the criminal process. As Teubner (1992: 15) says, the law regulates society by regulating itself. The erosion of these procedural safeguards – for example, the rule against hearsay, restrictions on investigatory powers, and exclusionary rules of evidence, to name but a few – has been accompanied by the implementation of a 'follow-the-money' approach in the form of NCB forfeiture, which further diminishes those procedural protections assumed to be inherent to criminal proceedings – especially the presumption of innocence and the standard of establishing guilt beyond reasonable doubt.

As mentioned above, it is really when the focus shifts to the money – the 'lifeblood of the organization' (Simser, 2009: 20), as it were – that a systems theoretical perspective comes into its own, mirroring in its own antihumanism the apersonal quality exhibited by a follow-the-money approach.[16] In what is perhaps the most alienating aspect of systems theory for some scholars, Luhmann deliberately

[15] The UK Supreme Court delivered its judgment in *R (Nicklinson) v Ministry of Justice* [2014] UKSC 38 in June 2014. For discussion of the role of criminal law in cases of assisted suicide and euthanasia, see Mullock (forthcoming; 2012); Coggon (2010); Price (2009).

[16] Our opening quote from *The Wire* captures well this move from individual to systemic medium within systems theory.

decenters the individual, thus bypassing the classic dichotomy of subject/object that restricted the ambit of many other sociological approaches. This move also facilitated the construction of an overarching epistemological framework premised upon the distinction system/environment, and the differentiation of social systems on the basis of their function. These function systems comprise the deep structures of society, identifiable by their respective codes, programmes and media. The function systems of most relevance to this analysis are the legal, economic and political systems[17]; while the legal system's core function is the stabilization of normative expectations in order to eliminate contingency, the economic system functions to regulate scarcity, and communicates through the symbolically generalized communicative medium[18] of *money* (see Moeller, 2006: 26-29), while the political system in turn carries out its function of making binding decisions for society through the medium of *power*. What makes a follow-the-money approach so interesting, therefore, is the involvement of the communicative medium of one system in the programmes and operations of another. This is not to say, of course, that there is any disruption of systemic autonomy: for example, the economic medium of money is 'seen' by the legal system as the result of illegal communicative acts – literally, the proceeds of crime. More important, however, is the structural coupling between the legal and economic systems in the form of the 'institution' of the financial sanction (Richardson, 2002: 138; see also Luhmann, 1993: 453-456). NCB forfeiture has the overt aims of deterring criminal activity through reduced returns and demonstrating the non-profitability of crime (Performance and

[17] Another function system of arguable relevance is that of the mass media (see Nobles & Schiff 1995, and 2013: chapter 8).
[18] Prior to settling on the term 'social system' in his 1984 text *Soziale Systeme*, Luhmann relied upon Talcott Parsons' terminology of 'symbolically generalized communicative media'. See Luhmann (2012: 191ff)

Innovation Unit, 2000: para.3.2) – these regulatory aims[19] provide the scale upon which the efficacy of the system would ideally be gauged,[20] while NCB forfeiture is classifiable as a financial sanction and thus a structural coupling between law and economics.

At this juncture some reference ought to be made to the unusual civil/criminal hybrid nature of NCB forfeiture, which has been the subject of much critique and conjecture. Though usually concerning allegations of criminality, NCB forfeiture proceedings are purportedly 'civil', a questionable stance that has been upheld by the courts (e.g. *Gale v SOCA* [2011] UKSC 49). And, as these proceedings are seen as civil, criminal procedural protections do not necessarily apply. This has attracted widespread criticism, with many commentators arguing that 'civil' (or NCB) forfeiture ought to be regarded as a criminal mechanism (e.g. Gray, 2012; Campbell, 2010, 2007; Gallant, 2004). At the very least, NCB forfeiture arguably represents a 'middleground' between civil and criminal paradigms (see Mann, 1991).[21] While interesting issues for critique from a systems theoretical perspective are raised by NCB forfeiture's strange procedural hybridity, systems theory in fact accommodates this elision of civil and criminal rather well; at least, it is not as jarring for systems theory as for other legal theories centred around the individual and on considerations of State power and authority. The reason for this is the system

[19] Additional regulatory aims of NCB forfeiture are the disruption of criminal networks, and the reinforcement of public confidence in the criminal justice process.
[20] The reality is otherwise, however. The success of follow-the-money strategies is ultimately measured by monetary returns, as illustrated in the recent report by the National Audit Office (2013) on confiscation orders, subsequently discussed by the Public Accounts Committee: House of Commons, Oral Evidence taken before the Public Accounts Committee, Confiscation Orders, Wednesday 15 January 2014, available at: http://www.parliament.uk/documents/commons-committees/public-accounts/PAC%20uncorrected%20transcript%2015%2001%2014.pdf (accessed 10/02/2014). It is unsurprising, then, that some commentators have questioned the underpinning assumptions, and expectations, of the asset recovery regime. See Bullock and Lister, 2014 and Harvey, 2014.
[21] This is discussed in relation to NCB forfeiture by King (2012: 358) and Campbell (2010: 32).

boundary established by the operation of the legal system's binary coding. Under this coding – where *legal* is the positive value, applied if a social fact conforms to system norms, and *illegal* is the negative value, employed by the legal system in the event such norms are violated – societal communications are 'seen' by the legal system as being of relevance to it. The dichotomy civil/criminal, therefore, is encompassed by the systemic code and included within the unity of the legal system.

Where this civil/criminal distinction does feature is in terms of additional system-internal semantic elements known as programmes: as Luhmann (2004: 192, emphasis in original) explains, '[s]ince the values legal and illegal are not in themselves criteria for the decision between legal and illegal, there must be further points of view that indicate whether or not and how the values of a code are to be allocated, *rightly* or *wrongly*'. These programmes are conditional in character (*Konditionalprogramme*), which is to say that they stipulate the conditions under which the binary coding is applied, linking self-reference with external reference and providing 'the system's orientation to and from its environment with a form that is cognitive and at the same time which can be evaluated deductively in the system' (ibid: 196). Within these conditional programmes exist further reflexive mechanisms for the 'recursive reproduction' of legal decisions, the most notable of these being rules of procedure, which have the task of 'applying norms to the application of norms' (ibid: 158). It is by means of the operation of these conditional programmes that the legal system is able to restructure its internal procedures in a way that addresses problems of operative efficiency (*Leistung*), such as the 'failure' of law adequately to tackle the complexities of organised crime. Such restructuring reorients the rules of procedure, such as in the case of NCB forfeiture, allowing their application in

situations where they would previously have been inapplicable and unenforceable: the use of a civil standard of proof in what is, arguably, a criminal mechanism, for example.

To be clear in this regard, such system-internal reorganisation is purely operational and undertaken to optimise its realisation / achievement of its primary function – the legal system has no interest in the civil/criminal dichotomy other than operatively. Nor does it engage with issues of either the moral content of the law or the policy motivations for legislative[22] change – in spite of the crime control ideology underpinning follow-the-money approaches, not to mention their overt political and normative instrumentality, the legal system's cognitive openness is restricted by the filter of its binary code and systemic autonomy is protected by means of its normative closure. To put this another way, while perceived 'failure' of law in tackling organised crime led to the adoption of the draconian option of NCB forfeiture under POCA 2002, the legal system *only* experiences these in terms of an initial disappointment of normative expectations and a subsequent alteration of its internal programming.

Thus far this article has concentrated on what we have been referring to as the 'failure' of criminal law and processes in effectively combatting organised crime. This has been presented as a failure of *Leistung*, of legal systemic efficiency and procedural fitness for purpose, a situation that gave rise to follow-the-money approaches in general and NCB forfeiture in particular. Our attention now turns to NCB

[22]'Luhmann claims that law retains its autonomy in the face of political power through the constitutionalising of that political power. Legislation provides a methodology for law to incorporate political demands without becoming law' (Schiff and Nobles, 1995: 306).

forfeiture, this hybrid civil/criminal legislative creation, with the view of examining its circumvention of procedural safeguards comprising fundamental individual and procedural rights. This critique submits that this simultaneous evasion and erosion of procedural rights protections serves to render NCB forfeiture illegitimate as a process, on the grounds that it is non-compliant with rights protections. This systems theoretically based argument, namely that NCB forfeiture gives rise to a different kind of 'failure' of law, will form the focus of the next section.

How Far Is Too Far?

The dynamic at the heart of the crime control / due process dichotomy is one which demands the striking of a balance between considerations of State power and those of individual liberties. This interaction not only lies at the heart of criminal justice process but at the heart of modern constitutional development – it involves what we tend to refer to as the 'rule of law', which is to say, that (constitutional) commitment to minimum standards of both substantive and procedural fairness. Whether understood as entrenched principles of the common law or meta-principles articulated in international agreements and enacted by legislation,[23] rights such as due process and the right to a fair trial (European Convention on Human Rights Article 6; International Covenant on Civil and Political Rights Article 14) not only represent 'principled expressions of the moral life of the nation (*Sittlichkeit*)' (Loughlin, 2010: 361) but also comprise limitations upon the potential excesses in the exercise of governmental power. Indeed, it could even be argued that rights protections have

[23] For discussion, see Ho, 2012; Ashworth, 2012.

become a laundry list of requirements amounting to 'a contract of good government' (Tomkins, 2003) and, furthermore, an indicator of good *governance*.[24]

As outlined above, however, such processes and thresholds certainly contributed to difficulties in successfully prosecuting individuals suspected of participating in and benefitting from organized crime – not only do they curb abuses of power, they also operate as a necessary restraint upon the efficacious operation[25] of the criminal law, thus giving rise to the first 'failure' of law. Douzinas (2000: 380) stated that 'rights are the necessary and impossible claim of law to justice', and this duality of necessity and impossibility has perhaps never been more apparent than it is here: while in the first instance rights comprise a barrier to the application of the classical processes of criminal justice, in the second any reliance upon them comes at the arguable expense of legal operations that are perceived – in Lord Goldsmith's 'plain as a pikestaff'[26] sense of the term – as being *just.*

For this is the point at hand, and the problem facing both criminal law enforcement agencies and criminal justice itself: the attrition of formerly robust and entrenched procedural standards within criminal justice has the effect of giving rise to anti-organised crime practices that are – if not *de facto* illegitimate – at the very least in contradiction to the spirit of the rule of law. As mentioned earlier, criminal procedural safeguards are justified by reference to the relationship between the State and the individual, the balance of resources between them, the consequences

[24] As outlined on the website of the United Nations Office of the High Commissioner on Human Rights, 'the true test of "good" governance is the degree to which it delivers on the promise of human rights: civil, cultural, economic, political and social rights'. For further details see (accessed 04/02/14): http://www.ohchr.org/en/Issues/Development/GoodGovernance/Pages/GoodGovernanceIndex.aspx

[25] 'Efficacious' is utilized here as a critical term within our systems theoretical argument; that said, it is arguably also indicative of the 'conveyor belt' within Packer's crime control model.

[26] House of Lords Debate, Proceeds of Crime Bill, 25 June 2002, vol.636, cc.1271.

of an adverse verdict for an accused, and respect for individual dignity and autonomy. In NCB forfeiture proceedings, such safeguards are sidestepped in spite of such proceedings being, in essence, concerned with matters of criminal law. It is our contention that this step is, simply, one too far. Indeed, the only salient difference amounts to the fact that what is being targeted is not individual liberty but, rather, an individual's *property* – as such the protection provided appears far less robust for personal property and assets than if the deprivation concerned either personal integrity or freedom.[27]

While the initial failure of law outlined in the previous section is one of legal systemic efficiency, of *Leistung*, it does not automatically follow that we are alleging a subsequent failure of *Funktion* in this section; the failure we pinpoint here is, rather, one of legitimacy. As mentioned above, constitutional due process rights and the right to a fair trial can be understood as reflecting a moral position as well as forming a bulwark against the abuse of political power; however, it is in terms of this latter understanding that systems theory understands constitutional rights. Indeed, the notions of morality, justice and fairness contained within the former have little purchase under a systems theoretical construction that reduces both justice and validity to *eigen*-values, which is to say, to values that are constituted by 'the recursive performance of the system's own operations and […which] cannot be used anywhere else' (Luhmann, 2004: 124) or, rather, that are produced simply by a system 'repeatedly doing what it does' (Nobles and Schiff, 2013: 163).

[27] To an already problematic situation we could include here additional considerations of personal reputation and 'good name'. See Campbell (2013b: 705 – 706) where it is suggested that "while the ostensible rationale [*of civil recovery*] is to recoup unlawfully acquired assets, and while these orders are directed at the property rather than the person, recovery also incorporates a substantial stigma and incorporates the blame that distinguishes criminal from civil measures, with the former connoting 'should not do'." (references omitted).

Systems theory conceptualizes rights as a means by which society is able to 'protect its own structure against self-destructive tendencies' (Verschraegen, 2002: 262), such as de-differentiation. Rights operate specifically as communications of the *political* system that comprise curbs upon its potential excesses, thus establishing limitations to be imposed upon the political system and its operations by the political system itself. Not only do these rights operate as instruments of self-restriction but they also preclude systemic de-differentiation. This 'establishment' – or self-creation – of systemic limitations is accomplished by a concretization of systemic expectations: 'in their very *concreteness,* the rights-based expectations take on the nature of fixed points, of *facts*' (Hendry, 2014: 68). In the absence of any such limitations upon its operations, the political system would be liable to encroach upon those of other function systems in a manner liable to compromise 'the ability of other systems to operate in ways that are productive for society' (Nobles and Schiff, 2013: 199-200). It should be noted at this juncture that the fixation upon protecting society from the dangers of de-differentiation is, for Luhmann, restricted to those excesses of the political system; it is not until Teubner (2006; 2008), who insists that other function systems need to operate under comparable controls, that the excesses and crises of the other systems are appreciated as being equally as dangerous to those of politics. Taking an overtly normative stance, Teubner thereby endorses rights as a shield against the structural violence created by unrestricted functional differentiation. What becomes important in this regard is the influence of rights upon not only the functionally differentiated political system but also the legal system and the economic system, and all of the others. In the same vein that the political system is subject to restraints upon its operations and programmes, *so too* is the legal system, with the

result that its own operations and conditional programmes, its own media and *eigen*-values, must occur relative to those restraints. This, then, is our argument concerning the erosion of procedural safeguards facilitated (with overt political instrumentality) in the form of NCB forfeiture under POCA 2002: the conditional programme (procedural) alterations engendered by POCA are, we argue, illegitimate, because they specifically exceed legal systemic self-limitations. Legitimacy is understood here in the Luhmannian sense of being defined 'through disseminated factual conviction in the validity of law [and] of principles and values upon which binding decisions are based (Luhmann 2013: 199) – in this regard the procedures comprising NCB forfeiture *disappoint*.

One final point should be made here in terms of validity, which, as mentioned above, is a legal systemic *eigen*-value. Our argument has been framed in terms of legitimacy or, rather, the lack thereof, but this relates specifically to the procedural changes implemented by POCA and does not purport to encompass any more than this within its ambit. Systems theory provides holistic assertions concerning legal systemic validity, which is both the marker of unity for the legal system and that which symbolizes the autopoiesis of its communications (Luhmann, 2004: 122-3). Indeed, Luhmann himself provides a stout argument against the notion that systemic validity could be in any way justiciable, stating that: 'All law is valid law. Law which is not valid is not law. It follows that the rule that makes validity recognizable cannot be one of the valid rules. There cannot be any rule in the system that regulates the applicability / non-applicability of all the rules of the system' (Luhmann 2004: 125; see also Habermas, 1996: 138). Constructed on the back of the legal system's binary coding, validity is designated as being norm-free and thus both empty and malleable –

this is uncontested. Nevertheless, there must necessarily be layers of legitimacy relative to the validity of system-internal operations, for how else could a situation of procedural illegitimacy on the basis of non-compliance with the meta-norms of rights and procedural safeguards be achieved at the same time that those procedures adhere to the rules established by the relative conditional programmes? Arguably this draws attention to a systemic recognition of difference between what is specifically legal – in essence, what the legal system holds to be legal – and what is *legitimate*. The eigen-values of validity map on to legality but not necessarily to legitimacy, a situation caused by the system's own protective mechanisms – which is to say, by the self-imposed restrictions upon systemic operations that we recognize as rights. This, we argue, is the legal system's recognition of what constitutes going too far. NCB forfeiture aptly illustrates this in relation to criminal procedural protections. Part 5 of POCA allows for such protections to be circumvented simply by virtue of being a 'civil' process. This is a contentious issue, however, and our argument is that the use of a civil process to target criminal assets in the absence of criminal conviction is an affront to legitimacy.

Conclusion

Crime, especially 'organised' crime, is widely seen both as big business (see, eg, European Council, 2012; UNODC, 2011) and as posing an invidious threat to society. As Hobbs (2013: 13) argues, 'UK law enforcement agencies and their political masters currently perceive organized crime as a major threat, and this shift in perception is a direct consequence of a particular reading of globalization and its

attendant attributes, in particular the expansion of illegal economic activity and its cosmopolitan associations.' This observation has resulted in substantial changes to criminal law and process; our focus in this article has been on how such amendments and augmentations relate to criminal procedural protections.

As discussed at the outset, criminal processes recognize the need for enhanced protections based on the relationship between the State and the individual. While enhanced protections such as the burden of proof and the presumption of innocence admittedly restrict the effective exercise of police power and make the task of prosecutors an onerous one, we argue that these procedural safeguards are necessary restrictions upon the operations of the legal system. Rather than being perceived as important and indispensable limitations, however, the continued disappointment of normative expectations – namely, the inability of the criminal process adequately to combat organized crime – caused these rights-based protections to be cited as the problem at the heart of the operation, the very cause of the 'failure' of law, a widespread perception that contributed to their erosion over the period of two decades. These changes to criminal law and processes laid the foundations for the adoption of a 'civil' process – NCB forfeiture – to target financial assets arising from criminal activities, a move that has been welcomed by some (e.g. Simser, 2009; Casella, 2008; Kennedy, 2004), but which has also been subject to stern criticism by others (e.g. Gray, 2012; Campbell, 2010). We hold with the latter standpoint: NCB forfeiture represents a step too far, a blatant attempt to avoid inbuilt procedural protections through a semantic mislabeling designating it as 'civil' in character, and at the very real expense of both criminal procedural and legal systemic legitimacy.

Bibliography

Alach, Zhivan J. (2011) 'An incipient taxonomy of organized crime' 14(1) *Trends in Organised Crime* 56-72.

Alldridge, Peter (2014) 'Proceeds of crime law since 2003 – two key areas' *Criminal Law Review* 171-188.

Alldridge, Peter (2003) *Money Laundering Law: Forfeiture, Confiscation, Civil Recovery, Criminal Laundering and Taxation of the Proceeds of Crime* (Oxford: Hart Publishing).

Ambos, Kai (2009) 'Command responsibility and *Organisationsherrschaft*: ways of attributing international crimes to the "most responsible"' in André Nollkaemper, and Harmen van der Wilt (eds) (2009) *System Criminality in International Law* (Cambridge: Cambridge University Press) pp.127-157.

Ashworth, Andrew (2012) 'The Exclusion of Evidence Obtained in Violating a Fundamental Right: Pragmatism Before Principle in the Strasbourg Jurisprudence' in Paul Roberts and Jill Hunter (eds) (2012) *Criminal Evidence and Human Rights: Reimagining Common Law Procedural Traditions* (Oxford: Hart Publishing) pp.145-161.

Ashworth, Andrew (2006) 'Four threats to the presumption of innocence' *International Journal of Evidence and Proof* 241-279.

Birch, Diane (2004) 'Criminal Justice Act 2003: (4) hearsay – same old story, same old song?' *Criminal Law Review* 556-573.

Bullock, Karen and Stuart Lister (2014) 'Post-Conviction Confiscation of Assets in England and Wales: Rhetoric and Reality' in Colin King and Clive Walker (eds), *Dirty Assets: Emerging Issues in the Regulation of Criminal and Terrorist Assets* (Farnham: Ashgate) pp.47-69.

Campbell, Liz (2007) 'Theorising Asset Forfeiture in Ireland' 71(5) *Journal of Criminal Law* 441-460.

Campbell, Liz (2010) 'The Recovery of "Criminal" Assets in New Zealand, Ireland and England: Fighting Organised and Serious Crime in the "Civil" Realm' 41 *Victoria University Wellington Law Review* 15-36.

Campbell, Liz (2013a) *Organised Crime and the Law: A Comparative Analysis* (Oxford: Hart Publishing).

Campbell, Liz (2013b) 'Criminal Labels, the European Convention on Human Rights and the Presumption of Innocence' 76(4) *Modern Law Review* 681-707.

Coggon, John (2010) 'Assisted Dying and the Context of Debate: "Medical Law" Versus "End-of-Life Law"' 18 *Medical Law Review* 541-563.

Coles, Nigel (2001) 'It's not what you know – it's who you know that counts. Analysing serious crime groups as social networks' 41(4) *British Journal of Criminology* 580-594.

De Grazia, Jessica and Kingsley Hyland (2011) 'Mainstreaming the use of assisting offenders: how to make SOCPA 2005, section 73 and 74 work' *Criminal Law Review* 357-376.

Donohue, Laura K. (2008) *The Cost of Counterterrorism: Power, Politics and Liberty* (Cambridge: Cambridge University Press).

Douzinas, Costas (2000) *The End of Human Rights: Critical Thought at the Turn of the Century* (Oxford: Hart).

Easton, Stephen, and Alexander Karaivanov (2009) 'Understanding optimal criminal networks' 10 *Global Crime* 41-65.

European Council (2012) *Confiscation and asset recovery: Better tools to fight crime* (Brussels, 12 March 2012, Memo/12/179).
Gallant, Michelle (2014) 'Civil Processes and Tainted Assets: Exploring Canadian Models of Forfeiture' in Colin King and Clive Walker (eds), *Dirty Assets: Emerging Issues in the Regulation of Criminal and Terrorist Assets* (Farnham: Ashgate) pp.165-181.
Gallant, Michelle (2004) 'Alberta and Ontario: Civilizing the Money-Centered Model of Crime Control' 4 *Asper Review of International Business and Trade Law* 13-33.
Gilmore, William (2011) *Dirty Money. The Evolution of International Measures to Counter Money Laundering and the Financing of Terrorism* (4th ed. Strasbourg: Council of Europe Publishing).
Gray, Anthony Davidson (2012) 'Forfeiture Provisions and the Criminal/ Civil Divide' 15 *New Criminal Law Review* 32-67.
Harvey, Jackie (2014) 'Asset Recovery: Substantive or Symbolic' in King, C and Walker, C (eds), *Dirty Assets: Emerging Issues in the Regulation of Criminal and Terrorist Assets* (Farnham: Ashgate) pp.183-202.
Habermas, Jürgen. (1996) *Between Facts and Norms* (Polity)
Hendry, Jennifer. (2014) '*Kadi* in Sight of Autopoiesis' in Matej Avbelj, Filippo Fontanelli and Giuseppe Martinico (eds) *Kadi on Trial: A Multifaceted Analysis of the Kadi Trial* (Routledge: London).
HM Government (2011) *Local to Global: Reducing the Risk from Organised Crime* (London: Stationery Office).
HM Government (2013) *Serious and Organised Crime Strategy* (London: Stationery Office).
Ho, Hock Lai. (2012) 'The Presumption of Innocence as a Human Right' in Paul Roberts and Jill Hunter (eds) (2012) *Criminal Evidence and Human Rights: Reimagining Common Law Procedural Traditions* (Oxford: Hart Publishing) pp.259-281.
Hobbs, Dick (2013) *Lush Life* (Oxford: Oxford University Press).
Home Office (2004) *One Step Ahead: A 21st Century Strategy to Defeat Organised Crime* (London: Stationery Office).
Home Office (2006) *New Powers Against Organised and Financial Crime* (London: Stationery Office).
Howard League for Penal Reform (1984) *Profits of Crime and Their Recovery: Report of a Committee Chaired by Sir Derek Hodgson* (London: Heinemann).
Jackson, John D. and Sarah J. Summers, (2012) *The Internationalisation of Criminal Evidence: Beyond the Common Law and Civil Law Traditions* (Cambridge: Cambridge University Press).
Jackson, John D. (2001) 'Silence and proof: extending the boundaries of criminal proceedings in the United Kingdom' *International Journal of Evidence and Proof* 145-173.
Jones, Imogen (2010) 'A political judgment? Reconciling hearsay and the right to challenge' *International Journal of Evidence and Proof* 232-252.
Kennedy, Anthony (2004) 'Justifying the Civil Recovery of Criminal Proceeds' *Journal of Financial Crime* 8-23.
Kennedy, Anthony (2005) 'Putting Robin Hood out of business: a proceeds of crime case study' 9(1) *Journal of Money Laundering Control* 19-26.
Kenney, Michael (2007) 'The architecture of drug trafficking: network forms of organization in the Colombian cocaine trade' 8(3) *Global Crime* 233-259.

King, Colin (2012) 'Using civil processes in pursuit of criminal law objectives: a case study of non-conviction-based asset forfeiture' 16(4) *International Journal of Evidence and Proof* 337-363.
King, Colin (2014a) '"Hitting Back" at Organized Crime: The Adoption of Civil Forfeiture in Ireland' in Colin King and Clive Walker (eds), *Dirty Assets: Emerging Issues in the Regulation of Criminal and Terrorist Assets* (Farnham: Ashgate) pp.141-164.
King, Colin (2014b) 'Civil Forfeiture and Article 6 of the ECHR: Due Process Implications for England and Wales and Ireland' 34(3) *Legal Studies* 371-394.
Langbein, John H. (2003) *The Origins of Adversary Criminal Trial* (Oxford: Oxford University Press).
Lea, John (2004) 'Hitting Criminals Where It Hurts: Organised Crime and the Erosion of Due Process' 35 *Cambrian Law Review* 81-96.
Lippke, Richard (2013) 'Justifying the proof structure of criminal trials' *International Journal of Evidence and Proof* 323-346.
Loughlin, Martin. (2010) *Foundations of Public Law* (Oxford: Oxford University Press).
Luhmann, Niklas. (1995) *Social Systems* (Stanford: Stanford University Press).
Luhmann, Niklas. (2004) *Law As A Social System* (Oxford: Oxford University Press).
Luhmann, Niklas. (2012) *Theory of Society: Volume 1* (Stanford: Stanford University Press).
Luhmann, Niklas. (2013) *A Sociological Theory of Law* (London: Routledge)
Mann, Kenneth (1992) 'Punitive Civil Sanctions: The Middleground Between Criminal and Civil Law' *Yale Law Journal* 1795-1873.
Martin, Richard (2013) 'The recent supergrass controversy: have we learnt from the troubled past?' *Criminal Law Review* 273-289.
Meade, J (2000) 'Organised Crime, Moral Panic and Law Reform: The Irish Adoption of Civil Forfeiture ' 10(1) *Irish Criminal Law Journal* 11-16.
Moeller, Hans-Georg. (2006) *Luhmann Explained: From Souls to Systems* (Chicago: Open Court).
Mullock, Alexandra (forthcoming) 'The Supreme Court decision in *Nicklinson*: Human rights, criminal wrongs and the dilemma of death' Copy on file with the authors.
Mullock, Alexandra (2012) 'Compromising on assisted suicide: is "turning a blind eye" ethical?' 7 *Clinical Ethics* 17-23.
Murray, Kenneth (2013) 'A square go: tackling organised crime where it doesn't want to be tackled' 16(2) *Journal of Money Laundering Control* 99-108.
National Audit Office (2013) *Confiscation Orders* (London: Stationery Office).
Nobles, Richard and David Schiff. (1995) 'Miscarriages of Justice: A Systems Approach' 58(3) *Modern Law Review* 299-320.
Nobles, Richard and David Schiff (2013) *Observing Law Through Systems Theory* (Oxford: Hart).
Ormerod, David, Andrew L-T Choo, and Rachel Easter (2010) 'Coroners and Justice Act 2009: the "witness anonymity" and "investigation anonymity" provisions' *Criminal Law Review* 368-388.
Paoli, Letizia (2002) 'The paradoxes of organized crime' 37 *Crime, Law and Social Change* 51-97.
Performance and Innovation Unit (2000) *Recovering The Proceeds of Crime* (London: Cabinet Office).

Price, David (2009) 'What shape to euthanasia after Bland? Historical, contemporary and futuristic paradigms' 125 *Law Quarterly Review* 142-174.
Quirk, Hannah (2013) 'Twenty years on, the right to silence and legal advice: the spiraling costs of an unfair exchange' 64(4) *Northern Ireland Legal Quarterly* 465-483.
Rees, Edward, Richard Fisher, and P. Bogan (2011) *Blackstone's Guide to the Proceeds of Crime Act* (4th ed. Oxford: Oxford University Press).
Richardson, Benjamin (2002) *Environmental Regulation Through Financial Organisations: Comparative Perspectives on the Industrialised Nations* (Dordrecht Kluwer).
Roberts, Paul and Jill Hunter, J (eds) (2012) *Criminal Evidence and Human Rights: Reimagining Common Law Procedural Traditions* (Oxford: Hart Publishing).
Rogowski, Ralf (2013) *Reflexive Labour Law in the World Society* (Cheltenham: Edward Elgar).
Scottish Law Commission (1994) *Report on Confiscation and Forfeiture. Report on a reference under section 3(1)(e) of the Law Commissions Act 1965. Cm 2622* (Edinburgh: HM Stationery Office).
Simser, Jeffrey, (2009) 'Perspectives on civil forfeiture' in Simon N.M. Young (ed) *Civil Forfeiture of Criminal Property: Legal Measures for Targeting the Proceeds of Crime* (Cheltenham: Edward Elgar) pp.13-20.
Spapens, Toine (2010) 'Macro networks, collectives, and business processes: an integrated approach to organized crime' 18(2) *European Journal of Crime, Criminal Law and Criminal Justice* 185-215.
Sproat, Peter (2009) 'To what extent is the UK's anti-money laundering and asset recovery regime used against organized crime?' 12(2) *Journal of Money Laundering Control* 134-150.
Sutherland Williams, Mark, Michael Hopmeier, and Rupert Jones. (2013) *Millington and Sutherland Williams on The Proceeds of Crime* (4th ed. Oxford: Oxford University Press).
Teubner, Gunther (1992) 'Social Order from Legislative Noise: Autopoietic Closure as a Problem for Legal Regulation' in Gunther Teubner and Alberto Febbrajo (eds) *Law, State and Economy as Autopoetic Systems: Regulation and Autonomy in a New Perspective* (Milan: Giuffré).
Teubner, Gunther. (2006) 'The Anonymous Matrix: Human Rights Violations by 'Private' Transnational Actors' 69 *Modern Law Review* 327-346.
Teubner, Gunther (2008) 'Justice under Global Capitalism' in Michael Blecher and Jennifer Hendry (eds) 'Governance, Civil Society & Social Movements: Special Issue' *Law & Critique* 19(3) 329-334.
Tomkins, Adam (2003) 'Introduction' in Tom Campbell, Keith Ewing, and Adam Tomkins (eds) *Sceptical Essays on Human Rights* (Oxford: Oxford University Press).
UNODC (2011) *Estimating Illicit Financial Flows Resulting From Drug Trafficking and Other Transnational Organized Crimes* (Vienna: UN Office on Drugs and Crime).
Van der Wilt, Harmen (2009) 'Joint criminal enterprise and functional perpetration' in André Nollkaemper and Harmen van der Wilt (eds) *System Criminality in International Law* (Cambridge: Cambridge University Press) pp.158-182.
Verschraegen, Gert. (2002) 'Human Rights and Modern Society. A Sociological Analysis from the Perspective of Systems Theory' 29 *Journal of Law & Society* 258-281.
Vettori, Barbara (2006) *Tough on Criminal Wealth* (Dordrecht: Springer).

Walker, Clive (2009) *Blackstone's Guide to the Anti-Terrorism Legislation* (2nd ed. Oxford: Oxford University Press).
Working Group on Confiscation (1998) *Third Report: Criminal Assets* (London: Home Office).