Reforming criminal confiscation laws in Kuwait using models from Australia and the United Kingdom: A comparative study on the possibilities and limitations in overcoming the problem of the linkage requirement of conviction-based confiscation in Kuwait

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Abstract

This thesis examines how the laws in Kuwait could be reformed to improve the operation of its approach to confiscating the proceeds of crime. In particular, it examines the possibilities and limitations of rules enabling the confiscation of the proceeds of crime without a need to secure a conviction in Kuwait. The primary aim of this thesis is to provide guidance to the legislature of Kuwait by identifying a general framework for confiscating the proceeds of crime that ensures a reasonable balance between the interests of the state in deterring criminality and recovering the proceeds of crime, and the need to protect the interests and rights of individuals in Kuwait. In so doing, it undertakes a comparative analysis of the approaches adopted in Kuwait, Australia, and the United Kingdom to overcome the requirement of conviction-based confiscation that assets sought to be confiscated, should to be linked to conduct evidenced by a criminal conviction – the so-called 'linkage requirement'.

The main research question to be answered is, 'what reforms could be undertaken in Kuwait to ensure that proceeds of crime can be confiscated effectively while safeguarding the rights and interests of the owners of property. In answering this question, the thesis examines the laws governing the confiscation of proceeds of crime in Kuwait, Australia and the United Kingdom, the procedural and evidentiary difficulties associated with securing confiscation orders in these countries, how best to safeguard the property interests and civil rights of individuals whose property is subject to confiscation orders and whether the systems that currently operate in Australia and the United Kingdom could be applied and improve the current situation in Kuwait.

Declaration

I, Humoud Alduwaisan, certify that this thesis does not incorporate any material previously submitted for a degree or diploma in any university without acknowledgement, and to the best of my knowledge and belief, does not contain any material previously published or written by another person except where due reference is made in-text and other than editorial and linguistic changes made by professional editors and translators.

Humoud Alduwaisan
25 May 2020

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Abbreviations

AUCPCC- African Union Convention on Preventing and Combating Corruption

Cth- Commonwealth of Australia

IACAC- Inter-American Convention Against Corruption

KW – Kuwait

NCBC – Non-conviction-based confiscation

NT- Northern Territory

UK- The United Kingdom

UNCAC- The United Nation Convention Against Corruption

US- The United States of America

UWO- unexplained-wealth order

WA- Western Australia

CHAPTER 1 - Introduction

In the early years of the "follow the money" strategy, the conviction-based confiscation model was the sole form of confiscation used for the deprivation of ill-gotten gains in most jurisdictions.[1] Under this model, the perpetrator of the crime that generated the proceeds sought to be confiscated must be charged with a specific criminal offence and his or her criminal liability must be established before a court can make a confiscation order in relation to the proceeds that were derived from that specific offence. In other words, conviction-based confiscation requires establishing a link between the property and benefits sought to be confiscated and a specific criminal offence for which a conviction has been secured.[2] Typically, the confiscation of the proceeds of crime takes place in association with criminal proceedings, thus ensuring that the proof of the link between the proceeds and the criminal offences for which a conviction has been secured adheres to criminal standards of proof and procedural safeguards.[3] This ensures that the state retains the burden to prove the criminal origin of the property to the criminal standard of proof, in addition to securing a conviction for a specific criminal offence. The failure to meet the linkage requirement should necessarily prevent the imposition of the confiscation order under this form of confiscation.

With increased recognition of the importance of confiscating the proceeds of crime, many states have challenged the requirements of conviction-based confiscation both to establish criminal liability for a specific offence and to adhere to procedural safeguards to prove the criminal origin of the property in question.[4] The reason for such challenges has arisen from the growing perception that conviction-based confiscation is not well-suited to deal with many practical difficulties in confiscating the proceeds of crime; thus failing in its intended aims.[5] For example, the fact that most corrupt acts are committed by individuals who occupy positions

[1] See, eg, Fernandez-Bertier, Michaël 'The Confiscation and Recovery of Criminal Property: A European Union State of the Art' (2016) 17(3) *Journal of the Academy of European Law* 323-328.
[2] See, eg, Kilchling, Michael 'Comparative Perspectives on Forfeiture Legislation in Europe and the United States' (1997) 5 *Eur. J. Crime Crim. L. & Crim. Just.* 342-347.
[3] In some countries, the criminal norms in relation to the standard and burden of proof apply only to the issue of conviction, while civil norms govern the issue of confiscation of the proceeds of crime. See, eg, Brun, Jean-Pierre, et al, *Asset Recovery Handbook: A Guide for Practitioners* (World Bank Publications, 2011) 105-106.
[4] See, eg, A, Performance and Innovation Unit, 'Recovering The Proceeds of Crime' (Cabinet Office, June 2000); 'Confiscation that Counts: A Review of the Proceeds of Crime Act 1987' (0642476322, Australian Law Reform Commission, 1999).
[5] 'Confiscation that Counts: A Review of the Proceeds of Crime Act 1987' (0642476322, Australian Law Reform Commission, 1999).

of power, coupled with the lack of direct victims to complain about the offence, make these illegal activities difficult to detect and prosecute.[6] Similarly, in the context of organised crime, it is acknowledged that securing a conviction against the heads of criminal organisations is very difficult.[7] One reason is that heads of criminal organisations use foot soldiers to commit crimes.[8] Hence, they are able to distance themselves from criminal acts, making it difficult to establish their actual participation in the offence.[9] Yet there may be compelling reasons to believe that the property in question is a proceed of a crime. As Lord Goldsmith stated during the passage of the *Proceeds of Crime* bill (UK):[10]

> *Someone at the centre of a criminal organisation may succeed in sufficiently distancing himself from the criminal acts themselves so that there is not adequate 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 engaged in criminal activity, but the type of crime may not be clear. It could be drug trafficking, money laundering, or bank robbery. However, the prosecution may not be able to say exactly what the crime is, and thus the person will be entitled to be 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 entitled to be acquitted. Yet, it is as plain as a pikestaff that his money has been acquired as the proceeds of a crime.*

[6] Muzila, Lindy, et al, 'On the Take: Criminalizing Illicit Enrichment to Fight Corruption' (2012) *World Bank Publications* 5.
[7] See generally, Lusty, David, 'Civil Forfeiture of Proceeds of Crime in Australia' (2002) 5(4) *Journal of Money Laundering Control* 345, 351-352.
[8] See generally Booz Allen Hamilton, 'Comparative Evaluation of Unexplained Wealth Orders' (2012) *US Department of Justice* 123.
[9] See generally, Goldsmith, A, Gray D, and Smith, R, 'Criminal Asset Recovery in Australia' in *Dirty Assets* (Ashgate, 2014) 115; Smith, Marcus and Smith, Russell G, 'Exploring the Procedural Barriers to Securing Unexplained Wealth Orders in Australia' (2016). Report to the Criminology Research Advisory Council, Australian Institute of Criminology: Canberra pp. 1-69.

[10] House of Lords Debates, Proceeds of Crime Bill, 25 June 2002, Vol.363, quoted in Hendry, J and King, CP, 'How Far Is Too Far? Theorising Non-Conviction-Based Asset Forfeiture' (2015) 11(4) *International Journal of Law in Context* 398-401.

In addition, identifying the proceeds of the crime and quantifying them is a challenging task. Criminals often use complicated financial schemes that involve offshore centres, shell companies, and corporate vehicles to launder the proceeds of crime.[11] The problem is exacerbated because such criminals are unlikely to establish corporate vehicles on their own, allowing others, such as lawyers and accountants, to do it for them.[12] These make the ability to prove the criminal derivation of the property difficult. Lords Neuberger, Hughes and Toulson mentioned the following in *R v Ahmad*:[13]

> *… there are the practical impediments in the way of identifying, locating and recovering assets actually obtained through crime and then held by the criminals. The defendants will often, indeed normally, be as misleading and uninformative as they can, and the sophistications and occasional corruption in the international financial community are such as to render the task of locating the proceeds of crime very hard, often impossible.*

Two main approaches have emerged to overcome these problems. The first, known as extended criminalisation, involves the enactment of specific offences that can be used, not only for the prosecution of offenders but also to confiscate their assets, even though the state has not proved the specific criminal conduct from which the property was derived. An example of such a provision is the illicit enrichment laws that operate currently in Kuwait.

The second, known as non-conviction-based confiscation (NCBC), enables assets to be confiscated by the state in the absence of a criminal conviction for the crime that generated the property in question. Unexplained-wealth confiscation is one form of this in which the burden of proving that an individual's wealth was legitimately acquired is placed on the subject of the proceedings to the civil standard of proof. Examples of this have been enacted in the United Kingdom, Australia and elsewhere.

Both approaches have the potential to overcome some of the practical difficulties associated with establishing criminal liability for a specific offence, especially when there is a high

[11] Sharman, Jason, 'Shopping for Anonymous Shell Companies: An Audit Study of Anonymity and Crime in the International Financial System' (2010) 24(4) *Journal of Economic Perspectives* 127-140.
[12] Emile van der Does de Willebois, et al, *The Puppet Masters: How the Corrupt Use Legal Structures to Hide Stolen Assets and What to Do About It* (World Bank Publications, 2011) 11.
[13] *R v Ahmad* [2014] 3 WLR 23 [36].

likelihood that the property is the proceeds of crime. However, they both create new problems by failing to adhere to conventional norms in relation to the burden and standard of proof – thus undermining the rights and interests of individuals.[14]

In Kuwait, there has been an inclination to use extended criminalisation as a way to, among other things, overcome the problem of the linkage requirement. Kuwait has a long history of public sector corruption, much of which has gone unpunished.[15] Kuwait remains a country in which profit-driven crime is a real problem.[16] It is increasingly recognised that prosecuting traditional corruption crimes, such as bribery, embezzlement, trading in influence, and abuse of function, is inadequate to deter corruption.[17] The covert nature of corruption makes prosecution of criminal conduct extremely difficult. Bozbar, the Secretary-General in Kuwait's Anti-Corruption Authority, stated that one of the main difficulties in combatting corruption, particularly bribery, is proving specific offences.[18] A public prosecutor in Kuwait has also confirmed that one of the main reasons for the lack of referral to court in such cases is the difficulty in proving the elements of the offence of bribery. It is not sufficient simply to prove the acquisition of money, without evidence of the material and mental elements of the offence.[19]

In 2011, for example, Kuwait witnessed considerable street protests after it was revealed that thirteen of the fifty members of Parliament had received the equivalent of approximately US$92 million.[20] The public prosecutor decided to close the investigation because there was

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[14] See, eg, Boles, Jeffrey, 'Criminalizing the Problem of Unexplained Wealth: Illicit Enrichment Offenses and Human Rights Violations' (2014) *Journal of Legislation and Public Policy*; Gray, Anthony Davidson, 'Forfeiture Provisions and the Criminal/Civil Divide' (2012) 15(1) *New Criminal Law Review: An International and Interdisciplinary Journal* 32.

[15] See, eg, Alyamama Alharbi, غسيل الأموال الظاهرة الاقتصادية دراسة تحليلية تطبيقية مقارنة *[Money Laundering Economic Phenomenon A Comparative Analytical Study]* (Master's Thesis, Kuwait University, 2002) 223.

[16] See, eg, Aloumi, Noura, 'The development of laws in Kuwait to combat corruption' in Colin King Katie Benson, Clive Walker (ed), *Assets, Crimes, and The State* (Routledge, 2020).

[17] See, eg, Aloumi, Noura, ' جريمة الكسب غير المشروع دراسة تحليلية مقارنة للمرسوم بقانون رقم (24) لسنة 2012 بإنشاء الهيئة العامة لمكافحة الفساد و الأحكام الخاصة بكشف الذمة المالية ['The Crime of Illicit Enrichment: A Comparative Study of the Legislative Decree No. (24) for the year 2012 on the Establishment of the General Authority for Combating Corruption'] (2015) 39(4) *Journal of Law* 79-85.

[18] 'Nazaha workshop on Bribery Offence: Corruption, Legislative Deficiency, and Possible Solutions' <https://www.youtube.com/watch?v=81MDKGCo-zs&t=135s>.

[19] Ibid.

[20] See, eg, https://www.nytimes.com/2011/09/22/world/middleeast/corruption-inquiry-rocks-kuwait.html.

insufficient evidence to prove bribery, money laundering, or other offences.[21] Confiscation of property suspected of being proceeds of crime was not possible in this case, as the conviction-based confiscation model was the sole form of confiscation available for the deprivation of ill-gotten gains.

This case led to the exploration of new laws to ensure that adequate legal avenues are available to prevent a similar recurrence. Amending the confiscation regime, however, was not considered. Instead, there was a decision made to rely on extended criminalisation as a way to, among other things, enhance the effectiveness of the confiscation regime. For example, one of the measures adopted was to create a new offence of illicit enrichment. This made it a criminal offence to fail to show lawful derivation of the targeted wealth. In addition to attracting a criminal penalty, the property in question could be confiscated by the state. The explanatory note of law number 24 of 2012 justifies the introduction of the illicit enrichment offence as a response to the corruption crisis in Kuwait, along with the failure of public institutions to deal with it. The academic literature has, however, preferred to explore the adoption of NCBC.[22]

The linkage requirement, and the problems it brings, cannot properly be understood without a thorough examination of the legal nature of confiscation of the proceeds of crime as this is integral to understanding the validity and fairness of the various approaches being pursued in dealing with the problems associated with the linkage requirement. The need to adhere to the criminal norms in relation to the standard and burden of proof, as well as the grounds for liability for confiscation are central to protect individuals' interests.

This thesis examines the advantages and limitations of overcoming the linkage requirement of conviction-based confiscation in Kuwait through the use of extended criminalisation and NCBC. The interests at stake in undertaking such reform are threefold: those of the state in seeking to prevent crime through the confiscation of assets; those of the individual subject to

[21] Aloumi, Noura, 'جريمة الكسب غير المشروع دراسة تحليلية مقارنة للمرسوم بقانون رقم (24) لسنة 2012 بإنشاء الهيئة العامة لمكافحة الفساد و الأحكام الخاصة بكشف الذمة المالية [The crime of illicit enrichment: A comparative study of the Legislative Decree No. (24) for the year 2012 on the establishment of the General Authority for Combating Corruption]' (2015) 39(4) *Journal of Law 65.*

[22] See, eg, Aloumi, Noura, 'In pursuit of non-Convection Based Confiscation Asset Recovery: Comparative Analyses Study of the Kuwaiti Criminal Law' (2018) 42(2) *Journal of Law*; Alrashidi, Khaled, 'Proceeds of corruption crime The Kuwaiti legal response' in King, Colin, Benson, Katie & Walker, Clive (ed), *Assets, Crimes, and The State* (Routledge, 2020).

confiscation proceedings, who may be the offender or a third party involved in the commission of a crime; and those of the victim with an interest in the assets sought to be confiscated whose rights may be infringed as a result of action by the state. A primary aim of this thesis is to provide guidance for the legislature by identifying a general framework for confiscating the proceeds of crime that ensures a reasonable balance between the interests of the state in overcoming the difficulties associated with confiscation and the need to protect the property interests of individuals in Kuwait. Another aim is to develop a better understanding of the problems associated with overcoming the linkage requirement. In doing so, it undertakes a comparative analysis of the approaches adopted to overcome the difficulties in establishing the linkage requirement in Kuwait, Australia, and the UK. The main research question to be answered is, 'how should Kuwait act to deal with the evidentiary, procedural and practical difficulties associated with the linkage requirement in confiscation proceedings?' In answering this question, the study examines the legal nature of confiscating the proceeds of crime, the practical requirements of confiscation and how these affect individuals' legal and property interests

The main argument to be advanced is that the use of extended criminalisation in Kuwait to overcome the difficulties associated with the linkage requirement can undermine individuals' rights and interests. This thesis also argues that NCBC that involved civil proceedings with a reversed burden of proof and a lower standard of proof as used in Australia and the United Kingdom, may not be possible for Kuwait owing to the potential to infringe individuals' rights and interests. In particular, the problems associated with using NCBC in Kuwait are fourfold. The first is the absence of theoretical justification for the claim that the state is adopting a non-punitive aim when taking proceeds of crime action. The second concerns the absence of a concrete ground of liability of the subject of NCBC without establishing *in rem* confiscation. The third problem relates to the application of the presumption of innocence in NCBC proceedings, especially where action is based on commission of a criminal offence. Finally, the reparative and preventive justifications for NCBC are not only weak in theory but also entail potential infringement of individuals' rights and liberties.[23]

[23] In fact, NCBC has been rejected by courts in other jurisdictions for similar grounds. These issues will be considered in chapters Five, Six, and Seven.

This thesis, therefore, argues that extended criminalisation and non-conviction-based confiscation should not be first and natural routes invoked to resolve the difficulties in establishing the linkage requirement in Kuwait. Nevertheless, the thesis suggests a basis for NCBC that may be less problematic in terms of legitimacy, better able to protect individuals' rights and interests, and able to deal with a major problem facing Kuwait—combating public-sector corruption. In particular, this thesis argues that the unexplained-wealth confiscation of the proceeds generated from public money offences that is based on the harm principle may be possible in Kuwait; it may also provide limits that ensure a reasonable balance between the need for dealing with the difficulties in proving the criminal origin of the property and the need for securing individuals' interests.

Background

The proceeds-oriented strategy

The past three decades have seen a growing perception that a number of the objectives and values of the criminal justice system, such as crime prevention and the principles of justice, cannot be accomplished simply by relying on conventional sanctions like imprisonment and fines.[24] Instead, they are thought to be better achieved by accompanying traditional sanctions with mechanisms that lead to the deprivation of criminally acquired assets.[25] As a result, a new crime control strategy directed at the financial aspects of crime has emerged. It is commonly known as the "follow the money" strategy.[26] The strategy identifies the removal of the proceeds of crime as a way to limit the rewards to be derived from property crime and thus, a way to deter and prevent acquisitive crime.[27] It is thought that this is the only reasonable response to property crime that can be attained.[28] It originated in the United States (US) as a critical

[24] See, eg, King, Colin and Walker, Clive, *Dirty Assets: Emerging Issues in the Regulation of Criminal and Terrorist Assets* (Routledge, 2016) 3.
[25] See, eg, Kilchling, Michael, 'Tracing, Seizing and Confiscating Proceeds from Corruption (and Other Illegal Conduct) Within or Outside the Criminal Justice System' (2001) 9(4) *European Journal of Crime, Criminal Law and Criminal Justice* 264.
[26] See, eg, Zagaris, Bruce and Kingma, Elizabeth, 'Asset Forfeiture International and Foreign Law: An Emerging Regime' (1991) 5 *Emory Int'L Rev.* 445.
[27] Gallant, Mary Michelle, *Money Laundering and the Proceeds of Crime: Economic Crime and Civil Remedies* (Edward Elgar Publishing, 2005) 1.
[28] Contra Nelen, Hans 'Hit Them Where it Hurts Most? The Proceeds-of-Crime Approach in the Netherlands' (2004) 41(5) *Crime, Law and Social Change* 517; Naylor, R Tom, 'Wash-out: A Critique of Follow-the-Money Methods in Crime Control Policy' (1999) 32(1) *Crime, Law and Social Change* 1.

instrument in addressing drug trafficking and organised crime offences.[29] The scope of the strategy, however, has been extended, and it is fast becoming the principal approach to fighting most kinds of property crime throughout the world, at both the national and international levels.[30]

The strategy identifies two central components in order to achieve its intended aims: the first is to criminalise money laundering and the second is to create or expand the mechanisms that allow for confiscation of the proceeds of crime.[31] The need for the second component is based on a number of rationales.

One of the main rationales behind the confiscation of criminally acquired assets is that crime cannot be deterred if criminals are allowed to retain the fruits of their illegality.[32] If they were, potential criminals could weigh up the risks of incarceration against the advantages of enjoying criminally acquired assets.[33] On the other hand, if potential criminals understand that being caught may lead to deprivation of the proceeds of their crime (in addition to a term of imprisonment), the incentive to commit crime is likely to diminish.[34] Here is how Fried explained this policy rationale:[35]

> *The notion is that there is a subset of hardened criminals, particularly participants in organized crime, who view crime as a business and make rational calculations of the profits and loss. Such criminals, supported by the ethos of their profession, supposedly regard the threat and fact of imprisonment as a "cost of doing business". They are*

[29] See generally, Fernandez-Bertier, Michaël, 'The History of Confiscation Laws: From the Book of Exodus to the War on White-Collar Crime' in Michele Simonato and Katalin Ligeti (ed), *Chasing Criminal Money: Challenges and Perspectives on Asset Recovery in the EU* (Hart publishing, 1st ed, 2017) 53 59.
[30] See generally, Stessens, Guy, *Money Laundering: A New International Law Enforcement Model* (Cambridge University Press, 2000)11-28.
[31] Fernandez-Bertier, Michaël, 'The confiscation and recovery of criminal property: a European Union state of the art' (2016) 17(3) *Journal of the Academy of European Law* 323 324.
[32] See, eg, Thornton, John, 'Confiscating Criminal Assets – The New Deterrent' (1990) 2 *Current Issues Crim. Just.* 72.
[33] See, eg, Thornton, John, 'The Objectives and Expectations of Confiscation and Forfeiture Legislation in Australia – an Overview' (1994) 1 *Canberra L. Rev.* 43-46.
[34] See, eg, Levi, Michael, 'Taking the Profit out of Crime: The UK Experience' (1997) 5 *Eur. J. Crime Crim. L. & Crim. Just.* 228; Contra Nelen, Hans, 'Hit them where it hurts most? The proceeds-of-crime approach in the Netherlands' (2004) 41(5) *Crime, Law and Social Change* 517 525.
[35] Fried, David J, 'Rationalizing Criminal Forfeiture' (1988) 79(2) *The Journal of Criminal Law and Criminology (1973)* 328-366.

> *willing to pay this price, if, upon release, they may freely enjoy the fruits of their crime. Therefore, they will only be deterred by the forfeiture of their profit.*

This policy rationale is based on the Rational Choice Theory of criminology.[36] In this approach, a criminal is regarded as a rational actor who assesses the risks and benefits of the crime prior to deciding to engage in that criminal behaviour.[37] Accordingly, an effective way to deter people from engaging in criminal conduct is to influence their decision-making process by increasing the costs and risks of committing a criminal offence.[38] In light of this, the deprivation of criminally acquired property is viewed as an integral part of increasing the cost of committing a crime.[39] Given that a significant proportion of crimes are committed for the sake of profit, the attraction of criminality can only be effectively reduced by removing the profits.

Another important rationale for the confiscation of the proceeds of crime is to prevent unjust enrichment.[40] In other words, confiscation serves a restorative purpose by restoring the individual to his or her position before the criminal offence was committed. Restoration as a justification for confiscation is, in turn, premised on moral and logical reasons. Regarding the latter, the logic in combating crime demands that all messages communicated to offenders should point in the same direction. The logic in combating crime will be impaired if offenders are allowed to benefit from the undesirable behaviour the state is seeking to prevent. As Alldridge observes:[41]

> *If law is to impact upon people's behaviour, it should deliver coherent messages. It is not coherent, on the one hand, to try to prevent a particular form of behaviour, but, on the other, to permit someone who does it to benefit.*

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[36] See, eg, Stessens, Guy, *Money laundering: a new international law enforcement model* (Cambridge University Press, 2000) 52; Gray, Anthony Davidson, 'Forfeiture provisions and the criminal/civil divide' (2012) 15(1) *New Criminal Law Review: An International and Interdisciplinary Journal* 32 52.
[37] Bowles, Roger, Faure, Michael, and Garoupa, Nuno, 'Forfeiture of Illegal Gain: An Economic Perspective' (2005) 25(2) (1 July) *Oxford Journal of Legal Studies* 275-382.
[38] Ibid.
[39] See, eg, Fisse, Brent, and Fraser, David, 'Some Antipodean Skepticisms About Forfeiture, Confiscation of Proceeds of Crime, and Money Laundering Offenses' (1992) 44 *Ala. L. Rev.* 737-38; Bowles, Roger, Faure, Michael and Garoupa, Nuno, 'Forfeiture of illegal gain: an economic perspective' (2005) 25(2) (1 July) *Oxford Journal of Legal Studies* 275 382.
[40] Freiberg, Arie, 'Criminal Confiscation, Profit and Liberty 1' (1992) 25(1) *Australian & New Zealand Journal of Criminology* 44-45.
[41] Alldridge, Peter, *Money Laundering Law: Forfeiture, Confiscation, Civil Recovery, Criminal Laundering and Taxation of the Proceeds of Crime* (Bloomsbury Publishing, 2003) 45.

The restorative justification is also premised on the moral principle that no one should receive advantage from his or her own wrongdoing.[42] It is because of this moral principle that McClean stated, "Every legal system would accept as axiomatic that an offender should not enjoy the profits of his criminal activities".[43]

Another important rationale behind targeting the proceeds of crime is that the deprivation of criminally-acquired assets could enhance the effectiveness of preventing further criminal activities and undesirable conduct from taking place. Organised crime illustrates this point. There is a perception that organised crime cannot be prevented without the deprivation of criminal property and that traditional sanctions alone cannot negatively impact the structure of criminal organisations.[44] Members of criminal organisations caught committing crimes can easily be replaced.[45] But if sanctions imposed on members of criminal organisations are not confined to imprisonment but extend to their profits from crime, the structure of criminal organisations could be expected to suffer. Deprivation of the profits of crime is perceived to be directed at the heart of criminal organisations: their money.[46] Deprived of profit, organised crime may not be able to finance further criminal activities. The strategy, in this context, is not essentially concerned with deterring persons from being members of criminal organisations. Instead, its primary objective is to undermine the structure of criminal organisations and their ability to function.[47] Justice Moffitt, then President of the New South Wales Court of Appeals, stated the following:[48]

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[42] See generally, King, Colin, 'Civil Forfeiture and Article 6 of the ECHR: Due Process Implications for England & Wales and Ireland' (2014) 34(3) *Legal Studies* 371 375; Husni, Mahmood Najeeb شرح قانون العقوبات- القسم العام- النظرية العامة للجريمة و النظرية العامة للعقوبة و التدبير الإحترازي *[Explanation of the Penal Code – General Section – The General Theory of Crime and General Theory of Punishment and Precautionary Measure]* (Dar Almatboa'at Aljama'eya, 8th ed, 2017) 891.

[43] McClean, David 'Seizing the Proceeds of Crime: The State of the Art' (1989) 38(02) International and Comparative Law Quarterly 334.

[44] See generally, Stessens, Guy, *Money laundering: a new international law enforcement model* (Cambridge University Press, 2000) 9.

[45] Gallant, Mary Michelle, *Money laundering and the proceeds of crime: Economic crime and civil remedies* (Edward Elgar Publishing, 2005) 6; Stessens, Guy, *Money laundering: a new international law enforcement model* (Cambridge University Press, 2000) 9.

[46] Stessens, Guy, *Money laundering: a new international law enforcement model* (Cambridge University Press, 2000) 9-10.

[47] Ibid.

[48] Moffitt, Athol, *A Quarter to Midnight: The Australian Crisis: Organised Crime and the Decline of the Institutions of State* (Angus & Robertson, 1985) 143.

> *A primary target of attack, if syndicates and their power are to be destroyed, is the money and assets of organised crime. There are many reasons to support this view. The goal of organised crime is money. The financial rewards are very great, and they are the greater because the profits are tax-free. Money generates power; it allows expansion into new activities; it provides the motive for people to engage in such crime. It is used to put the leaders in positions, superior to that of others in the community, where they are able to exploit the law and its technicalities and so on. At the same time, it is the point at which organised crime is most vulnerable.*

A significant influence on the introduction of laws designed to confiscate the proceeds of crime is the lack of adequate legal mechanisms allowing for their deprivation in all situations.[49] Specifically, a reliance on compensation legislation cannot, for a number of reasons, ensure neutralising the proceeds of crime from individuals. One reason is that criminal offences in the modern era are not limited to acts against a direct victim. Legislators increasingly criminalise acts that do not involve a direct victim.[50] An example of victimless crime involves arms trafficking. Importantly, the profits that may be generated from the commission of such victimless crimes could be significant.[51] Since there is no direct victim to institute civil proceedings, civil law remedies fail to provide an adequate legal mechanism for the recovery of criminal proceeds. Therefore, one of the main rationales for introducing confiscation as a legal mechanism is its ability to remove proceeds from criminals in all situations, regardless of the availability of civil claims. Another inadequacy of compensation legislation is that, normally, the maximum amount of compensation is limited to the loss incurred by the victim of the crime.[52] However, the concept of the proceeds of crime can go beyond the loss incurred by the victim to include the direct or indirect benefits generated from the commission of the criminal offence. It is not necessary for a correlation to exist between the loss suffered by the

[49] See especially, Naylor, R Thomas 'Towards a General Theory of Profit-Driven Crimes' (2003) 43(1) *British Journal of Criminology* 81; Alldridge, Peter, *Money laundering law: Forfeiture, confiscation, civil recovery, criminal laundering and taxation of the proceeds of crime* (Bloomsbury Publishing, 2003) 48-54; Stessens, Guy, *Money laundering: a new international law enforcement model* (Cambridge University Press, 2000) 4.

[50] Stessens, Guy, *Money laundering: a new international law enforcement model* (Cambridge University Press, 2000) 4.

[51] Ibid.

[52] See, eg, Bahbahani, A, and Alnakkas, J, مصادر الإلتزام و الإثبات *[Sources of Duty and Proof]* (Dar Alkotob, 2010).

victim and the benefits derived from the commission of the criminal offence by the offender.[53] Another main inadequacy of compensation legislation is that there is no assurance that the victim of the crime will institute civil proceedings to recover property, since civil proceedings can be costly and cumbersome. Although some countries allow for a civil party to claim compensation and seek a restitution order at the sentencing stage of proceedings, which is relatively cheap and efficient, there are still many restrictions on permitting such recovery, as many legislative restrictions govern the ability of courts to pay compensation. One of the main limitations is that compensation payments often only apply for victims of crimes of violence.[54] In the case of money laundering, one reason for its criminalisation is to discourage the circulation of the proceeds of crime, which can have a number of negative impacts on financial institutions,[55] including undermining stakeholders' confidence in the financial system.[56] By providing a detection system for preventing it, the criminalisation of money laundering is also an effective way to promote confiscation of the proceeds of crime. Sherman, then President of the Financial Action Task Force, stated the following:[57]

> *Confiscation of criminal assets and prevention of money laundering go hand in hand. If money laundering is allowed to continue unchecked, large amounts of criminal assets will be effectively protected from confiscation.*

In other words, if a criminal succeeds in concealing the criminal origin of the proceeds of crime, the likelihood of confiscating those proceeds will be significantly diminished.

Due to the perceived benefits of the proceeds-oriented strategy, it has spread throughout the world. Confiscation of the proceeds of crime and criminalisation of money laundering lies at the heart of many international conventions. This is because the suppression of crime can no

[53] See also, Freiberg, Arie, 'Sentencing White-Collar Criminals' (1992) *Australian Institute of Judicial Administration, Sentencing of Federal Offenders* 1 8.
[54] See generally, Victorian Law Reform Commission, 'Victims of Crime: Consultation Paper' (Victorian Law Reform Commission, 2015).
[55] See, eg Rui, JP and Sieber, U, 'Non-Conviction-Based Confiscation in Europe. Bringing the Picture Together' in Rui & Sieber (ed), *Non-Conviction-Based Confiscation in Europe: Possibilities and Limitations on Rules Enabling Confiscation without a Criminal Conviction* (Duncker & Humblot, 2015) 294.
[56] See, eg, Gallant, Mary Michelle, *Money laundering and the proceeds of crime: Economic crime and civil remedies* (Edward Elgar Publishing, 2005) 4.
[57] National Crime Authority, *Proceeds of Crime Conference, Sydney, June 1993: Working Party Paper* (Australian Govt. Pub. Service, 1994) 314.

longer be achieved by one state alone. Crimes are increasingly likely to be committed in one state while their proceeds are to be found in another. This is due to globalisation and to criminals' recognition that attempts to prosecute crime and confiscate the proceeds might be hindered if the proceeds are located in a state whose proceeds of crime laws are weak.[58] In order to prevent so-called 'jurisdiction shopping', international conventions to suppress crime are aimed at ensuring that uniform and effective procedures are in place in all member states. Moreover, since international law does not generally permit enforcement to states outside of its territory, these conventions are aimed at facilitating the implementation of the strategy through international cooperation, or mutual legal assistance.[59] At the national level, the strategy is regarded as a necessary condition for any effective effort to combat crime, and the search for a more balanced approach to implementing the strategy is continuing. As Freiberg notes:[60]

> *legislation to confiscate the proceeds of crime is now a standard feature of the modern crime-fighter's armoury. Over the past two decades a number of countries ... have introduced, amended, adjusted, reviewed, reinforced, enhanced and, in some cases, repealed and then re-legislated schemes to combat a range of serious crimes.*

Non-conviction-based confiscation

The last two decades have seen a growing tendency in many countries to adopt other models for confiscating the proceeds of a crime without the need to establish the linkage requirement.[61] One model involves property-directed confiscation. Property-directed confiscation allows for the confiscation of a nominated object because of its clear connection to a criminal offence.[62] What matters under this model is whether the nominated property is proved to amount to a proceed of crime; if it is, the state is allowed to confiscate it without needing to establish criminal liability of a person for the criminal offence. Property-directed confiscation enables

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[58] Buranaruangrote, Torsak, *The Control of Money Laundering in Emerging Economics: The Case Study of Thailand* (2005) 158.
[59] Ibid.
[60] Freiberg, Arie, 'Confiscating the Profits' (1998) 73 *Australian Law Reform Commission – Reform Journal* 67.
[61] See, eg, Young, Simon NM, *Civil Forfeiture of Criminal Property: Legal Measures for Targeting the Proceeds of Crime* (Edward Elgar Publishing, 2009).
[62] See, eg, Rui, Jon Petter, 'Non-Conviction Based Confiscation in the European Union – An Assessment of Art. 5 of the Proposal for a Directive of the European Parliament and of the Council on the Freezing and Confiscation of Proceeds of Crime in the European Union' (Paper presented at the ERA Forum, 2012) 349.

the state to target criminally-acquired assets more simply than within the conviction-based confiscation model. This is for three main reasons. The first is the absence of the need to establish criminal liability. The second is that property-directed confiscation is normally pursued outside the criminal justice framework, taking place in civil proceedings that adhere to civil rules of evidence and procedure.[63] This makes property-directed confiscation attractive to law enforcement authorities since, normally, criminal law safeguards have no application in this type of confiscation. The third is that, typically, the requirement to prove the specific criminal offence from which the proceeds are derived is relaxed.[64]

Although property-directed confiscation is considered to be a far-reaching tool for depriving people of the profits of crime, a more robust tool for confiscation, called unexplained-wealth confiscation, has been introduced in a number of countries.[65] Confiscation of unexplained-wealth shares with property-directed confiscation the notion that confiscation can be imposed in the absence of a conviction for the crime that generated the property. However, unexplained-wealth confiscation goes one step further. In property-directed confiscation, in principle, the burden of proving the criminal origin of the property is placed upon the state. In unexplained-wealth confiscation, by contrast, the subject of unexplained-wealth proceedings bears the burden of proving that the property or wealth in question was legitimately acquired.[66]

Although NCBC mechanisms may offer a valuable solution to overcome the difficulties in establishing the linkage requirement, the use of NCBC is far from uncontroversial. The ability of NCBC to facilitate confiscation without applying criminal norms is mainly based on the idea that such confiscation proceedings are civil in nature rather than criminal. Others have argued, however that although civil in name, NCBC mechanisms are, in substance, criminal

[63] Kennedy, Anthony, 'Designing a Civil Forfeiture System: An Issues List for Policymakers and Legislators' (2006) 13(2) *Journal of Financial Crime* 132-45.
[64] See, eg, *Proceeds of Crime Act 2002* (Cth) s49.
[65] See generally Booz Allen Hamilton, 'Comparative Evaluation of Unexplained Wealth Orders' (2012) *US Department of Justice*; Smith, Marcus and Smith, Russell G, 'Exploring the Procedural Barriers to Securing Unexplained Wealth Orders in Australia' (2016). Report to the Criminology Research Advisory Council, Australian Institute of Criminology: Canberra.
[66] See, eg, *Proceeds of Crime Act 2002* (Cth) s 179E.

proceedings.[67] They inflict a criminal sanction without affording the subject of confiscation conventional safeguards available in criminal proceedings.[68] Freiberg and Fox contend:[69]

> *The minimum prerequisite of expropriation of property as direct or indirect punishment for crime should be a judicial order pursuant to a finding of guilt, or conviction of an offence. Property should not be liable to be permanently confiscated simply upon the 'commission' of an offence, or for allegation of crime proven to non-criminal standards.*

The issue is not confined to the legitimacy of severing the linkage requirement. It extends to finding a fair balance between dealing with the difficulties in recovering the proceeds of crime and protecting individuals' interests. Even though the proportionality of various NCBC mechanisms has been upheld in many European Court of Human Rights judgments, it remains contentious. As Ivory contends, "the rationale behind the ECHR's classification scheme is obscure, if not incoherent and inconsistent," and that, "if there is a golden thread running through the cases, it is that the court is committed to enabling state parties to pursue this criminal justice policy without ceding entirely its capacity for supervision".[70] King and Hendry argue that NCBC represents "a step too far".[71] Goode describes the reverse onus clause in confiscation proceedings as "unnecessary" and "unjust".[72]

One problem with NCBC mechanisms is the increased risk of confiscating legitimately-acquired property through diminishing the standards of evidence required for establishing the existence of a criminal offence and its link to the criminal derivation of the property in question.

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[67] See, eg Skead, Natalie, and Murray, Sarah, 'The Politics of Proceeds of Crime Legislation' (2015) 38 *UNSWLawJl* 455-464; Campbell, Liz, 'Theorising Asset Forfeiture in Ireland' (2007) 71(5) *The Journal of Criminal Law* 441-453; Gray, Anthony Davidson, 'Forfeiture provisions and the criminal/civil divide' (2012) 15(1) *New Criminal Law Review: An International and Interdisciplinary Journal* 32.

[68] See, eg, Collins, Martin and King, Colin, 'The Disruption of Crime in Scotland Through Non-Conviction Based Asset Forfeiture' (2013) 16(4) *Journal of Money Laundering Control* 379-381.

[69] Freiberg, Arie, et al, 'Forfeiture, Confiscation and Sentencing' (1992) in *The Money Trail: Confiscation of the Proceeds of Crime, Money Laundering, and Cash Transactions Reporting* (Law Book, 1992) 106-143.

[70] Ivory, Radha, *Corruption, Asset Recovery, and the Protection of Property in Public International Law* (Cambridge University Press, 2014).

[71] Hendry, J and King, CP, 'How Far Is Too Far? Theorising Non-Conviction- Based Asset Forfeiture' (2015) 11(4) *International Journal of Law in Context* 398-408.

[72] Goode, M 'The Confiscation of Criminal Profits" (Paper presented at the Proceedings of the Institute of Criminology, 1986) 48.

NCBC mechanisms also have the potential to place the difficult burden of proving the lawful derivation of the property—not only on the criminal but also on blameless third parties. There is also the additional risk of NCBC mechanisms being abused.[73] The use of NCBC might also lead to double deprivation of the proceeds of crime and deter the achievement of justice to true victims of crime. The difficulty in finding a fair balance between effective confiscation and securing individuals' rights and liberties is well-documented. As Simonato contends, national courts are "struggling" to find a proportionate approach between the need for effective confiscation and the protection of individual rights.[74]

Research Questions

This thesis examines the advantages and limitations of reforming the law of confiscation and its reliance on the linkage requirement in Kuwait. It aims to determine what should be done to resolve this issue in a manner that ensures a reasonable balance between the various interests at stake. In doing so, the following questions will be addressed:

1. What are the influences behind the need for the linkage requirement for confiscating the proceeds of crime in Kuwait?
2. Should extended criminalisation be used to overcome the problem of the linkage requirement in Kuwait?
3. What are the theoretical justifications for NCBC in Australia and the UK?
4. Is punishment the true nature of NCBC?
5. Can NCBC, as it is theoretically justified in Australia and the UK, be applied to Kuwait to deal with the problem of corruption?
6. Can there be an alternative basis for NCBC that could be less problematic, in terms of legitimacy, and more proportional in terms of securing individuals' rights and interests?

Methodology

The objective of this research, namely the examination of extended criminalisation and NCBC as a solution to overcoming the difficulties created by the need to establish the linkage

[73] Clarke, Ben, 'Confiscation of Unexplained Wealth: Western Australia's Response to Organised Crime Gangs' (2002) 15 *S. Afr. J. Crim. Just.* 61-87.
[74] Simonato, Michele, 'Confiscation and Fundamental Rights across Criminal and Non-Criminal Domains' (Paper presented at the ERA Forum, 2017) 377.

requirement in confiscation proceedings, lends itself to a comparative law analysis. Primarily, this research has undertaken a comparative analysis of the position in Kuwait, Australia, and the UK.

One of the important purposes of a comparative law study is to provide a better solution to a problem by looking at how the same problem has been dealt with by other countries.[75] Indeed, many commentators have stated that the chief aim of comparative law is to aid a legislature in improving or abolishing a legal rule in order to provide a better solution to a given problem.[76] In justifying this purpose of comparative law, Smits stated the following:[77]

> *All legal systems share the common goal of finding and applying the best and most just legal rules. All legal systems try to approximate this goal, and it is likely that some will have succeeded earlier or more convincingly than others. This means that it is useful to compare the solutions reached elsewhere with domestic solutions in order to develop one's own law in accordance with that of other legal systems.*

In addition, the comparative-law approach will be employed in order to facilitate a deeper understanding of the problems stemming from the linkage requirement of conviction-based confiscation and the solution needed to deal with it.

A functional approach, rather than a rule-oriented approach, is employed as a basis for comparison. Specifically, when examining the difficulties in establishing the linkage requirement, not only will confiscation provisions be considered but the impact of offences on confiscation regimes will also be analysed. As Reitz pointed out:[78]

> *A good comparative law study should normally devote substantial effort to exploring the degree to which there are or are not functional equivalents of the aspect under study in one legal system in the other system or systems under comparison. This inquiry*

[75] Danneman, Gerhard, 'Comparative Law: Study of Similarities or Differences?' in *The Oxford Handbook of Comparative Law* (Oxford University Press, 2006) 403.
[76] See, eg, Kamba, Walter Joseph, 'Comparative Law: A Theoretical Framework' (1974) 23(03) *International and Comparative Law Quarterly* 485, 495-499.
[77] Smits, Jan M, 'Comparative Law and its Influence on National Legal Systems' in *The Oxford Handbook of Comparative Law* (Oxford University Press, 2006) 487.
[78] Reitz, John C, 'How to Do Comparative Law' (1998) 46(4) *The American Journal of Comparative Law* 61, 621-622.

> *forces the comparatist to consider how each legal system works together as a whole. By asking how one legal system may achieve more or less the same result as another without using the same terminology or even the same rule of procedure, the comparatist is pushed to appreciate the interrelationships between various areas of law.*

The choice of jurisdictions is not haphazard. Australia was selected because it has enacted NCBC mechanisms after extensive examination of the problems caused by the linkage requirement of conviction-based confiscation and because of the range of its confiscation without conviction models in its nine separate jurisdictions at federal and state/ territory level. Moreover, it is a country in which extended criminalisation is also used. The UK was selected because it has several forms of NCBC and because of the extensive range of cases in which the validity of confiscation provisions has been scrutinised.

Although Kuwait is a civil-law country, and Australia and the UK are common-law countries, this should not be considered as an impediment to the current comparative law approach as the differences can contribute to a deeper understanding of the problems and the solutions needed to suit the legal circumstances in Kuwait.

Sources and research approach

This research is based on primary and secondary materials. It adopts a doctrinal method of inquiry, which includes examining proceedings of criminal laws, case law, official reports and academic legal scholarship to examine the issues associated with the linkage requirement and how it could be reformed. It was hoped that the research would use data as evidence in a number of areas of inquiry: the extent to which conviction-based confiscation has been used in Kuwait; how effective it has been in recovering assets; how many cases and how much money has been ordered; how much was actually recovered; and whether the scheme has been effective in achieving its purposes. However, there is a complete lack of data in relation to confiscation of the proceeds of crime in Kuwait.

The first step was to examine influences on the introduction of the linkage requirement in Kuwait. This was done by considering the nature of confiscation of proceeds of crime and the principles that govern its use in Kuwait. The second step was to examine one way to overcome the difficulties of meeting the linkage requirement, namely extended criminalisation. A case

study of a money-laundering offence and an illicit-enrichment offence was conducted to illustrate why extended criminalisation should not be maintained in Kuwait to deal with the difficulties in establishing the linkage requirement. This was done by examining the impact of using the content of offences on individuals' rights and interests.

The next step involved the examination of the features and the theoretical justifications of NCBC. This was done by examining proceeds of crime laws, case law, official reports and academic legal scholarship. It was the necessary to examine the nature of NCBC itself. The difficulty here was that in most countries,[79] there are no criteria by which the true legal nature of a sanction can be determined. Kuwait is no exception.[80] In the absence of criteria to determine the true legal nature of the measure in Kuwait, the chapter drew on the philosophical notion of punishment and the jurisprudence of the European Court of Human Rights in order to determine whether the true legal nature of NCBC is, or is not, punishment.[81]

The next step was to examine whether the theoretical justifications for NCBC in Australia and the UK could effectively be applied to the legal situation in Kuwait. Having identified many obstacles for theoretically justifying NCBC in Kuwait in the same way that is justified in Australia and the UK, the final step was to explore whether the unexplained wealth confiscation of proceeds generated from the commission of public money offences may overcome the barriers to adopt NCBC in Kuwait.

Significance

This research contributes to knowledge in a significant respect in a number of ways. First, like much of the literature dealing with NCBC mechanisms, this thesis aims to achieve a reasonable

[79] See generally, Freiberg, Arie, and O'Malley, Pat, 'State Intervention and the Civil Offense' (1984) *Law and Society Review* 373-378.

[80] See generally, Alsaeed Mustafa Alsaeed, العامة في قانون العقوبات الأحكام *[General Provisions of the Penal Code]* (Dar Almaaref Bimasser, 1962) 670-671.

[81] Much academic literature examining the true nature of NCBC relies on the Mendoza-Martinez case in which the Supreme Court of the US developed a test for identifying whether the true legal nature of a measure is punishment. The factors of the test are as follows: (i) whether the sanction involves an affirmative disability or restraint, (ii) whether it has historically been regarded as a punishment, (iii) whether it comes into play only on a finding of scienter, (iv) whether its operation will promote the traditional aims of punishment—retribution and deterrence, (v) whether the behaviour to which it applies is already a crime, (vi) whether an alternative purpose to which it may rationally be connected is assignable for it, and (vii) whether it appears excessive in relation to the alternative purpose assigned. 372 US 144 (1963). For the purpose of this research, however, it would be more useful to resort to methods with a general application rather than being confined to a specific country.

balance between the need for effectiveness and the need to secure individuals' rights and freedoms. In doing so, however, it provides a novel solution to the problem. The literature that deals with NCBC mechanisms implicitly departs from two ideas: first, that conviction-based confiscation will necessarily protect individuals' rights and freedoms; and, secondly, that the ability of conviction-based confiscation to achieve results relatively similar to non-conviction-based confiscation mechanisms is unattainable. This thesis rejects these assumptions. It departs from the idea that finding a fair balance between the need for effectiveness and the need to secure safeguards should not be confined to examining confiscation provisions but should extend to examining the shape and content of the offences. In doing so, it is hoped that the study will provide new insights into the extent of the problem, and the potential solutions that could be adopted.

Secondly, dealing with the problem of the linkage requirement through the use of NCBC is usually confined to dealing with organised crime. Even though there are similarities between corruption and organised crime in terms of the practical difficulties in establishing the conduct and criminal liability, they differ in many other respects. The nature of corruption may have a different pattern of offending from that of organised crime, and it also may involve direct victims. An examination of NCBC's ability to deal with corruption, especially in relation to crime involving victims, provides new insight into the problem and the solutions needed to tackle it.

Thirdly, the findings of the present research will assist policymakers in Kuwait in their determination of the best approach to adopt to deal with the difficulties associated with establishing the linkage requirement in connection with confiscation proceedings. As mentioned above, there is an inclination to use extended criminalisation to enhance the effectiveness of the confiscation regime in Kuwait, but there is no study that examines whether this approach is preferable to using NCBC measures. Although the number of studies in the area of confiscation is growing, there is currently a paucity of studies specifically relating to extended criminalisation and NCBC. The vast majority of studies on confiscation seek to explain the general part of the criminal law in this context.[82] This body of literature has focused

[82] See, eg, Nassrallah, Fadhel, شرح القواعد العامة لقانون الجزاء الكويتي في ضوء الفقة و القضاء الجريمة و العقوبة *[Explaining the General Rules of the Kuwaiti Penal Code in the Light of Jurisprudence and the Judiciary (Crime and Punishment)]* (Nassrallah, Fadhel, 2014); Homed, Abdulwahad, الوسيط في شرح الكويتي- القسم العام القانون الجزائي *[Explaining the Kuwaiti Penal Code – The General Part]* (Abdulwahad Homed, 1993); Abdulmutalib, Ehab, الموسوعة الحديثة في شرح قانون الجزاء الكويتي طبقا لأحداث تعديلات قانون الجزاء

on explaining Article 78 of the Kuwaiti penal code, which is the main article that governs confiscation. This body of literature is largely repetitive simply explaining confiscation provisions in terms of the nature of confiscation, types of confiscation, property liable for confiscation, prerequisites for confiscation, and third-party protection. There is little evaluative and analytic research and commentary.

Fourthly, the present research fills a gap in the literature by examining the possibilities and limitations of adopting a novel approach to NCBC in Kuwait. There is only one study that urges adopting NCBC in Kuwait[83] but this study is limited to an analysis of the need for property-directed confiscation to deal with the legal obstacles for securing a conviction such as death and nullification of procedures.

Finally, the present research provides new insights into the problems associated with securing confiscation using the linkage requirement. It also demonstrates how the balance between the need for effective confiscation of the proceeds of crime and the security of individual rights and freedoms can be improved by suggesting a way to understand the nature of confiscation and its limits that may suit the legal, social and political circumstances present in Kuwait.

A note in terminology

There are many differences between jurisdictions in the terminology used in the area of confiscation of criminal proceeds. As a result, it is essential to define and determine the key terms used in the thesis with precision. This is not only because of the existence of alternative

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2014 الكويتي وأحكام محكمة التمييز الكويتية مقارنة بأحكام محكمة النقض المصرية منذ تاريخ إنشائها حتى عام [*The Modern Encyclopedia to Explain the Kuwaiti Penal Code in Accordance with the Lastest Amendments to the Kuwaiti Penal Code and the Kuwaiti Court of Cassation Judgments Compared to the Egyptian Court of Cassation Judgments from the Date of its Establishment until 2014*] (Dar Alwaleed, 2015); Husni, Mahmood Najeeb, شرح قانون العقوبات- القسم العام- النظرية العامة للجريمة و النظرية العامة للعقوبة و التدبير الاحترازي [Explaining the penal code- the general part (the general theory of crime and the general theory of punishment and the precutionary measure)] (Dar alnahdha alarabia, 2012); Suror, Ahmad Fatehi, الوسيط في قانون العقوبات - القسم العام [*The Penal Code – The General Part*] (Dar Alnahdha Alarabia, 2015); Aobaid, Raaof, مبادئ القسم العام من التشريع العقابي [*The General Part Principles of the Penal Legislation*] (Maktabat Alwafaa Alqanoniya, 2015); Abdulmoneam, Sulaiman, النظرية العامة لقانون العقوبات [*The General Theory of the Penal Code*] (Dar Almatboaat Aljameaa, 2014); Mohamad, Ameen Mustafa قانون العقوبات- القسم العام (Dar Almatboaat Aljameaa, 2013).

[83] Aloumi, Noura, 'In Pursuit of Non-Conviction Based Confiscation Asset Recovery: Comparative Analyses Study of the Kuwaiti Criminal Law' (2018) 42(2) *Journal of Law*.

terms describing similar mechanisms but also because the same terms can have different meanings in various jurisdictions.

Several definitions of the term 'confiscation' exist at international and national levels. The *United Nations Convention against Corruption* and the *United Nations Convention against Transnational Organised Crime* define the terms 'confiscation' as "the permanent deprivation of property by order of a court or other competent authority".[84] Confiscation is not, however, defined by legislation in Kuwait. In the literature, the definition of confiscation is accepted as a procedure that deprives property from its owner without compensation.[85] For example, in the Australian *Proceeds of Crime Act 2002* (Cth), the term 'confiscation order' refers to 'a forfeiture order, a pecuniary penalty order, literary proceeds order or an unexplained wealth order'.[86] A confiscation order is thus a generic description of various types of orders that deprive persons of their property in different circumstances. In this thesis, the term 'confiscation' will be used in its broadest sense to refer to 'the deprivation of property by a competent authority without compensation'. It encompasses both conviction-based confiscation models and confiscation-without-conviction models.

Consideration also need to be given to the term 'forfeiture'. The terms 'confiscation' and 'forfeiture' are often used interchangeably. However, forfeiture has a distinct meaning in the Australian and UK proceeds of crime acts as referring to court orders taking specific property that is the proceeds of crime or used in the commission of crime. Some forfeiture orders require a conviction while others relate to civil forfeiture only. To avoid confusion, the term 'confiscation' will be used solely when referring to the deprivation of property without compensation in a general sense.

The term 'property-directed confiscation'—which in this thesis refers to the confiscation of a nominated object because of its connection to a criminal 'offence' without the need to secure a conviction—may not be usual. There is a considerable discrepancy in what is referred to as property-directed confiscation among jurisdictions in this context. In the UK, for example, an alternative term used is 'civil recovery'. In Australia, such confiscation is referred to as a

[84] UNCAC article 2(g); UNCATOC article 2(g).
[85] See, eg, Nassrallah, Fadhel, شرح القواعد العامة لقانون الجزاء الكويتي في ضوء الفقة و القضاء الجريمة و العقوبة *[Explaining the general rules of the Kuwaiti Penal Code in the light of jurisprudence and the judiciary (crime and punishment)]* (Nassrallah, Fadhel, 2014) 374.
[86] *Proceeds of Crime Act 2002* (Cth) s338.

forfeiture order of property suspected of being the proceeds of an offence. In the US, the term 'civil forfeiture' is used to describe such confiscation. The term 'non-conviction-based confiscation' is used instead of 'property-directed confiscation' in some literature. For the purpose of this research, the term 'property-directed confiscation' will be utilised in order to avoid confusion with unexplained-wealth confiscation.

In this thesis, the term 'unexplained-wealth confiscation' refers to the direct or indirect confiscation of property without the need to first secure a conviction and based on the inability of a person to prove that his or her wealth or property was legitimately acquired. The reason for referring to direct and indirect confiscation in this definition is to accommodate both the UK and Australian unexplained-wealth order definitions in one term. In Australia, an 'unexplained-wealth order' requires a person to pay a proportion of his or her wealth that has not been satisfactorily proved as being legitimately acquired. In the UK, the effect of the 'unexplained-wealth order' is not to confiscate the property directly. Instead, the property is presumed to be recoverable under a property-directed confiscation scheme.

The term 'non-conviction-based confiscation' is used in the context of this study as a generic description of property-directed confiscation and unexplained-wealth confiscation. The main reason for using this term is one of convenience: it can accommodate both forms of confiscation without conviction and thus avoids the need to mention both each time.

Although the term 'extended criminalisation' has been used in some studies,[87] there is no clear definition of what exactly it refers to. The term is often used by reference to its function. Specifically, extended criminalisation is often defined as a way indirectly to circumvent the requirements of conviction-based confiscation through the shape of the offence. Given this lack of a clear definition, extended criminalisation refers, in this study, to criminalisation in which a property is regarded as having a criminal origin, even though the state has not proved the specific criminal offence from which the property is derived.

Some reference should also be made to the scope of confiscation systems themselves. Confiscation may be classified on the basis of the mode in which property rights are affected

[87] See, eg, ForSaith, J, et al, 'Study for an Impact Assessment on a Proposal for a New Legal Framework on Confiscation and Recovery of Criminal Assets' (Technical Report for European Commission Directorate General Home Affairs, European Union, 2012).

in property-based systems of confiscation and value-based systems of confiscation.[88] A property-based system of confiscation operates *in rem* in that the confiscation is directed at specific property prescribed by law, normally because the property constitutes the proceeds of an offence.[89] Since this confiscation system is directed at specific property, the confiscation order must specify the property sought to be confiscated. It follows that the prescribed property must be identified in order to allow for the confiscation order to be made under the property-based system of confiscation.[90]

In contrast, the value-based system of confiscation is not directed at specific property, but rather the focus of this system is on benefits derived from the commission of a criminal offence.[91] It requires the confiscation subject to pay an amount of money based on such benefits. It is not a requirement to identify the property that constitutes the proceeds of crime. Instead, what is required is to value the benefits derived from the criminal offence. Such systems operate *in personam*, in that the order attaches to the person against whom they are made.

Scope and Limitations

Because of the nature of the research and time constraints affecting it, a number of important limitations need to be considered and certain parameters need to be set.

First, the problem of establishing the linkage requirement may be attributed to two main categories. The first kind of problem is related to legal reasons that prevent the conviction. Examples of such reasons are the inability to secure a conviction because of death or the operation of statutes of limitations. Another category relates to a lack of evidence to meet the elements necessary to confiscate the proceeds of a crime. Due to time constraints, the research will only deal with the latter category.

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[88] Stessens, Guy, *Money laundering: a new international law enforcement model* (Cambridge University Press, 2000) 31.

[89] Husni, Mahmood Najeeb, شرح قانون العقوبات- القسم العام- النظرية العامة للجريمة و النظرية العامة للعقوبة و التدبير الإحترازي *[Explanation of the Penal Code -General Section- The general theory of crime and general theory of punishment and precautionary measure]* (Dar Almatboa'at Aljama'eya, 8th ed, 2017) 884.

[90] Brun, Jean-Pierre et al, *Asset Recovery Handbook: A Guide for Practitioners* (World Bank Publications, 2011)108.

[91] Ibid 111.

Secondly, it must be noted that there is a considerable variation in confiscation provisions between and within jurisdictions. The purpose is not to present any comprehensive confiscation regime here. Instead, the thesis is concerned with exploring the right basis and general framework to ensure a fair balance between the need for overcoming the difficulties in establishing the linkage requirement and securing individuals' rights and interests in Kuwait. The thesis, therefore, determines whether extended criminalisation as a basis for dealing with the shortcomings of conviction-based confiscation is more suitable than dealing with them using NCBC measures. If it is not more suitable, the thesis will determine what the basis should be for confiscation without conviction that is both legitimate and ensures a fair balance.

Thirdly, this research examines the possibilities and limitations of overcoming the linkage requirement of conviction-based confiscation in Kuwait within the existing criminal justice system. Although the right to property can influence the possibilities and limitations of overcoming the linkage requirement, is not considered in this research.

Fourthly, this research is not concerned with confiscation without conviction in the general sense. It is mainly concerned with the problems stemming from the establishment of the linkage requirement. Therefore, issues such as confiscation after acquittal, the retrospectivity of the confiscation, the discretion of judges to make the confiscation order, and the relevance of confiscation to sentencing are not dealt with in this thesis. Moreover, due to time constraints, this thesis will not deal with investigative powers, even though they have an important impact on proving the criminal origin of the property. The only exception is the unexplained wealth order in the UK.

Finally, this study could not provide a comprehensive review of all proceeds-of-crime provisions and extended-criminalisation offences in Kuwait, Australia, and the UK. The scope of the examination of confiscation provisions in Kuwait will be limited to those provided in the penal code, namely Law No. 106 of 2013, pertaining to combating money laundering and the financing of terrorism, and Law No 2 of 2016, on the establishment of Kuwait's Anti-Corruption Authority. The examination of property-directed confiscation and unexplained-wealth confiscation in Australia will be limited to confiscation provisions under the *Proceeds of Crime Act 2002* (Cth), excluding the many other detailed and conflicting provisions in Australia’s states and territories. The UK *Proceeds of Crime Act* provides distinct provisions for confiscation in England and Wales, Northern Ireland, and Scotland. For convenience, the

discussion of the UK confiscation provisions will be limited to England and Wales. In relation to extended criminalisation, the examination will mainly be confined to money-laundering and illicit-enrichment offences.

Structure

The thesis consists of eight chapters. Chapter Two is concerned with the deprivation of the proceeds of crime in Kuwait. It traces the development of the Kuwaiti confiscation regime and provides an overview of the requirements to confiscate the proceeds of crime. It demonstrates that these requirements are influenced by the legal nature of confiscating the proceeds of crime as an additional punishment and by the property-based system of confiscation. It will be demonstrated that a link must be established between the property sought to be confiscated and the crime for which a conviction has been secured and that the underlying reason behind this requirement is the legal nature of confiscating the proceeds of crime as an additional punishment. As to the confiscation system used for linking the proceeds to the crime, the chapter argues that adhering to the property-based system of confiscation solely will impair the effectiveness of the confiscation regime. Therefore, it will be argued that property-directed confiscation should be supplemented by a value-based system of confiscation order to overcome the difficulties in identifying the proceeds of crime.

Chapter Three is concerned with the use of extended criminalisation as a tool to facilitate the fulfilment of the requirements of confiscation. It discusses the reasons and consequences of using the content of the offences to overcome the difficulties in proving the criminal origin of the property. It is mainly aimed at examining extended criminalisation as a solution to mitigate the obstacles in proving the criminal origin of the property. This is done in order to determine whether the use of extended criminalisation constitutes a reasonable approach to dealing with such difficulties or whether alternative mechanisms should be explored. The main argument of the chapter is that, although the use of extended criminalisation can improve the ability of the state to deal with the difficulties in proving the criminal origin of the property, the way in which such improvement is reached can impair the foundation of criminal law and individual safeguards. It is, therefore, recommended that alternative mechanisms be explored to deal with such issues.

Chapter Four is concerned with the move towards NCBC. It traces the developments towards NCBC in Australia and the UK and provides an overview of features of property-directed confiscation and unexplained-wealth confiscation in selected jurisdictions in the UK and Australia. The aim is to identify the principal features of property-directed confiscation and unexplained-wealth confiscation in order to facilitate the analysis, in subsequent chapters, of the nature of NCBC mechanisms. It will be demonstrated that the move away from conviction-based confiscation is premised on two main grounds. The first is the practical difficulties in establishing criminal liability in certain kinds of crime and proving the criminal derivation of a property. The second is in the denial of imposing a 'criminal' punishment through the confiscation of the proceeds of crime. The chapter concludes with a number of concerns related to the effects of NCBC in terms of impact on individual rights and interests.

Chapter Five is concerned with the legal nature of non-conviction-based confiscation. The question under discussion is whether confiscation of the proceeds of crime through non-conviction-based confiscation constitutes a criminal punishment. In answering this question, the chapter draws on the philosophical notion of punishment and the jurisprudence of the European Court of Human Rights. It will be argued that although non-conviction-based confiscation that complies with certain features has been found not to constitute a punishment, it is difficult to exclude completely the punitive nature of NCBC when there is an absence of a clear non-punitive aim and a theoretical justification of the requirements of confiscation.

Chapter Six is concerned with the possibilities and limitations of theoretically justifying requirements of NCBC in Kuwait similar to those provided in Australia and the UK. This chapter will present two main arguments in relation to NCBC in Kuwait. The first is that property-directed confiscation should not be considered in Kuwait due to the legal limitations that hinder the overcoming of the problems of the linkage requirement through property-directed confiscation. In particular, the inability to lower the standard of the proof and the difficulties in recognising in rem confiscation make it difficult to implement property-directed confiscation to overcome the problem of the linkage requirement in Kuwait. The second argument is that unexplained-wealth confiscation, as theoretically justified in Australia and the UK, may not be possible in Kuwait and involves a number of concerns that can undermine individuals' rights and liberties. This is because the general application of the unexplained-wealth confiscation to a number of offences renders the likelihood of finding the nature of

unexplained wealth confiscation punitive. Therefore, the deviation from conventional norms for confiscating the proceeds of crime may not be justified.

Chapter Seven is concerned with the possibilities and limitations of unexplained-wealth confiscation of proceeds generated from public-money offences to combat public-fund crimes in Kuwait that involve corruption. Specifically, it explores whether the harm principle can provide a satisfactory basis for the state's claim to the proceeds of crime generated from public-fund crimes. It also explores a ground for liability to the person in relation to the proceeds generated from such crimes. It will be argued that by concentrating on depriving the proceeds generated by public-fund crimes, unexplained-wealth confiscation may be possible; it may also provide limits that ensure a reasonable balance between the need for dealing with the difficulties in proving the criminal origin of the property and the need for securing individuals' interests.

Chapter Eight provides a conclusion. It summarises the main argument of the thesis and synthesises the various issues discussed in order to explain the problems stemming from the difficulties in establishing the linkage requirement. The chapter makes suggestions on how to deal with the issue in a manner that suits the legal circumstances in Kuwait and ensures a reasonable balance between the need to overcome the difficulties in establishing the linkage requirement and the need to secure individuals' rights and interests. The chapter demonstrates that extended criminalisation and NCBC mechanisms should not be the first route invoked to resolve the problem of the linkage requirement, since they both entail risks to individuals' rights and interests. Nevertheless, as suggested in Chapter Seven, unexplained-wealth confiscation is to be preferred over extended criminalisation as a solution to the difficulties in establishing the linkage requirement. Chapter Eight also provides suggestions for further studies that need to be conducted if the adoption of unexplained-wealth confiscation is to be considered in Kuwait.

CHAPTER 2 - The linkage requirement and the Kuwaiti confiscation regime

Introduction

The need for a legal tool that allows for offenders to be deprived of their criminally acquired profits is widely accepted internationally. The rules and principles with which the deprivation of the proceeds of crime must comply, however, vary among countries. This stems from many factors, including the purposes of confiscating proceeds of crime, the legal nature of the tool that allows for confiscation and the human rights laws to which the deprivation of the proceeds of crime must adhere.[92]

This chapter is concerned with the deprivation of the proceeds of crime in Kuwait and examines the legal provisions that allow this to occur. The aim is to explore the influences that affected how the deprivation of proceeds of crime laws were shaped in Kuwait. It also aims to show that the requirements of confiscating the proceeds of crime are influenced by the legal nature of confiscation as an additional punishment and by the property-based system of confiscation. It will be demonstrated that, in Kuwait, a link must be established between the property sought to be confiscated and the crime for which a conviction has been secured. This is justified by the legal nature of confiscation as a form of additional punishment. As to the confiscation system used for linking the proceeds to the crime, the present chapter argues that adhering solely to a property-based system of confiscation impairs the effectiveness of the confiscation regime. A value-based system of confiscation should supplement the property-based system of confiscation in order to overcome the difficulties in identifying the proceeds of crime. This is mainly because property-based system of confiscation entails a number of shortcomings which diminish the likelihood of the confiscation of the proceeds of crime.

[92] See, eg, Boucht, Johan, *The Limits of Asset Confiscation: On the Legitimacy of Extended Appropriation of Criminal Proceeds* (Hart Publishing, 2017) 95.

The chapter begins by providing an overview of the penal law in Kuwait, including its development and, in particular, its approach to sentencing. It then contextualises confiscation within the criminal sentencing system. It then examines the rules and principles with which the confiscation of the proceeds of crime must comply. The rest of the chapter examines the problem of the linkage requirement. This will provide background to understanding the effectiveness of the regime in Kuwait, and how it could be improved that will be addressed in subsequent chapters.

Historical background

In the early centuries after its establishment,[93] the population of Kuwait was very small.[94] Relationships among members of the population were characterised by tolerance and brotherhood.[95] As a result, the likelihood of the occurrence of a crime was very low.[96] If a crime was committed, there were no official judges who could be relied on to settle the issue.[97] Instead, there was a tendency to resort to tribal princes or elderly individuals (Arrafa) within Kuwaiti society, with people seeking their opinions to settle disputes.[98] The literature dealing with the development of the Kuwaiti legal system and criminal law does not precisely determine which laws were used to resolve disputes in the early centuries after the establishment of Kuwait.[99] Nevertheless, what is known is that disputes were settled through the rules of custom, morality, and religion that prevailed at that time in the community.[100]

[93] There is disagreement over when Kuwait was founded. The most likely opinion is that it was established in approximately 1716. See Alrsheed, Abdulaziz, تاريخ الكويت *[Kuwait History]* (Manshorat Dar Maktabat alhayat, 1978) 31.
[94] Ibid 91; Alnuwaibit, Mubarak, شرح المبادئ العامة في قانون الجزاء الكويتي *[Explaining the General Principles in the Kuwaiti Penal Code]* (No Publisher, 2011) 37.
[95] Ibid.
[96] Ibid.
[97] Alrsheed, Abdulaziz, تاريخ الكويت *[Kuwait History]* (Manshorat Dar Maktabat alhayat, 1978) 92; Alnuwaibit, Mubarak, شرح المبادئ العامة في قانون الجزاء الكويتي *[Explaining the general principles in the Kuwaiti Penal Code]* (No Publisher, 2011) 37-38.
[98] Althaferi, Fayez, نظرية) الجريمة و العقوبة القواعد العامة في قانون الجزاء الكويتي *[The General Rules in the Kuwaiti Penal Code (The Theory of Crime and Punishment)]* (No publisher, 2017) 7-8.
[99] Ibid 7; Alnuwaibit, Mubarak, شرح المبادئ العامة في قانون الجزاء الكويتي *[Explaining the general principles in the Kuwaiti Penal Code]* (No Publisher, 2011) 37.
[100] Alnuwaibit, Mubarak, شرح المبادئ العامة في قانون الجزاء الكويتي *[Explaining the general principles in the Kuwaiti Penal Code]* (No Publisher, 2011) 37.

The period from the late 19th century until the early 20th century was marked by a change in the legal system in Kuwait.[101] A more reliable approach to dispute resolution was needed, which stemmed mainly from the economic development that was taking place in the country during that period. As a consequence, there was a change in the way in which disputes were resolved. One of the changes was in the appointment of formal judges dedicated to settling conflicts that arose within the population.[102] Another alteration was that Sharia-based laws were used for dispute resolution both in civil and criminal matters.[103] In civil matters, the Mecelle (Mjalat Alahkam Aladlya), which codified Sharia-based laws in civil matters, was voluntarily adopted. Similarly, Sharia-based laws prevailing among the community were applied to resolve criminal cases. One piece of evidence that Sharia laws were applied in criminal matters in this period is that there was a Sharia-based court, known as the Sharia Court, for felonies and misdemeanours (Almahkma Alsharia Lljnayat Wljnh).[104]

This period also witnessed a change in the jurisdiction of Kuwaiti courts. There were external threats to the country, mainly from the Ottoman Empire, resulting from increasing realisation of the importance of the territory of Kuwait.[105] In order to prevent dominance by the Ottoman empire, the then Amir of Kuwait resorted to Britain for protection.[106] Accordingly, an agreement for the protection of Kuwait was reached with Britain in 1899, which defined Kuwait as an independent country under British protection. It was not until 1925 that this relationship between Kuwait and Britain prompted a change in the jurisdiction of Kuwaiti courts. In 1925, British laws were applied to British and foreign non-Islamic people in both civil and criminal matters, whereas Kuwaiti people were subjected to Sharia law in criminal and civil matters.[107]

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[101] Althaferi, Fayez, نظرية) الجريمة و العقوبة القواعد العامة في قانون الجزاء الكويتي*) [The general rules in the Kuwaiti Penal Code (the theory of crime and punishment)]* (No publisher, 2017) 8.

[102] Alrsheed, Abdulaziz, تاريخ الكويت *[Kuwait History]* (Manshorat Dar Maktabat alhayat, 1978) 92-93; Alnuwaibit, Mubarak, شرح المبادئ العامة في قانون الجزاء الكويتي *[Explaining the general principles in the Kuwaiti Penal Code]* (No Publisher, 2011) 38.

[103] For the criminal matters, see, eg, Nassrallah, Fadhel, شرح القواعد العامة لقانون الجزاء الكويتي في ضوء الفقة و القضاء الجريمة و العقوبة *[Explaining the General Rules of the Kuwaiti Penal Code in the Light of Jurisprudence and the Judiciary (Crime and Punishment)]* (Nassrallah, Fadhel, 2014) 29; Homed, Abdulwahad, الكويتي- القسم العام الوسيط في شرح القانون الجزائي *[Explaining the Kuwaiti Penal Code – The General Part]* (Homed, Abdulwahad, 1993) 3.

[104] Alnuwaibit, Mubarak, شرح المبادئ العامة في قانون الجزاء الكويتي *[Explaining the general principles in the Kuwaiti Penal Code]* (No Publisher, 2011) 47.

[105] Alrsheed, Abdulaziz, تاريخ الكويت *[Kuwait History]* (Manshorat Dar Maktabat alhayat, 1978) 89.

[106] Ibid 100.

[107] Alnuwaibit, Mubarak, شرح المبادئ العامة في قانون الجزاء الكويتي *[Explaining the general principles in the Kuwaiti Penal Code]* (No Publisher, 2011) 47-48; Althaferi, Fayez, القواعد العامة في قانون الجزاء الكويتي

It is useful here to provide a brief overview of the kinds of wrongs under the Islamic criminal law. Sharia law distinguishes three categories of wrongs: Hudod, Qisas and Diyyat, and Tazir.[108] Hudod has two distinguishing features. The first is that the Quran or Sunnah predefines the penalties to Hudod wrongs.[109] The second feature is that these kinds of offences are considered as violations of the rights of God.[110] Because of this feature, no one has the right to waive the infliction of punishment under the Hudod framework.[111] Two examples of these kinds of wrongs are Zina and theft.[112]

Qisas and Diyyat crimes are the second category of wrongs under Sharia criminal law. This category shares with Hudod the idea that the Quran or Sunnah predefines the penalties for these wrongs.[113] However, they are not considered to be wrongs committed against God but against individuals.[114] Accordingly, their penalty can, in principle, be waived by the victim of the offence.[115] An example of this kind of offence is murder.

The third type of wrongdoing, Tazir, entails crimes that do not fit within the framework of either of the categories mentioned above. In other words, this category includes either wrongs that are defined in the Quran or Sunnah without stipulating the penalty for them (such as cases of bribery and failure to provide Zakat)[116] or cases where neither the wrongs nor the penalties

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الجريمة و العقوبة (نظرية *[The general rules in the Kuwaiti Penal Code (the theory of crime and punishment)]* (No publisher, 2017)8-9.

[108] See, eg, Abdulmeam, Sulaiman, أصول علم الإجرام و الجزاء *[Principles of Criminology and Punishment]* (Dar Almatboaat Aljameaa, 2015) 86.

[109] See, eg, Mohamad, Ameen Mustafa, علمي الإجرام و الجزاء الجنائي *[Criminology and Criminal Punishment]* (Dar Almatboaat Aljameaa, 2010) 447.

[110] See, eg, Abdulmeam, Sulaiman, أصول علم الإجرام و الجزاء *[Principles of criminology and punishment]* (Dar Almatboaat Aljameaa, 2015) 86.

[111] Alshathly, Fatooh, علم الإجرام و علم العقاب *[Criminology and Punishment Science]* (Dar Almatbooat Aljamea'a, 2017) 307.

[112] Zina can be defined as unlawful sexual intercourse. See, eg, Azam, Hina, 'Rape as a variant of fornication (Zinā) In islamic Law: An Examination of the Early Legal Reports' (2013) 28(2)*Journal of Law and Religion.*

[113] See, eg, Abdulmeam, Sulaiman, أصول علم الإجرام و الجزاء *[Principles of criminology and punishment]* (Dar Almatboaat Aljameaa, 2015) 87.

[114] Alnuwaibit, Mubarak, شرح المبادئ العامة في قانون الجزاء الكويتي *[Explaining the general principles in the Kuwaiti Penal Code]* (No Publisher, 2011) 43.

[115] However, this does not prevent the imposition of punishment under the Tazir framework, See, eg, Nassrallah, Fadhel, شرح القواعد العامة لقانون الجزاء الكويتي في ضوء الفقة و القضاء الجريمة و العقوبة *[Explaining the general rules of the Kuwaiti Penal Code in the light of jurisprudence and the judiciary (crime and punishment)]* (Fadhel Nassrallah, 2014) 36.

[116] Zakat is a form alms-giving treated in Islam as a religious obligation.

are described in the Quran or the Sunnah.[117] The distinguishing feature of this kind of wrongdoing is that the penalty to be imposed is not defined in either the Quran or the Sunnah. It is left to the discretion of the ruler or the judge to decide the quantity and quality of the penalty,[118] provided that it does not contravene Islamic principles.[119]

A renaissance in the legal domain in Kuwait occurred in the 1960s, after the discovery of oil and the achievement of the full independence in 1961.[120] For example, a law pertaining to the organisation of the judiciary was passed, which resulted in ceasing the operation of British laws and diverting all cases to Kuwaiti courts. The Kuwaiti constitution, which contains fundamental public rights and duties, among others, was issued in 1962. The Code of Criminal Procedures and Trials was developed in 1960. The penal code, which primarily governs criminal law in Kuwait, was issued in 1960.[121]

Although the explanatory note of the Kuwaiti penal code clearly stipulates that Kuwaiti criminal law does not contravene Islamic law, this does not necessarily suggest that Kuwaiti criminal law is primarily influenced by Islamic law.[122] A reading of the penal code clearly reveals that there are considerable variations between Kuwaiti criminal law and Islamic criminal law. Kuwaiti criminal law is no longer based on Sharia law. Instead, many of its

[117] See, eg, Alnuwaibit, Mubarak, شرح المبادئ العامة في قانون الجزاء الكويتي *[Explaining the general principles in the Kuwaiti Penal Code]* (No Publisher, 2011) 45-46.
[118] Alshathly, Fatooh, علم الإجرام و علم العقاب *[criminology and punishment science]* (Dar Almatbooat Aljamea'a, 2017) 310.
[119] See, eg, Nassrallah, Fadhel, شرح القواعد العامة لقانون الجزاء الكويتي في ضوء الفقة و القضاء الجريمة و العقوبة *[Explaining the general rules of the Kuwaiti Penal Code in the light of jurisprudence and the judiciary (crime and punishment)]* (Nassrallah, Fadhel, 2014) 37. Confiscation is included within the Tazir framework since confiscation was not prescribed as a penalty under the Quran or Sunnah. The question as to whether confiscation should be permitted under the Tazir framework has caused much debate among Islamic scholars. Three opinions can be distinguished concerning confiscation. The first does not support the confiscation of the offenders' property on the basis that the guilt of the person cannot be replaced by money. Another opinion limits the confiscation of the property. It suggests that the temporary deprivation of an offender's property is allowed until the deterrence purpose is achieved. If deterrence is achieved, then the property should be returned to the person. The third opinion does not view any reason to prohibit confiscation if the confiscation is based on reasonable cause.
[120] Alnuwaibit, Mubarak, شرح المبادئ العامة في قانون الجزاء الكويتي *[Explaining the general principles in the Kuwaiti Penal Code]* (No Publisher, 2011) 47-48.
[121] Criminal law provisions are not confined to the penal code. The penal code is accompanied by supplemental criminal legislation. Examples of such legislation include Law No. 74 of 1983 pertaining to combating drugs, Law No. 106 of 2013 pertaining to combating of money laundering and financing of terrorism, and Law No 2 of 2016 on the establishment of Kuwait's Anti-Corruption Authority.
[122] Althaferi, Fayez, (نظرية الجريمة و العقوبة القواعد العامة في قانون الجزاء الكويتي) *[The general rules in the Kuwaiti Penal Code (the theory of crime and punishment)]* (No publisher, 2017) 10-12.

provisions are extracted from European laws.[123] Kuwaiti criminal law was primarily modelled on the French penal code of 1810.[124] This was done either by extracting directly from the French penal code or by extracting from the Egyptian and Bahraini penal codes, which are based on the French penal code.[125]

The criminal sentencing system

The criminal law of Kuwait has not been influenced by the ideas of one penal school only.[126] Instead, it adopted ideas from different penal schools, but primarily those of the classical school concerning criminal liability and punishment.[127] That is, the commission of a criminal offence is built on the notion of freedom of choice, and therefore, the commission of crime and culpability are the basis of criminal liability. Punishment is imposed to penalise the offender for his criminal fault for the sake of justice and deterrence of crime.[128]

The ideas of the positivist school have also influenced Kuwaiti criminal law, but to a lesser degree.[129] It is because of this school that the sentencing of the offender takes into consideration not only the gravity of the offence committed and the element of fault but also the personal

[123] Alnuwaibit, Mubarak, شرح المبادئ العامة في قانون الجزاء الكويتي *[Explaining the general principles in the Kuwaiti Penal Code]* (No Publisher, 2011) 48.
[124] Althaferi, Fayez, نظرية الجريمة و العقوبة القواعد العامة في قانون الجزاء الكويتي *[The general rules in the Kuwaiti Penal Code (the theory of crime and punishment)]* (No publisher, 2017)10.
[125] The resort to Egypt was mainly because of its reputation as one of the advanced countries in relation to the legal domain. See Bin-Salama, Waleed K, *Confiscation Orders: Procedures against Drug Trafficking Offences* (PhD Thesis, Loughborough University Institutional Repository, 1998) 268.
[126] For the discussion of the penal schools and their impact on the Kuwaiti criminal law, see, eg, Nassrallah, Fadhel, شرح القواعد العامة لقانون الجزاء الكويتي في ضوء الفقة و القضاء الجريمة و العقوبة *[Explaining the general rules of the Kuwaiti Penal Code in the light of jurisprudence and the judiciary (crime and punishment)]* (Nassrallah, Fadhel, 2014) 94-96; Nassrallah, Fadel, ' قانون الجزاء في ماضيه و حاضره[Penal code in its past and present]' (2013) 8(4) *Journal of Law* 220-223.
[127] See, eg, Abdula'al, Mohamad, قانون الجزاء الكويتي النظرية العامة للجريمة و المسؤولية الجنائية في *[The General Theory of Crime and Criminal Responsibility in the Kuwait Penal Code]* (Academic Publication Council, 2015) 5.
[128] Althaferi, Fayez, المبادئ في علم الإجرام و العقاب *[Principles in Criminology and Punishment]* (Almuqahwi Alola, 2013) 236-238; Husni, Mahmood Najeeb, شرح قانون العقوبات- القسم العام- النظرية العامة للجريمة و النظرية العامة للعقوبة و التدبير الإحترازي *[Explanation of the Penal Code – General Section – The General Theory of Crime and General Theory of Punishment and Precautionary Measure]* (Dar Almatboa'at Aljama'eya, 8th ed, 2017) 783-786.
[129] See, eg, Nassrallah, Fadhel, شرح القواعد العامة لقانون الجزاء الكويتي في ضوء الفقة و القضاء الجريمة و العقوبة *[Explaining the general rules of the Kuwaiti Penal Code in the light of jurisprudence and the judiciary (crime and punishment)]* (Nassrallah, Fadhel, 2014) 95.

circumstances of the offender.[130] Moreover, it is because of this school that punishment is not regarded as the only response to crime. Rather, security measures are adopted to overcome criminal dangerousness, as opposed to criminal fault.[131]

Security measures are not aimed at penalising the offender for the criminality activity committed. Instead, they are aimed at preventing the offender from committing further criminal activity.[132] The basis for the imposition of security measures is not the person's criminal fault but his or her criminal dangerousness, or likelihood of re-offending.[133] Security measures are mainly target criminals who suffer from mental issues.[134] Other examples of security measures include the supervision of the police for repeated criminals and deporting dangerous foreign criminals from the country.[135]

The Kuwaiti system of sentencing, therefore, recognises two types of sanctions as responses to crime: criminal punishment and security measures.[136] They are similar in that their imposition is a response to the commission of a criminal activity and seeks to suppress crime.[137] However, criminal punishment and security measures differ in many other respects. The essence of criminal punishment is the imposition of deliberate suffering on convicted offenders.[138] The suffering of the punishment is achieved by depriving or decreasing one or more of their rights

[130] See, eg, Abdula'al, Mohamad, قانون الجزاء الكويتي النظرية العامة للجريمة و المسؤولية الجنائية في *[The General Theory of Crime and Criminal Responsibility in Kuwait Penal Code]* (Academic Publication Council, 2015) 6.
[131] See, eg, Nassrallah, Fadhel, شرح القواعد العامة لقانون الجزاء الكويتي في ضوء الفقة و القضاء الجريمة و العقوبة *[Explaining the general rules of the Kuwaiti Penal Code in the light of jurisprudence and the judiciary (crime and punishment)]* (Fadhel Nassrallah, 2014) 95.
[132] Belal, Ahmad Awad, النظرية العامة للجزاء الجنائي *[The General Theory of Criminal Punishment]* (Dar Alnahdha Alarabiya, 1996) 48.
[133] Ibid.
[134] See, eg, Nassrallah, Fadhel, شرح القواعد العامة لقانون الجزاء الكويتي في ضوء الفقة و القضاء الجريمة و العقوبة *[Explaining the general rules of the Kuwaiti Penal Code in the light of jurisprudence and the judiciary (crime and punishment)]* (Fadhel Nassrallah, 2014) 95.
[135] Ibid
[136] It should be noted that security measures are regulated under the framework of additional punishment and therefore there is no express provisions for security measures in the Kuwaiti penal code.
[137] Husni, Mahmood Najeeb, شرح قانون العقوبات- القسم العام- النظرية العامة للجريمة و النظرية العامة للعقوبة و التدبير الإحترازي *[Explanation of the Penal Code – General Section – The General Theory of Crime and General Theory of Punishment and Precautionary Measure]* (Dar Almatboa'at Aljama'eya, 8th ed, 2017) 765.
[138] Belal, Ahmad Awad, النظرية العامة للجزاء الجنائي *[The General Theory of Criminal Punishment]* (Dar Alnahdha Alarabiya, 1996) 16.

or their liberty.[139] The basis for the imposition of such suffering is the criminal fault that the convicted offender commits by directing his or her will against protected interests.[140]

Since criminal punishment entails serious damage to the rights and interests of the convicted offender, criminal punishment is surrounded by a number of safeguards. One of the main safeguards is the application of the principle of legality (*nullum crimes sine lege, nulla poena sine lege*).[141] This principle holds that no crime or punishment is without law.[142] A number of consequences follow from the principle of legality. The first is the prohibition of retrospective criminalisation and punishment.[143] In other words, an act cannot be considered a criminal offence unless all the elements of the offence have been prescribed prior to the commission of the act. In addition, a criminal punishment cannot be imposed on a perpetrator of the criminal offence unless the quantity and quality of the punishment have been ascertained prior to the commission of the criminal offence.[144] The principle of legality also regards any criminal offence that is not clearly defined as void, and it confines the authority of criminalisation to the legislature.[145]

One of the influential philosophers in enacting this principle was Beccaria, who believed that only laws could define penalties for crimes.[146] Montesquieu also pointed out that there is no freedom if the power of the court is not separated from the legislature.[147] Today, this principle exists across many nations and represents one of the main requirements for the rule of law. The rationale for the principle is twofold. First, it offers personal protection for individuals by

[139] Suror, Ahmad Fatehi, الوسيط في قانون العقوبات - القسم العام *[The penal Code – The General Part]* (Dar alnahdha alarabia, 2015) 915.
[140] Belal, Ahmad Awad, النظرية العامة للجزاء الجنائي *[The General Theory of Criminal Punishment]* (Dar Alnahdha Alarabiya, 1996) 18.
[141] The constitution of Kuwait section 32.
[142] See generally, Husni, Mahmood Najeeb, العامة شرح قانون العقوبات- القسم العام- النظرية العامة للجريمة و النظرية للعقوبة و التدبير الإحترازي *[Explanation of the Penal Code -General Section- The general theory of crime and general theory of punishment and precautionary measure]* (Dar Almatboa'at Aljama'eya, 8th ed, 2017) 79-108.
[143] Ibid
[144] Ibid
[145] Ibid
[146]Hayati, Yaqoub, ' ترجمة كتاب الجرائم والعقوبات للفيلسوف بكاريا[Translation of On crimes and punishments by Beccaria]' (1994) 8(1) *Journal of Law* 220.
[147] Cited in Althaferi, Fayez, القواعد العامة في قانون الجزاء الكويتي (نظرية الجريمة و العقوبة) *[The General Rules in the Kuwaiti Penal Code (The Theory of Crime and Punishment)]* (No publisher, 2017)118.
[147] Ibid.

informing them of criminal acts prior to subjecting them to the punishment of the state.[148] Therefore, they will be certain of what constitutes a criminal offence and what acts they can perform lawfully. Protecting general interest is the second rationale, which is achieved by providing the legislator with the authority to criminalise and punish. This is because the values and interests that criminal law should pursue and adhere to cannot be defined except by a representative of the citizens.[149]

Another main safeguard for imposing criminal punishment is the principle of personal punishment.[150] This principle holds that the imposition of the criminal punishment must be confined to the individual who is found criminally liable for the crime committed.[151] Therefore, it forbids criminal punishment on any person other than offender, regardless of the relationship between the offender and other individuals.[152] Because of the importance of this principle, the constitution of Kuwait stipulates that criminal punishment must be personal.

Another main safeguard in the imposition of the criminal punishment is that it cannot be imposed except by a court judgment according to criminal procedural laws. Conviction is the procedural means to determine criminal liability and allows the state to exercise its right to punish.[153] One of the main consequences is the application of the presumption of innocence. The presumption of innocence is a well-recognised principle that can be found in most human rights documents.[154] The presumption of innocence holds that the accused person is innocent until proved guilty by the court of law.[155] In other words, the accused person should be treated as innocent until the court reaches a verdict of conviction in relation to the criminal charge.[156]

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[148] Suror, Ahmad Fatehi الحماية الدستورية للحقوق و الحريات *[Constitutional Protection of Rights and Freedoms]* (Dar Alshoroq, 2000) 393.
[149] Ibid.
[150] The constitution of Kuwait section 33.
[151] Belal, Ahmad Awad, النظرية العامة للجزاء الجنائي *[The General Theory of Criminal Punishment]* (Dar Alnahdha Alarabiya, 1996) 26-33.
[152] Ibid.
[153] Suror, Ahmad Fatehi الوسيط في قانون العقوبات - القسم العام *[The penal Code – The General Part]* (Dar alnahdha alarabia, 2015) 920-921.
[154] See generally Murae,Ahmad, نحو تدعيم مبدأ أصل البراءة في الإجراءات الجنائية *[Towards Strengthening the Principle of the Presumption of Innocence in Criminal Proceedings]* (Dar Alketab Aljamae, 2016) 146-174.
[155] See generally Ashworth, Andrew, 'Four Threats to the Presumption of Innocence' (2006) *The International Journal of Evidence &Proof* 241.
[156] See, eg Alsammak, Ahmad & Nassrallah, Fadhel, شرح قانون الاجراءات و المحاكمات الجزائية الكويتي *[Explanation of the Kuwaiti Code of Criminal Procedure and Trial]* (Kuwait University Law School, 2015) 596.

Although the presumption of innocence is essentially related to the proof of the criminal charge against the accused, the scope of the presumption of innocence extends to pre-trial procedures. These should be conducted in a manner that complies with the presumption of innocence as far as possible.[157] A number of consequences follow from the presumption of innocence when proving a criminal charge. One is that the burden of proving the elements of the offence should be placed on the state.[158] Placing the burden of proof on the accused person would, in principle, treat the accused person as guilty until proven otherwise. The second consequence is that the guilt of the accused cannot be established except by a high standard of proof, such as intimate conviction (establishing the facts to the level of definiteness and certainty) or proof beyond reasonable doubt.[159] The inability to reach such a standard should result in the accused person being acquitted of the charge. Due to its importance, the presumption of innocence is included in the constitution of Kuwait, which states that an accused person is innocent until proven guilty in a legal trial, at which the necessary guarantees for the exercise of the right of defence are secured.[160]

Classifications of confiscation

Confiscation can take a variety of forms in Kuwaiti law with two main kinds of confiscation being distinguished, depending on the type of property involved. The first is 'general confiscation', which refers to the deprivation of the ownership of all or a proportion of the convicted person's property without regard to any connection between the property to be confiscated and offences committed.[161] It is described as an inhumane punishment that deprives the person of all means of living, which may lead to his or her committing further criminal activity in order to survive.[162] Historically, it was exploited as a means to enhance the financial

[157] See, eg, The Supreme Constitutional Court of Egypt, Case number 13 of 12.
[158] See, eg, Suror, Ahmad Fatehi, الحماية الدستورية للحقوق و الحريات *[Constitutional Protection of Rights and Freedoms]* (Dar Alshoroq, 2000) 605.
[159] Ibid.
[160] The Kuwaiti Constitution section 34.
[161] See, eg, Homed, Abdulwahad, الوسيط في شرح القانون الجزائي الكويتي- القسم العام[Explaining the Kuwaiti Penal Code –The General part] (Homed, Abdulwahad, 1993) 353-354; Nassrallah, Fadhel, شرح القواعد العامة لقانون الجزاء الكويتي في ضوء الفقة و القضاء الجريمة و العقوبة*[Explaining the general rules of the Kuwaiti Penal Code in the light of jurisprudence and the judiciary (crime and punishment)]* (Nassrallah, Fadhel, 2014) 474.
[162] Husni, Mahmood Najeeb, شرح قانون العقوبات- القسم العام- النظرية العامة للجريمة و النظرية العامة للعقوبة و التدبير الإحترازي *[Explanation of the Penal Code -General Section- The general theory of crime and general theory of punishment and precautionary measure]* (Dar Almatboa'at Aljama'eya, 8th ed, 2017) 885-886.

situation of the state and as a tool to suppress its adversaries.[163] It is therefore a punishment that can advance the interests of authoritarian regimes. In order to ensure that this type of confiscation has no application in Kuwait, the Kuwaiti Constitution prohibits general confiscation. Article 19 of the Kuwaiti constitution states the following:[164]

> *General confiscation of the property of any person shall be prohibited. Confiscation of particular property as a penalty may not be inflicted except by court judgment in the circumstances specified by law*.

What is permitted under the Kuwaiti confiscation regime is 'special confiscation'. Special confiscation is directed at property where a connection between it and the offences committed exists. Such property might be either the proceeds of crime or the instrumentalities of crime.[165]

The core of the special confiscation provisions is articulated in Article 78 of the penal code. The Kuwaiti penal code is divided into two parts: the general part and the special part. The general part involves the principles that should govern all crimes and punishments, except for situations in which the law has special provisions governing a particular crime.[166] The special part is mainly concerned with defining the material and mental elements for every offence.[167] Confiscation provisions under Article 78 are included in the general part of the penal code and thus should, in principle, govern confiscation for all offences. The inclusion of these provisions has not been prompted by special incidents. Instead, they were included as part of the establishment of the penal code in general and have not been amended since then. A reading of the confiscation provisions under Article 78 clearly reveals that they are inspired or extracted from Article 30 of the Egyptian penal code, which governs confiscation. Section 30 of the

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[163] See, eg, Homed, Abdulwahad, الوسيط في شرح القانون الجزائي الكويتي- القسم العام[Explaining the Kuwaiti Penal Code- The General part] (Abdulwahad Homed, 1993) 354.
[164] The Kuwaiti Constitution s 19.
[165] See, eg, Nassrallah, Fadhel, شرح القواعد العامة لقانون الجزاء الكويتي في ضوء الفقة و القضاء الجريمة و العقوبة *[Explaining the general rules of the Kuwaiti Penal Code in the light of jurisprudence and the judiciary (crime and punishment)]* (Nassrallah, Fadhel, 2014) 474.
[166] Abdulmohaimen Baker Salem, الوسيط في شرح قانون الجزاء الكويتي -القسم الخاص *[Explaining the Kuwaiti Penal Code – The Special Part]* (1993) 8.
[167] Ibid.

Egyptian penal code, in turn, is extracted from Section 36 of the Italian penal code of 1889 with few amendments.[168] Article 78 of the Kuwaiti penal code states the following:[169]

> *A judge who passes a penalty sentence in a felony or deliberate misdemeanour case may rule that the things seized that are used or intended to be used in the commission of the offence and the things that are obtained from the commission of the offence be confiscated without prejudice to the rights of bona fide third parties.*
>
> *If the objects the manufacturer uses, possesses, sells, or offers for sale are considered illegal, a ruling shall necessarily be passed, confiscating them regardless of the rights of the bona fide third parties.*

According to the differences between the first and second paragraphs of Article 78 of the penal code, confiscation is classified in terms of the forms of the application into discretionary confiscation and obligatory confiscation.[170] The main difference between the discretionary and obligatory forms of confiscation lies in whether the possession of the thing subject to confiscation is legitimate according to the law.[171] Obligatory confiscation is directed at property possession that is prohibited under the law.[172] Obligatory confiscation targets property that is considered dangerous in nature, and thus the mere possession or circulation of this kind of thing constitutes a criminal offence.[173] Examples include firearms and counterfeit money. The confiscation of such property is merely preventive; it is designed to protect society from the damage that may occur as a consequence of the uncontrolled use of an inherently injurious property.[174] Because of this, such confiscation is mandatory, even if the accused person has not been convicted.[175]

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[168] Alsaeed Mustafa Alsaeed, العامة في قانون العقوبات الأحكام *[General Provisions of the Penal Code]* (Dar Almaaref Bimasser, 1962) 708.
[169] Law No. 16 of 1960 section 78.
[170] See, eg, Bozbar, Mohamad & Althaferi, Fayez, المبادئ العامة في قانون الجزاء الكويتي *[General Principles of the Kuwaiti Penal Law]* (2013)540-543.
[171]Awad Mohamad, قانون العقوبات المصري القسم العام *[Egyptian Penal Law: The General Part]* (Dar almatboat aljameaiya, 1998) 575.
[172] Alqahwaji, Ali, شرح قانون العقوبات القسم العام الكتاب الأول التظرية العامة للجريمة *[Explainig the Penal Code: General Section: The First Book: The General Theory of Crime]* (1997) 335.
[173] Tharwat, Jalal, النظرية العامة لقانون العقوبات *[General Theory of the Penal Code]* (Moaasasat althaqafa aljameaa) 500-501.
[174] Alshathly, Fatooh, شرح قانون العقوبات القسم العام *[Explanation of the Penal Code the General Section]* (2001) 335.
[175] Appeal No.722 of 2010 (14-06-2011).

Discretionary confiscation is directed at property that does not constitute a criminal offence. The reasoning behind confiscation is not that the property is dangerous in nature. Instead, it originates in the link between the property and the criminal offence committed.[176] Whereas obligatory confiscation is regarded as a precautionary measure, discretionary confiscation under Article 78 has an absolute penal character.[177] The aim of confiscating property under the discretionary form of confiscation is to penalise the offender for the crime committed by removing property from his ownership. The possession of this property is not regarded as illegitimate, but it will be taken as a punishment because of its connection to the crime.[178]

In some situations, however, the law provides that confiscation is mandatory even though the possession of the property does not constitute a criminal offence in itself. The mandatory form of application to property that is not considered to be dangerous in nature does not lead to a change in the nature of confiscation. The legal nature confiscation is not regarded as a security measure. Rather, the confiscation is still regarded as a punishment and is governed by the confiscation provisions contained in the first paragraph of Article 78.

The requirements of confiscating the proceeds of crime

Having provided a brief overview of the Kuwaiti criminal sentencing system and classifications of confiscation, this section is concerned with the requirements of confiscating the proceeds of crime. It will be shown that confiscating the proceeds of crime is mainly influenced by two main impactors. The first is the legal nature of confiscating the proceeds of crime as an additional punishment. The second is the *in rem* character of the confiscation system.

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[176] Alsaeed, Kamel شرح الأحكام العامة في قانون العقوبات دراسة مقارنه *[Explanation of General Provisions in the Penal Code: Comparative Study]* (1998).

[177] Husni, Mahmood Najeeb, شرح قانون العقوبات- القسم العام- النظرية العامة للجريمة و النظرية العامة للعقوبة و التدبير الإحترازي *[Explanation of the Penal Code -General Section- The general theory of crime and general theory of punishment and precautionary measure]* (Dar Almatboa'at Aljama'eya, 8th ed, 2017) 886.

[178] In addition to acting as a punishment and as a security measure, confiscation serves a compensatory purpose if the law stipulates that the ownership of confiscated property is to be vested to the victim of the crime or the Treasury as compensation for the damaged caused by crime. The main rationale for such confiscation is not to compensate for the cost incurred to the state. Rather, it aims at assisting the victim to redress the harm caused without a need to initiate civil claims. Since such confiscation aims at compensation, private law provisions relevant to compensation for damages govern this type of confiscation. As a result, a confiscation order that aims at compensation could not be imposed except at the request of the injured party; the value of the property to be confiscated should not exceed the value of the loss suffered; it could also be imposed even if the defendant has been acquitted.

The confiscation system and the seizer requirement

Confiscation may be classified on the basis of the mode in which property rights are affected by a property-based or value-based system of confiscation.[179] A property-based system of confiscation operates *in rem* in that the order is directed at specific property prescribed by the law, normally because the property constitutes the proceeds or instrumentality of an offence.[180] Since the order is directed at a specific property, the specific property that is prescribed by the law must be identified.[181]

On the other hand, the value-based system of confiscation is not directed at specific property; rather, the focus of this system is on the benefits derived by the person from a criminal offence, so-called *in personam* confiscation.[182] There is no need to link particular property to an offence under this system; what is required is to value the benefits derived from the commission of an offence.

Confiscation under Article 78 of the Kuwaiti penal code only recognises the property-based system of confiscation. Based on the first paragraph of Article 78, there are three types of items that can be confiscated within the framework of discretionary confiscation. The first type consists of items used in order to increase the likelihood of the successful commission of the criminal offence or overcome the obstacles that would have prevented its execution.[183] Examples of these kinds of things are weapons used in a murder or cars used to transport drugs.

Discretionary confiscation is not limited to things used in the commission of the offence; it also extends to items the offender intended to use but did not. For example, if the offender

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[179] Stessens, Guy, *Money Laundering: A New International Law Enforcement Model* (Cambridge University Press, 2000) 31.

[180] Husni, Mahmood Najeeb, شرح قانون العقوبات- القسم العام- النظرية العامة للجريمة و النظرية العامة للعقوبة و التدبير الإحترازي *[Explanation of the Penal Code -General Section- The general theory of crime and general theory of punishment and precautionary measure]* (Dar Almatboa'at Aljama'eya, 8th ed, 2017) 884.

[181] Brun, Jean-Pierre, et al, *Asset Recovery Handbook: A Guide for Practitioners* (World Bank Publications, 2011) 108.

[182] Ibid 111.

[183] Husni, Mahmood Najeeb, شرح قانون العقوبات- القسم العام- النظرية العامة للجريمة و النظرية العامة للعقوبة و التدبير الإحترازي *[Explanation of the Penal Code -General Section- The general theory of crime and general theory of punishment and precautionary measure]* (Dar Almatboa'at Aljama'eya, 8th ed, 2017) 891.

chose a gun to commit murder but a knife was used instead, the gun can be confiscated because it is a thing that was intended to be used in the commission of the offence.

The proceeds of crime are the third type of item that can be subject to discretionary confiscation.[184] The proceeds of crime, under Article 78 of the penal code, denote the things that are acquired as a result of the commission of the offence.[185] Although it would seem important to clearly define what is meant by the proceeds of crime, there is no definition of this kind of property in the penal code.[186]

The list of things that can be subject to discretionary confiscation is an exclusive one. Therefore, discretionary confiscation cannot be imposed on things that deviate from one of the things set out in the first paragraph of Article 78 of the penal code, unless otherwise expressly provided by the law in certain circumstances.

A property-based system of confiscation is complemented by a requirement that the property sought to be confiscated must be seized prior to the imposition of the confiscation order.[187] The logic in support of this requirement is twofold. First, it ensures that a confiscation order can be

[184] It should be noted that Article 78 of the penal code does not regulate the proceeds of crime only but also property used or intended to be used in the commission of a criminal offence. The inclusion of the property used or intended to be used in the commission of the offence makes the discretionary application of confiscation a necessary safeguard without which the confiscation can be grossly disproportionate to the gravity of the offence committed. Moreover, the appearance of confiscation provisions in parts other than Article 78 of the penal code demonstrates a clear orientation towards the mandatory application of the confiscation of the proceeds of crime, especially in relation to victimless offences. For example, in response to bribery offences, money-laundering offences, and illicit-enrichment offences, the confiscation of the proceeds of crime is mandatory.

[185] Husni, Mahmood Najeeb, شرح قانون العقوبات- القسم العام- النظرية العامة للجريمة و النظرية العامة للعقوبة و التدبير الإحترازي *[Explanation of the Penal Code -General Section- The general theory of crime and general theory of punishment and precautionary measure]* (Dar Almatboa'at Aljama'eya, 8th ed, 2017) 891.

[186] However, Law No 106 of 2013 pertaining to combatting money laundering and financing the terrorism defines the proceeds of crime as any money arising or obtained directly or indirectly from the commission of an offence, including the profits, interests, rent or other output of such funds, whether they remain intact or transferred, in whole or in part, to other funds.

[187] The requirement that the property to be confiscated must be seized has generated controversy. The disagreement is about whether this requirement precludes immoveable property from the confiscation regime. This is because the seizing requirement of the property to be confiscated denotes the actual seizing of the property by law enforcement authorities. One justification often given for supporting the view that immovable property is beyond the reach of the confiscation regime is that immovable property such as real estate cannot be subject to actual seizing. In light of this, if a person acquired real state as a result of the commission of a bribery offence, this property cannot be confiscated. Those who object to the view that immovable property is beyond the reach of the confiscation regime argue that real estate property could be subject to actual seizing. Thus, there is no reason to argue that confiscation cannot be imposed in relation to real estate property.

executed.[188] Second, it provides the judge with the ability to examine whether the property in question meets the requisite description in order to be confiscated.[189]

Sole reliance on the property-based system of confiscation generates serious shortcomings in the Kuwaiti confiscation regime. First, a property-based system of confiscation makes depriving offenders of the profits of their crime uncertain.[190] Since the confiscation order is limited to property that is specifically the proceeds of an offence, the inability to identify that specific property (because, for instance, the property cannot be located or is consumed) will result in offenders continuing to enjoy the fruits of their criminality. Even if offenders own other property of corresponding value, they can escape confiscation because the legitimately-acquired property is beyond the scope of the application of the pure property-based system of confiscation.[191] If the state is able to establish the value of the proceeds acquired by the criminals, there is no moral reason to permit them to retain the proceeds because they are successfully able to hide or consume them.[192]

In addition, there are three main arguments that can be advanced in support of a value-based system of confiscation. The first is that sole reliance on property-directed confiscation may result in abnormal consequences. This is because the system provides no 'punishment' for those who have successfully dissipated or laundered the property, because the specified property is no longer available. Only those who retain the specified property may be subject to 'punishment'. Thus, reliance on property-based systems could send an unintended message for a would-be offender of acquisitive crime that the proceeds of crime should be enjoyed and dissipated to avoid punishment. The second argument is that allowing for value-based systems of confiscation may increase the deterrence value of confiscation. This is because hiding assets is expensive, and therefore "criminals will be deterred by the imperative to hide all of their

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[188] Husni, Mahmood Najeeb, شرح قانون العقوبات- القسم العام- النظرية العامة للجريمة و النظرية العامة للعقوبة و التدبير الإحترازي *[Explanation of the Penal Code -General Section- The general theory of crime and general theory of punishment and precautionary measure]* (Dar Almatboa'at Aljama'eya, 8th ed, 2017) 889.

[189] Hassan, Ali Fadhel نظرية المصادرة في القانون الجنائي المقارن *[Confiscation Theory in the Comparative Criminal Law]* (Dar Alnahdha Alarabia, 1997) 334.

[190] Alsaeed, Alsaeed Mustafa, العامة في قانون العقوبات الأحكام *[General Provisions of the Penal Code]* (Dar Almaaref Bimasser, 1962) 706; Stessens, Guy, *Money laundering: a new international law enforcement model* (Cambridge University Press, 2000) 33.

[191] Bahnam, Ramsees, النظرية العامة للقانون الجنائي *[The General Theory of Criminal Law]* (No Publisher, 3rd ed, 1997) 826.

[192] ForSaith, J et al, 'Study for an Impact Assessment on a Proposal for a New Legal Framework on Confiscation and Recovery of Criminal Assets' (Technical Report for European Commission Directorate General Home Affairs, European Union, 2012) 49.

assets rather than only their illicit assets".[193] Moreover, reliance on property-based systems of confiscation is not well-suited to dealing with the profits from crime in cases of reducing obligation. For example, if the proceeds of a crime were acquired in the act of discharging a mortgage or debt, there is no property that can be confiscated.

In Kuwait, the value-based system of confiscation is used only for money-laundering offences.[194] The inclusion of the value-based system of confiscation came as a response to a detailed assessment of money-laundering law by the Middle East and North Africa Financial Action Task Force in 2011.[195] The assessment revealed that the anti-money-laundering framework had various weaknesses in Kuwait at that time. With regard to confiscation, it found that the major shortcoming of confiscation provisions under the money laundering act was the absence of any provision allowing for the confiscation of property of corresponding value. In order to fulfil its commitment to effectively combat money laundering, Kuwait has taken steps to address the various deficiencies highlighted by the financial action task force assessment by passing Law NO. 106 of 2013 pertaining to combating money laundering and financing of terrorism, which contain provisions that allow for value-based systems of confiscation.

The underlying criminality

As noted above, the general principles of Kuwaiti criminal law demand that no punishment be imposed unless it is in response to a criminal offence.[196] Since confiscation of the proceeds of crime is regarded as a punishment in Kuwait,[197] it cannot be imposed except in response to a criminal offence. In particular, if the conduct in question is not criminalised, confiscation of the proceeds of crime is not possible. For example,[198] if a person acquires profits from engaging in drug dealing with a new kind of narcotic that has not been included in the narcotic law schedules, the profits cannot be confiscated, because no criminal offence has been committed. Even if the conduct is criminalised, the confiscation of the proceeds of crime cannot be imposed if permissibility causes (Asbab al-ibahah) accompany the 'criminal' act committed.

[193] Ibid.
[194] Law No.106 of 2013 Section 40.
[195] MENA FATF, 'Anti-Money Laundering and Combating the Financing of Terrorism – State of Kuwait' (2011).
[196] See, eg, Aloumi, Noura, 'In Pursuit of Non-Conviction Based Confiscation Asset Recovery: Comparative Analyses Study of the Kuwaiti Criminal Law' (2018) 42(2) *Journal of Law* 99.
[197] Law No. 16 of 1960 section 66.
[198] See Aloumi, Noura, 'In Pursuit of Non-Conviction Based Confiscation Asset Recovery: Comparative Analyses Study of the Kuwaiti Criminal Law' (2018) 42(2) *Journal of Law* 99.

Permissibility causes consist of self-defence, acts performed pursuant to obligation, acts performed according to license, and acts done with the consent of the victim. The reason for this is that permissibility causes target the criminal act itself and change what would have been considered a criminal act in the absence of the permissibility cause, into a lawful act.[199] Therefore, any confiscation imposed in response to a criminal offence accompanied by a permissibility cause is confiscation in response to lawful conduct, and not permitted.

Within the Kuwaiti confiscation regime, the particular underlying criminal offence must be proven. Although there is no definition of a criminal offence in the existing laws, it is accepted in academic writings that the criminal offence consists not only of a material element (*actus reus*), but also a criminal fault element (*mens rea*) in order to meet the elements of the offence for the purpose of inflicting punishment.[200] Accordingly, there cannot be a criminal offence without identifying the perpetrator of the criminal offence in order to determine that person's mental element in committing the offence.

In relation to the standard of proof, it should be noted that there are no existing laws that determine what standard of proof is required to prove the facts. Nevertheless, the courts have determined that as a consequence of the presumption of innocence, the standard of proof required to establishing the existence of the offence is at a level of 'definitiveness and certainty'.[201]

The last issue to be considered in relation to underlying criminality is what criminal offences can trigger confiscation. In Kuwait, the scope of such offences is wide. All felony offences can result in imposing a confiscation order.[202] However, this is not the case in misdemeanour

[199] See, eg, Nassrallah, Fadhel, شرح القواعد العامة لقانون الجزاء الكويتي في ضوء الفقة و القضاء الجريمة و العقوبة *[Explaining the general rules of the Kuwaiti Penal Code in the light of jurisprudence and the judiciary (crime and punishment)]* (Fadhel Nassrallah, 2014) 337.
[200] See, eg, Suror, Ahmad Fatehi, الوسيط في قانون العقوبات - القسم العام *[The penal Code- The general part]* (Dar alnahdha alarabia, 2015) 641; Husni, Mahmood Najeeb, شرح قانون العقوبات- القسم العام- النظرية العامة للجريمة و النظرية العامة للعقوبة و التدبير الإحترازي *[Explanation of the Penal Code -General Section- The general theory of crime and general theory of punishment and precautionary measure]* (Dar Almatboa'at Aljama'eya, 8th ed, 2017) 46.
[201] See, eg, The Constitutional Court of Kuwait, Case number 2 of 2005.
[202] Section 3 of the law No. 16 of 1960 defines felony offences as the offences that are punished by one of the following primary punishments: Death penalty, life imprisonment or a term of imprisonment of more than three years.

offences.[203] One important limitation is the requirement that if the offence is a misdemeanour, it must be a deliberate misdemeanour; otherwise, a confiscation regimen cannot be triggered.[204]

Imposing primary punishment

Punishments under Kuwaiti criminal law are divided into three categories depending on the ability to fulfil the purposes and objectives of the punishment. They are: primary punishment, ancillary punishment, and supplementary punishment.[205] Primary punishments are punishments capable of fulfilling the purposes of punishment on their own, consisting of fines, imprisonment, and capital punishment.[206] Ancillary punishments and supplementary punishments are both unable to fulfil the purposes of punishment on their own, therefore the imposition of them must be accompanied by a primary punishment.[207] The main difference between ancillary punishment and supplementary punishment has to do with judges' rulings. The punishment is considered as ancillary punishment if the law provides that its imposition is an inevitable consequence of the judgment of primary punishment without a need for judgment declaring it.[208] In contrast, the imposition of supplementary punishment depends on the ruling of the judge.[209] According to the penal code, confiscation is regarded as supplementary punishment,[210] therefore its imposition depends on the imposition of primary punishment and also a ruling of the judge.

One of the consequences of regarding confiscation as punishment is that confiscation orders are not able to be made without establishing a criminal liability against the perpetrator of the

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[203] Section 5 of the law No. 16 of 1960 defines misdemeanour offences as offences that are punished by a term of imprisonment of less than three years and fine or one of them.

[204] In light of this, if a person commits manslaughter through a car accident, the car cannot be confiscated as a thing used in the commission of the offence because the crime is a misdemeanour and is not a deliberate crime.

[205] See, eg, Althaferi, Fayez, القواعد العامة في قانون الجزاء الكويتي (نظرية الجريمة و العقوبة) *[The general rules in the Kuwaiti Penal Code (the theory of crime and punishment)]* (No publisher, 2017) 469.

[206] Ibid.

[207] See, eg, Husni, Mahmood Najeeb, شرح قانون العقوبات- القسم العام- النظرية العامة للجريمة و النظرية العامة للعقوبة و التدبير الإحترازي *[Explanation of the Penal Code -General Section- The general theory of crime and general theory of punishment and precautionary measure]* (Dar Almatboa'at Aljama'eya, 8th ed, 2017) 791-792.

[208] See, eg, Aobaid, Raaof, مبادئ القسم العام من التشريع العقابي *[The General Part Principles of the Penal Legislation]* (Maktabat Alwafaa Alqanoniya, 2015) 1168.

[209] See, eg, Nassrallah, Fadhel, شرح القواعد العامة لقانون الجزاء الكويتي في ضوء الفقة و القضاء الجريمة و العقوبة *[Explaining the general rules of the Kuwaiti Penal Code in the light of jurisprudence and the judiciary (crime and punishment)]* (Nassrallah, Fadhel, 2014) 445.

[210] Law No. 16 of 1960 section 66.

criminal offence. This is because criminal liability is the legal basis that allows for the imposition of punishment, and criminal liability is governed by the principle of personal criminal liability.[211] Three main consequences follow from the requirement of establishing criminal liability.

The first is that the ability to prove the criminal derivation of the property is not sufficient solely to confiscate the property. Instead, the perpetrator of the criminal offence must be identified, and his criminal liability must be established in order to make the confiscation order.

Secondly, it is not sufficient solely to impute criminal activity to the perpetrator of the criminal offence in order to make a confiscation order; there must also be the mental element required for establishing criminal liability (al-ahlya aljnaaya). The third is that the scope of property that can be confiscated is limited to those linked to a specific offence for which a criminal liability has been established.

It follows that any reason preventing the imposition of primary punishment will necessarily result in preventing the making of a confiscation order. In light of this, the availability of permissibility causes and responsibility preventives (mwana almsaolya) such as fancy, insanity and diminished capacity will necessarily result in inability to impose a confiscation order, since no primary punishment can be imposed in these circumstances. Moreover, the acquittal of the accused means that a confiscation order cannot be imposed, regardless of the reason for the acquittal. For instance, the availability of any procedural reason preventing the imposition of a primary punishment will also result in the inability to confiscate.

Third-party confiscation

So far, it has been demonstrated that establishing criminal liability is a prerequisite to the making of a confiscation order. The question also arises as to whether a confiscation order can be imposed against a third party who has interests in the property sought to be confiscated, but not personally liable? This has great relevance in determining the effectiveness of the confiscation regime, because transferring ownership of property to a third party is an obvious

[211] See, eg, Suror, Ahmad Fatehi, الوسيط في قانون العقوبات - القسم العام *[The penal Code- The general part]* (Dar alnahdha alarabia, 2015) 716.

route used by criminals to prevent the operation of the confiscation regime.[212] However, permitting third-party confiscation is inherently problematic because it may result in passing the burden of loss to an innocent third party.[213] Therefore, an appropriate balance should be struck between the public interest in confiscating criminal assets on the one hand and the property interests of third parties, on the other.

In this regard, an important distinction needs to be drawn between a property-based system of confiscation and a value-based system of confiscation. In principle, a property-based system of confiscation enforces the order *in rem* as we have seen. The order targets specific property that has a connection with the crime, such as the proceeds of crime or the instrument of the crime. The issue as to who owns the property targeted by the order is immaterial.[214] Therefore, in principle, a confiscation order is not confined to property owned by the convicted person or defendants. Rather, property owned by persons other than the convicted persons can be subject to confiscation.[215] However, most jurisdictions mitigate the ramifications of a property-based system of confiscation by providing protection for third parties in certain circumstances.[216]

A value-based system of confiscation, on the other hand, is not directed towards specific property. Instead, it is directed at a person for the purpose of valuing the benefit acquired as a result of the commission of the offence. A value-based system, in principle, should not be calculated based on benefits acquired other than by the person who is subject to the order.

Provided that there is a compelling justification for confiscating the proceeds of crime from third parties, adopting a value-based system of confiscation would be the preferred option. This is especially the case when the confiscation of the proceeds of crime serves a punitive or restorative purpose to the third party. As shown above, the sole reliance on a property-based

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[212] ForSaith, J et al, 'Study for an Impact Assessment on a Proposal for a New Legal Framework on Confiscation and Recovery of Criminal Assets' (Technical Report for European Commission Directorate General Home Affairs, European Union, 2012) 49.
[213] Freiberg, Arie, 'Criminal Confiscation, Profit and Liberty 1' (1992) 25(1) *Australian & New Zealand Journal of Criminology* 44-59; Skead, N, Tubex H, Murray, S & Tulich, T 2020. Pocketing the proceeds of crime: Recommendations for legislative reform. Canberra: Criminology Research Grants Report No CRG 27/16-17. https://www.aic.gov.au/crg/reports/crg-2716-17 71-72.

[214] Stessens, Guy, *Money laundering: a new international law enforcement model* (Cambridge University Press, 2000) 33-34.
[215] Ibid.
[216] Ibid 34.

system of confiscation suffers from several shortcomings diminishing the likelihood of ensuring that crime does not pay.

Article 78 of the penal code stipulates that confiscation must be imposed without prejudicing the interests of a bona fide third party. The concept of a bona fide third party has generated controversy among scholars that could, potentially, affect the scope of the protections afforded to third parties. This controversy is centred on the issue of whether confiscation can be imposed on property other than that of the convicted offender.

Those who interpret the article in such a way that only the property owned by the convicted person may be confiscated rely on the legal character of discretionary confiscation as a punishment.[217] They argue that treating confiscation as a punishment should result in the application of the general principles of punishment, one of which is that it must be personal. This principle confines the operation of confiscation to those who have been convicted of criminal offences. The main reason for limiting the scope of confiscation to only those who have been convicted of the offence is that confiscation aims to penalise the offender for the crime committed. Therefore, the requirement that property to be confiscated must be owned by the convicted person is a logical one: penalising the offender cannot be carried out if the property to be confiscated is not owned by him or her.[218] This means that imposing a confiscation order against property owned by a third party will violate the principle of personal punishment, even if the third party was acting in bad faith. If this approach is taken, the legal character of confiscation represents an additional punishment limited to conviction of the person who owns the property. Otherwise, the principle of personal punishment will be infringed.

Those who argue that it is not necessary for a third party to have been convicted of an offence in order to confiscate his or her interests in the property argue that the mere mention of protection of bona fide interests suggests that confiscation is not limited to property actually

[217] See, eg, Husni, Mahmood Najeeb, شرح قانون العقوبات- القسم العام- النظرية العامة للجريمة و النظرية العامة للعقوبة و التدبير الإحترازي *[Explanation of the Penal Code -General Section- The general theory of crime and general theory of punishment and precautionary measure]* (Dar Almatboa'at Aljama'eya, 8th ed, 2017) 893-894; Alsaeed, Alsaeed Mustafa, *[General provisions of the Penal Code]* العامة في قانون العقوبات الأحكام (Dar Almaaref Bimasser, 1962) 717.

[218] Hassan, Ali Fadhel, *[Confiscation Theory in the Comparative Criminal Law]* نظرية المصادرة في القانون الجنائي المقارن (Dar Alnahdha Alarabia, 1997) 190.

owned by the convicted person.[219] According to this view, if the third party knew that his or her interests in the property were acquired as a result of the commission of offences, he or she does not deserve such protection, and, accordingly, his or her interests in property can be confiscated.[220] On the other hand, if he or she does not know about the criminal origin of the proceeds, then confiscation cannot be imposed, even though the third party has not provided sufficient consideration in exchange for the property. They argue that confiscation of bona fide third-party property represents an exception to the general principle of punishment.[221]

To summarise, the legal character of confiscation imposes clear limits on the reach of the Kuwaiti confiscation regime. In order for a third party's property to be confiscated, that party must have been convicted or proved to have acted in bad faith. For third-party interests to be confiscated in the case of bad faith, perpetrators must be convicted of their crime; only then can their property be confiscated.[222]

Having said that, adherence to the principle of personal punishment has been diminished in relation to a number of offences. For example, the death of the offender in money-laundering offences, and those offences included in the law No. 2 of 2016 pertaining to combating corruption, does not prevent the imposition of confiscation if the property is proven to be the proceeds of crime.[223] These are, in fact, a form of non-conviction-based confiscation—without due explanation in the theory used to justify such confiscation being imposed. Such confiscation also contradicts the notion that confiscation is additional punishment and therefore cannot be inflicted except if a primary punishment has been imposed. It is clear that such confiscation does not aim primarily to penalise the offender. Instead, it could be seen as being influenced by the need for general deterrence or to prevent harm to others. In addition, there is express authority to confiscate property from a third party closely related to the offender in law

[219] Awadh, Mohamad, قانون العقوبات المصري القسم العام *[Egyptian Penal Law: the General Part]* (Dar almatboat aljameaiya, 1998) 585.
[220] See, eg, Suror, Ahmad Fatehi, الوسيط في قانون العقوبات - القسم العام *[The penal Code- The general part]* (Dar alnahdha alarabia, 2015) 1011; Awadh, Mohamad, قانون العقوبات المصري القسم العام *[Egyptian Penal Law the general part]* (Dar almatboat aljameaiya, 1998) 585.
[221] Awadh, Mohamad, قانون العقوبات المصري القسم العام *[Egyptian Penal Law the general part]* (Dar almatboat aljameaiya, 1998) 585.
[222] It is important to mention that protection of the third-party interest does not necessarily denote the inability to confiscate the property, but rather, the ownership of the property is transferred to the state with the protection to rights of the third parties. If the third parties have jointly owned a property with the convicted person, the state owns the convicted person share of the property only.
[223] Law No.106 of 2013 Section 40; Law No. 2 of 2016 Section 48.

No. 2 of 2016 pertaining to combating corruption.[224] Moreover, there is a clear intention to replace fault as a basis for confiscating property from a third party with the idea of enrichment. This can be seen in money-laundering laws where the protection of third parties depends on giving corresponding value.[225] The removal of the fault element can also be found in crimes of illicit enrichment, where confiscation from a third party is based on benefiting from the crime, not on bad faith.[226]

The problem of conviction-based confiscation

Conviction-based confiscation has increasingly been considered to be an unsatisfactory instrument for recovering the proceeds of crime from individuals.[227] The failure of conviction-based confiscation to achieve its intended objectives has been mainly attributed to the practical difficulties in proving a nexus between the assets sought to be confiscated and the criminal activity that generated the assets in question.[228] The nature of some offences, such as those involving corruption and organised crime, make satisfaction of the requirements of a conviction-based confiscation model practically impossible to attain in many cases.[229]

Although the practical difficulties may be considered the primary reason for the failure of conviction-based confiscation, the practical difficulties alone cannot explain the problem of the linkage requirement. It is submitted that the problem of the linkage requirement can be better explained by accompanying the practical difficulties with the theoretical problem of the linkage requirement. Specifically, it will be argued that conviction-based confiscation requires conceiving crime as wrongdoing for the purpose of the intervention of the state in which a significant value is attached to the conduct that is considered wrong and the person who committed the wrongful conduct as a wrongdoer.[230]

[224] Law No. 2 of 2016 Section 48.
[225] Law No.106 of 2013 Section 40.
[226] Law No.2 of 2016 Section 55.
[227] See, eg, Hendry, J. and C. King, 'How Far Is Too Far? Theorising Non-Conviction- Based Asset Forfeiture' (2015) 11(4) *International Journal of Law in Context* 398 400.
[228] Ibid 401.
[229] Ibid 401.
[230] For a discussion on the conception of crime as wrongdoing, see Zedner, Lucia, *Criminal Justice*, Clarendon Law Series (Oxford, 2004) 47-52.

However, many justifications for the confiscation of the proceeds of crime do not place emphasis on the wrongdoer for the purpose of state intervention. Moreover, the confiscation of the proceeds of crime entails many features that render the focus of the specific behaviour that is considered wrong unnecessary.

This section begins by examining the relationship between the requirements of conviction-based confiscation and the conception of crime as wrongdoing. It then examines the tension between the justifications for confiscating the proceeds of crime and the focus on the wrongdoer. This is followed by examining the features of confiscating the proceeds of crime and the specific behaviour that is considered wrong.

The requirements of conviction-based confiscation and the conception of crime as wrongdoing

The relationship between the requirements of conviction-based confiscation and the conception of crime as wrongdoing can be understood through the concept of punishment. In discussing punishment, three important distinctions should be made between the definition of punishment, the justification of the practice of punishment, and the rules and principles that govern the act of punishment. The definition of punishment refers to what the punishment is without referencing the justifications of the practice of punishment.[231] In general, the definition of punishment entails two important components: intentional hard treatment and censure.[232] The rules and principles that govern the act of punishment differ among nations. The justification for the practice of punishment refers to why punishment is imposed. The justification of the practice of punishment can take mainly two different dimensions: the first is deontological justifications, and the second is the utilitarian justifications.[233]

The deontological justification of the practice of punishment is a backward-looking justification in that the punishment is justified because of what occurred in the past.[234] Retributive justice is the leading application of deontological justification of the practice of

[231] Bedau, Hugo Adam and Erin Kelly, 'Punishment' (2003) *Stanford Encyclopedia of Philosophy.*
[232] See, eg, Andrew Ashworth and Lucia Zedner, *Preventive Justice* (OUP Oxford, 2014) 14; Ahmad Awad Belal, النظرية العامة للجزاء الجنائي [The General Theory of Criminal Punishment] (Dar Alnahdha Alarabiya, 1996) 14–20.

[233] Bedau, Hugo Adam and Erin Kelly, 'Punishment' (2003) *Stanford Encyclopedia of Philosophy.*
[234] Moore, Michael, 'The Moral Worth of Retrubution' in Andrew Von Hirsch and Andrew Ashworth (eds), *Principled Sentencing Readings on theory & Policy* (Hart Publishing, 1998) 150.

punishment. Retributive justice, also known as desert theory, is "committed to the following three principles: (1) that those who commit certain kinds of wrongful acts…morally deserve to suffer a proportionate punishment; (2) that it is intrinsically morally good – good without reference to any other goods that might arise – if some legitimate punisher gives them the punishment they deserve; and (3) that it is morally impermissible intentionally to punish the innocent or to inflect disproportionally large punishments on wrongdoers."[235] There is a consensus among Desert theorists in relation to the questions of whom to punish and how much to punish.[236] There is, however, no agreement in relation to reasons for the punishment. For Duff, punishment is imposed as a form of penance.[237] For Hirsch, it is a combination of the censuring of punishment for the wrong committed and the deterrence for prudential reasons that justify the practice of punishment.[238] The deontological justification, therefore, imposes limits on who should be punished and how much we should punish. In terms of who should be punished, the wrongdoer is who deserves such punishment and can be censured. No one should be censured unless he committed a wrong.[239] In terms of how much we should punish, it requires proportionate punishment mainly according to the seriousness of the offence.[240]

The utilitarian justification of the practice of punishment is a forward-looking justification.[241] The imposition of punishment is justified because it maximises the utilities and makes the community safer.[242] Therefore, the practice of punishment is justified by looking at the consequences of the punishment and the achievement sought to be fulfilled. This normally includes deterrence, incapacitation and rehabilitation.[243] Accepting that the utilitarian

[235] Walen, Alec, 'Retributive justice' (2014) *Stanford Encyclopedia of Philosophy.*
[236] Von Hirsch, Andrew, Andrew Ashworth and Julian V Roberts, *Principled sentencing: Readings on theory and policy* (Hart Oxford, 1998) 141.
[237] Duff, A, 'Desert and Penance' in Andrew Von Hirsch and Andrew Ashworth (eds), *Principled Sentencing Readings on theory & Policy* (Hart Publishing, 1998) 161.
[238] Simester, Andrew P and Andreas Von Hirsch, *Crimes, harms, and wrongs: On the principles of criminalisation* (Bloomsbury Publishing, 2011) 14.
[239] See, eg, Edwards, J, 'Theories of Criminal Law' (2018) *Stanford Encyclopedia of Philosophy;* Walen, Alec, 'Retributive justice' (2014) *Stanford Encyclopedia of Philosophy.*
[240] See, eg, Von Hirsch, Andrew, 'Proportionate Sentences: A Desert Perspective' in Andrew Von Hirsch and Andrew Ashworth (eds), *Principled Sentencing Readings on theory & Policy* (Hart Publishing, 1998) 168; Von Hirsch, Andrew, 'Seriousness, Severity and the Living Standard ' in Andrew Von Hirsch and Andrew Ashworth (eds), *Principled Sentencing Readings on theory & Policy* (Hart Publishing, 1998) 185.
[241] Von Hirsch, Andrew, Andrew Ashworth and Julian V Roberts, *Principled sentencing: Readings on theory and policy* (Hart Oxford, 1998) 44.
[242] Von Hirsch, Andrew, Andrew Ashworth and Julian V Roberts, *Principled sentencing: Readings on theory and policy* (Hart Oxford, 1998) 44.
[243] Zedner, Lucia, *Criminal Justice*, Clarendon Law Series (Oxford, 2004) 90-94.

justification governs the criminal justice system leads to a number of consequences. One of the major consequences is that the sanction imposed can go beyond the perpetrator of the criminal offence as long as it maximises the security.[244] That is, there is no inherent limit to punish the innocent.[245]

Most systems incorporate both justifications in one system. However, especially in terms of who should be punished, the retributive justification of punishment is dominant in most systems.[246] The consequences are as follows: in order for the person to deserve the punishment, the commission of the criminal offence must be a product of the moral choice of the person. That is, there should be some requirement of the mental element of the offence. In order to achieve proportional punishment, the specific behaviour that is committed needed to be identified. In order to impose the punishment to the person who deserves it, the person who committed the criminal offence should also be identified.

The conception of crime can have different forms;[247] two important forms of crime are about interests.[248] Crime can be conceived as wrongdoing and harm-doing. Crime as wrongdoing requires that the act is considered wrong for the purpose of punishment.[249] It also requires the commission of criminal offence comes as a result of moral choice by the perpetrator.[250] Therefore, the mental element is always required. Crime can also be conceived as harm-doing, which focuses on the interests protected by criminalisation and the harmful consequences to the victim and indirect victim.[251] Unlike the conception of crime as wrongdoing, conceiving crime as harm doing permits viewing the behaviour as crime even if no culpability exists.

The concept of crime may differ according to the definition and justification of the sanction. For instance, the conception of crime as harm-doing prevails when the sanction imposed is a security measure in which there is no intentionally hard treatment and censure. Instead, the

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[244] Goldman, Alan, 'Deterrence Theory: Its Moral Problems' in Andrew Von Hirsch and Andrew Ashworth (eds), *Principled Sentencing Readings on theory & Policy* (Hart Publishing, 1998) 80
[245] Goldman, Alan, 'Deterrence Theory: Its Moral Problems' in Andrew Von Hirsch and Andrew Ashworth (eds), *Principled Sentencing Readings on theory & Policy* (Hart Publishing, 1998) 80
[246] See generally, Belal, Ahmad Awad, المذهب الموضوعي و تقلص الركن المعنوي للجريمة *[The objective doctrine and diminishing the moral component of the crime]* (Dar alnadha alarabiya, 1988).
[247] See generally, Zedner, Lucia, *Criminal Justice,* Clarendon Law Series (Oxford, 2004) 37-69.
[248] Ibid 47-58.
[249] Ibid.
[250] Ibid.
[251] Ibid.

imposed sanction aims at facing the danger of the perpetrator rather than the criminal fault. The result of the crime as harm-doing is that the mental element of the offence is removed from the conception of crime.[252] A person can commit a crime even though the person has no mental element recognised by the law.[253] The prevalence of the retribution justification of punishment leads to the conception of crime as wrongdoing rather than harm-doing, for the purpose of state intervention to practice punishment.

Conviction-based confiscation with its requirement to establish criminal liability for a specific criminal offence, in general, complies with the conception of crime as wrongdoing. It requires securing a conviction for a specific criminal offence against the perpetrator which normally requires mental element of the offence. The requirements of conviction-based confiscation to identify and convict the perpetrator of the criminal offence and the wrongdoing committed align with the conception of crime as wrongdoing.

The wrongful behaviour and the confiscation of the proceeds of crime

In the criminal law, the general principle is that the conduct is the sole subject of criminalisation.[254] In other words, the prohibition that the criminal law is concerned with should be conduct.[255] This appeal to specific conduct is strong in criminal law for a number of reasons. The criteria through which the legislature should determine the punishment that should be inflicted on the perpetrator of the criminal offence should take into consideration two main factors: the first is the level of the harm done, and the second is the level of culpability.[256] As to the first factor, any criminalisation is aimed at protecting certain interest from harm or risk

[252] Husni, Mahmood Najeeb, شرح قانون العقوبات- القسم العام- النظرية العامة للجريمة و النظرية العامة للعقوبة و التدبير الإحترازي *[Explanation of the Penal Code -General Section- The general theory of crime and general theory of punishment and precautionary measure]* (Dar Almatboa'at Aljama'eya, 8th ed, 2017) 1046-1047.

[253] Husni, Mahmood Najeeb, شرح قانون العقوبات- القسم العام- النظرية العامة للجريمة و النظرية العامة للعقوبة و التدبير الإحترازي *[Explanation of the Penal Code -General Section- The general theory of crime and general theory of punishment and precautionary measure]* (Dar Almatboa'at Aljama'eya, 8th ed, 2017) 1046-1047.

[254] See generally, Abdulmeam, Sulaiman, تراجع مبدأ مادية الجريمة*[Retraction of principle of materialism in crime]* (Dar Almatboa'at Aljameia, 2015).

[255] See generally, Alsaifi, Abdulfattah, المطابقة في مجال التجريم *[Conformity in criminalization]* (Dar Almatboaat Aljameaa, 2017).

[256] Suror, Ahmad Fatehi, الوسيط في قانون العقوبات - القسم العام *[The penal Code- The general part]* (Dar alnahdha alarabia, 2015) 921-922.

of harm.[257] It is therefore important that the legislature, in determining the punishment that should be inflicted on the perpetrator, reflects the importance of the interests protected through the criminalisation.[258] As to the second factor, the punishment inflicted must take into account the culpability of the offender.[259] The level of culpability cannot be determined unless the specific behaviour has been identified.

There are a number of factors in confiscating the proceeds of crime that do not have difficulties in going beyond the specific conduct that generated the property. One of the main challenges to conviction-based confiscation is in the fact that it is now accepted that a determination that the property constitutes proceeds of crime can be deduced not through identifying the proscribed conduct in a specific provision that generated that property,[260] but, rather, based on a number of fact-based matters that can be used to infer that the property may be classified as proceeds of crime.[261] One example may be seen when examining the person in question's financial position.[262] By comparing the person's wealth and the legitimate income with the lack of justification of a property, one may deduce whether the assets can be considered proceeds of crime.[263]

Confiscation of the proceeds of crime may also deviate from the specific conduct that generated the property because, as opposed to other traditional sanctions, the amount of the proceeds of crime that is to be confiscated is fixed. In traditional sanctions, the amount of imprisonment and fine differs according to the conduct committed. The greater the value of the interest protected in the criminalisation, the greater the sanction to be imposed on the perpetrator of the criminal offence. In light of this, the imposition of traditional sanction necessitates identifying the particular conduct that generated the property. In contrast, the amount of the proceeds sought to be confiscated does not differ according to which conduct generated the property. What matters is whether a property constitutes proceeds of crime.

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[257] See generally, Kleinig, John, 'Crime and the Concept of Harm' (1978) 15(1) *American Philosophical Quarterly* 27.
[258] Suror, Ahmad Fatehi, الوسيط في قانون العقوبات - القسم العام *[The penal Code- The general part]* (Dar alnahdha alarabia, 2015) 921-922.
[259] Ibid.
[260] See generally, *Gogitidze v Georgia* (2015) Application No 36862/5.
[261] Ibid.
[262] Ibid.
[263] Ibid.

Confiscation of the proceeds of crime is always proportional to the conduct committed regardless of which conduct is committed. As long as the confiscation is limited to the actual benefits of the proceeds of crime, normally the confiscation would be proportional. This is, however, unlike traditional sanction, where proportionality demands identifying the conduct to determine a proportionate punishment consisting of fine and imprisonment. Confiscation of the proceeds of crime, therefore, neutral from the harm of criminalisation in the sense that the specific harm done through crime does not affect the amount of the property to be confiscated.

Similarly, the amount of traditional sanctions varies according to the level of culpability in the commission of the criminal offence. In contrast, the level of culpability, in principle, does not impact the amount of the confiscation order. It is true that while culpability can affect whether to confiscate or not depending on the nature of confiscation, it does not impact the amount of the property to be confiscated. This makes the confiscation of the proceeds of crime compliant with retrospective proportionality without a need to identify the level of culpability in the commission of a specific criminal conduct.

Therefore, regardless of the justifications for confiscating the proceeds of a crime, concentrating on confiscating the proceeds of crime will produces difficulties in conceiving crime as wrongdoing, with its focus on the specific behaviour that is considered wrong.

The tension between the justifications of confiscating the proceeds of crime and the concentration on the wrongdoer

The previous sections demonstrated that the requirements of conviction-based confiscation align with the conception of crime as wrongdoing. This section is concerned with the tension between the rationales for confiscating the proceeds of crime and the requirement of conviction-based confiscation to establish criminal liability for the perpetrator of the criminal offence. The question under discussion is whether the rationales for confiscating the proceeds of crime may depend upon the requirement to identify the wrongdoer as necessary for the confiscation of the proceeds of crime.

Chapter One demonstrated that there is a mixture of purposes attached to the confiscation of the proceeds of crime, including deterrence, incapacitation, and prevention of unjust

enrichment.[264] The rationales for confiscating the proceeds of crime that are related to preventing harm can, in turn, be divided into three kinds depending on the origin of the harm sought to be prevented: harm of offender, harm of persons other than the offender, and harm of property.

The first type of justification for confiscating the proceeds of crime concentrates on the harm of the offender who committed the criminal offence that generated the proceeds. The main rationale for confiscating the proceeds of crime, according to this focus, is special deterrence. In special deterrence, the confiscation of the proceeds of crime targets the motive behind the commission of the criminal offence of the offender in order to send the message to the offender that the commission of further criminal activity for the purpose of acquiring gains is simply not worth it.[265] Ascertaining special deterrence as the paramount aim for confiscating the proceeds of crime requires the focus on the person who committed the criminal offence for the purpose of confiscating the proceeds of crime.

The issue as to whether there should be a mental element for the purpose of achieving special deterrence is complex. On the one hand, it could be argued that deterrence is based on the rationale choice theory, in which the criminal is regarded as a rational actor who had assessed the risks and benefits prior to the commission of the criminal offence.[266] Therefore, it assumes that special deterrence cannot be achieved unless the person has committed some fault. Otherwise, the aim of special deterrence cannot be achieved. On the other hand, the deterrence theory, in general, has no limitations. For the purpose of increasing detection and successful prosecution, the mental element may not be necessary in order to maximise the deterrence value of confiscation. Requiring the mental element of the offence leads to viewing crime as wrongdoing. Discarding the mental element of the offence leads to viewing crime as doing harm. Conviction-based confiscation, with its focus on establishing that the criminal liability for the perpetrator suits the prevention of harm, stems from the offender. This is especially the case if special deterrence requires the mental element of the offence in order to achieve the aim.

[264] See chapter One.
[265] Ibid.
[266] Ibid.

The aim of special deterrence, however, suffers from a number of challenges because it is limited to the person who committed the criminal offence. This is especially the case with the property-based system of confiscation or in cases where the value-based system of confiscation is used, but the person has insufficient resources to meet the amount of the confiscation order. The property sought to be confiscated can easily be transferred to another person. This third party may have no knowledge that the property was acquired illegally. Here we have serious challenges. The person who committed the criminal offence can benefit from the crime although the property is not in his possession. With the value-based system, problems arise when the person does not have sufficient property to cover the amount owed. Property-directed confiscation may not be possible since the target of the sanction is not the offender.

The second possible concentration of the confiscation of the proceeds of crime is preventing harm by other persons than the offender. The main rationale for confiscating the proceeds of crime may be included in this category: general deterrence. General deterrence is similar to special deterrence in that the target of the confiscation is the motive behind the commission of the criminal offence and is aimed at combating crime by focusing on the incentive to commit the crime. Contrary to special deterrence, however, the focus of general deterrence is not on the offender. Rather, it focuses on individuals at large with the aim to deter them from criminal activity.[267]

The question is whether the concentration on general deterrence requires a focus on the person who committed the criminal offence. That is, the confiscation of the proceeds of crime can only be imposed on the person who committed the criminal offence in order to achieve this aim. There are a number of applications that permit the confiscation of the proceeds of crime to be imposed on other than the perpetrator of the criminal offence to achieve general deterrence. One of the applications is in the confiscation of the proceeds of crime in the situation where the offender has died. In this situation, the confiscation of the proceeds of crime cannot serve a special deterrence purpose. The confiscation of the proceeds of crime is imposed on the person who acquires the proceeds in order to achieve general deterrence.

[267] See generally, Husni, Mahmood Najeeb, شرح قانون العقوبات- القسم العام- النظرية العامة للجريمة و النظرية العامة للعقوبة و التدبير الإحترازي *[Explanation of the Penal Code -General Section- The general theory of crime and general theory of punishment and precautionary measure]* (Dar Almatboa'at Aljama'eya, 8th ed, 2017) 784-786.

Another possible harm of other persons than the offender is incapacitation of other persons than the offender to commit criminal activities. In this regard, the confiscation of the proceeds of crime targets the dangerousness of the person rather than the fault. If the confiscation of the proceeds of crime can be considered as predominantly preventive, then the focus on the wrongdoing of conviction-based confiscation fails. The focus is more about the dangerous of the person rather than the criminal fault.

The third kind of the focus of the claim of the state to intervene to confiscate the proceeds of crime is related to harm of property. That is, the harm sought to be prevented or protected lies on the proceeds of crime. It differs from the harm of the person in the sense that the proceeds of crime is not merely a motive behind the commission of the criminal offence. But rather, the proceeds of crime are the cause of harm or risk of harm sought to be prevented.

The question is 'can the proceeds of crime cause harm? Can the property do harm? The first thing to note is that the proceeds of crime is not per se harmful.[268] That is, the nature of proceeds of crime as property is not harmful. This is unlike some dangerous thing in nature such as a weapon. The proceeds of crime, however, can be considered as harmful not per se but through his position as proceeds of crime.[269] That is, the proceeds of crime can be considered as harmful because they derive from a specific kind of offence. That is, without the proceeds of crime the harm sought to be prevented is diminished or eliminated. This is especially the case where the focus is in combating organised crime in which although the future harm is committed by human conduct, the proceeds of crime acquired in the past is considered the root cause of harm. Without the proceeds of crime, the ability to commit further criminal activity would be diminished.[270] In this situation, the conception of crime as wrongdoing including identifying the perpetrator and the mental element may be unnecessary. It demands the focus on the result of crime regardless of any circumstances related to the offender. In other words, crime may be conceived as a production of harmful result.

[268] See generally, Vogel, Joachim, 'The Legal Construction that Property Can Do Harm - Reflections on the Rationality and legitimacy of "Civil" Forfeiture' in JP Rui and U Sieber (eds), *Non-Conviction-Based Confiscation in Europe. Possibilities and Limitations on Rules Enabling Confiscation Without a Criminal Conviction* (Duncker & Humblot, 2015) 225 235.
[269] For a similar discussion in relation to civil law duty of things, see, Abdulreda, A & Alnakkas, J, مصادر الإلتزام و الإثبات *[Sources of duty and proof]* (Dar Alkotob, 2010) 277-285.
[270] See chapter Four.

This is also the situation in relation to protecting the economy.[271] The fear that the proceeds of crime can be used in a manner that negatively impacted the economy render the proceeds of crime is the root cause of harm sought to be prevented. Conviction-based confiscation is a wrongdoer-based sanction that requires proof of a criminal offence by an individual such that the principles of sentencing can be justified as applying to that offender. conceiving crime as a harm places less emphasis on the individual accused and more on the harmful consequences of the alleged conduct.

Conviction-based confiscation fails to provide a satisfactory response to crime when the primary cause of the future harm sought to be prevented stems mainly from the proceeds of crime. Conviction-based confiscation is a wrongdoer-based sanction that requires proof of a criminal offence by an individual such that the principles of sentencing can be justified as applying to that offender. Conviction-based confiscation fails to permit the intervention of the state based on viewing crime as harm to protect against and prevent the harm stemming mainly from the existing of the proceeds of crime. In this situation, crime as harm perceive the requirements of conviction-based confiscation as unnecessary for the purpose of protecting against and preventing the harmful consequences of criminal offences.

The problem of deviating from the conception of crime as wrongdoing

The previous sections demonstrated that the confiscation of the proceeds of crime produces a number of challenges to the conception of the crime as wrongdoing for the purpose of state intervention. However, the legal nature of the confiscation of the proceeds of crime constitutes a barrier for deviating from the conception of crime as wrongdoing. The issue of the justifications of the proceeds of crime is separate from the issue of the legal nature of confiscating the proceeds of crime. If the nature of confiscating the proceeds of crime is regarded as a punishment, a number of consequences follow:

One of these consequences relates to the standard and burden of proof. The criminal norms in relation to the burden of proof constitutes barrier when the main issue needed to be determined is the provenance of the property. If the case of conviction arises, the main issue that is needed to be determined is whether or not the prohibited act has been committed by the person in question. The burden of proving it logically falls on the state. This is because, usually, a person

[271] Ibid.

cannot prove the non-existence of the conduct. In contrast, if the case of confiscation arises, the main issue that needed to be determined is the provenance of the property. The property's provenance can be proved by the person. In fact, it is especially within the knowledge of the person who owns it rather than of any other person.[272]

Criminal punishment is the main reason for affording the persons enhanced procedural safeguards in criminal proceedings compared with the civil proceedings. For some scholars, the potential severity of the punishment on the convicted person is the main reason for the affording enhanced procedural safeguards.[273] For Steiker, it is not the potential severity of the punishment inflicted on the person that calls for enhanced procedural safeguards to avoid erroneous infliction; instead, it is mainly the censuring capacity of punishment that warrants the enhanced procedural safeguards.[274] Hard treatment and censure are the central components of criminal punishment. Others have mainly pointed out the differences in resources between the state and the accused person as warranting the enhanced protection. In other words, the state is armed with sufficient resources to prove the case in question; in contrast, the accused person may lack sufficient resources to prevent proving the case. Therefore, the existence of procedural safeguards may balance the position of the state and the person in question. In civil law, in contrast, the parties are treated as equals. There is no intentional hard treatment or censure involved that warrants enhanced procedural safeguards for the defendant.

Another consequence is the application of the principle of personal punishment. This principle holds that the imposition of criminal punishment must be confined to the individual who is found criminally liable for the crime committed.[275] Therefore, it forbids criminal punishment on any person other than the offender, regardless of the relationship between the offender and other individuals.[276] Even if the confiscation of the proceeds of crime concentrates on the harm that stems from the offender, the adherence to the principle of personal punishment may be

[272] See generally, Lusty, David, 'Civil forfeiture of proceeds of crime in Australia' (2002) 5(4) *Journal of Money Laundering Control* 345.
[273] See, eg, Husni, Mahmood Najeeb, شرح قانون العقوبات- القسم العام- النظرية العامة للجريمة و النظرية العامة للعقوبة و التدبير الإحترازي *[Explanation of the Penal Code -General Section- The general theory of crime and general theory of punishment and precautionary measure]* (Dar Almatboa'at Aljama'eya, 8th ed, 2017)774-779.
[274] Steiker, Carol S, 'Punishment and procedure: punishment theory and the criminal-civil procedural divide' (1997) 26 *Ann. Rev. Crim. Proc.* 775 806.
[275] Belal, Ahmad Awad, النظرية العامة للجزاء الجنائي *[The General Theory of Criminal Punishment]* (Dar Alnahdha Alarabiya, 1996) 26-33.
[276] Ibid.

problematic since the confiscation of the proceeds of crime can be circumvented through the transfer of the ownership of the property to a third party.

Although intentional hard treatment and censure may be absence when the concentration of the confiscation of the proceeds of crime on the harm of property, there are many barriers for deviation from the conception of crime as wrongdoing. One of the main challenges for deviating from the conception of crime as wrongdoing is that the confiscation of the proceeds of crime can have a number of objectives and it is difficult to determine the paramount aim of confiscating the proceeds of crime since the same construction of the confiscation regime can be viewed to serve a number of aims. For instance, the confiscation of the proceeds of crime that target organized crime can be viewed as aiming to prevent harm from the offender, preventing harm from others, and preventing harm stemming from the property. Even if it could be established that the confiscation of proceeds of crime aimed mainly at preventing harm of property, the issue of the ground of liability would be problematic since there is no recognition in Kuwait of property liability.

Conclusion

This chapter has provided an overview of the legal provisions that allow for the deprivation of the proceeds of crime in Kuwait. It revealed that confiscation provisions are influenced by two main factors. The first is the property-based system of confiscation and the second is the legal nature of the confiscation of the proceeds of crime as additional punishment. The latter has led to adherence to the conviction-based model for confiscating the proceeds of crime. In other words, confiscation of the proceeds of crime cannot be imposed unless criminal liability for a specific criminal offence has been established. In addition, it is necessary to establish a link between the property sought to be confiscated and the specific criminal offence(s) for which a conviction has been secured.

This chapter also shows that sole reliance on property-directed confiscation can carry with it serious shortcomings for the confiscation scheme. For the purpose of confiscation, a value-based system can overcome the difficulties in proving the criminal origin of the property when the benefits acquired as a result of the commission of the criminal offence can be determined but the specific property acquired cannot be identified.

In addition, this chapter demonstrated the tension between several justifications for confiscating the proceeds of crime and the conception of crime as wrongdoing required by the linkage requirement. It also showed a number of difficulties to deviating from the conception of crime as wrongdoing through the use of confiscation provisions.

However, a discussion on the requirements for the confiscation of the proceeds of crime from individuals, may be misleading without examining the substance of the offence. For the purpose of determining the ability to deal with the difficulties in establishing the linkage requirement and the safeguards afforded to individuals, not only the requirements of confiscating the proceeds of crime should be considered, but also the substance of the offence that must be established. This is because the substance of some offences can indirectly affect how the requirements for the deprivation of the proceeds of crime from individuals can be fulfilled. As a result, an examination of confiscation provisions undertaken solely to demonstrate the ability of the confiscation regime to deal with the difficulties in establishing the linkage requirement may not reflect the actual picture. Instead, it should be complemented with the content of the offence that must be established.

CHAPTER 3 - Extended criminalisation as a solution to the difficulties in proving the criminal origin of the property

Introduction

The previous chapter examined the legal provisions in Kuwait that allow for the confiscation of the proceeds of crime from individuals. This chapter is concerned with the use of extended criminalisation as a tool to facilitate the fulfilment of the requirements of confiscation. It discusses the reasons for and consequences of using the content of the offences to overcome the difficulties in establishing the linkage requirement.

In recent years, there has been a legislative trend to use extended criminalisation in order to, inter alia, facilitate the fulfilment of the requirements of the confiscation of the proceeds of crime.[277] In particular, the illicit-enrichment offence and the money-laundering offence have been commonly employed to overcome the difficulties in meeting the linkage requirement of conviction-based confiscation. This tendency is evident in Kuwait, where the illicit-enrichment offence has been adopted mainly to combat the nature of corruption. This legislative tendency may enhance the ability to establish the criminal origin of the property, but it has not been thoroughly examined whether the use of extended criminalisation constitutes a reasonable approach to overcome such difficulties.

This chapter is mainly aimed at examining extended criminalisation as a solution to mitigate the obstacles in establishing the linkage requirement. This chapter seeks to determine whether the use of extended criminalisation constitutes a reasonable approach to deal with such difficulties or whether alternative mechanisms should be explored. The main argument of the

[277] According to a study conducted by the world bank in 2012, 44 countries have criminalised illicit-enrichment offences. Most of them are developing countries. Muzila, Lindy, et al, 'On the Take: Criminalizing Illicit Enrichment to Fight Corruption' (2012) *World Bank Publications*; Panzavolta, Michele, 'Confiscation and the concept of punishment: Can There be a Confiscation Without Conviction' in Michele Simonato Katalin Ligeti (ed), *Chasing Criminal Money Challenges and Perspectives On Asset Recovery in the EU* (Hart Publishing, 1st ed, 2017).

chapter is that, although the use of extended criminalisation can improve the ability of the state to deal with difficulties in establishing the linkage requirement, the way in which such improvement is reached and justified can impair the foundation of criminal law and individual rights and liberties. It is, therefore, recommended that alternative mechanisms be explored to deal with such issues.

The chapter begins with a discussion of illicit enrichment offence as a mechanism to deal with the nature of corruption crimes in Kuwait. This is followed by an examination of money laundering offences as a tool to overcome the difficulties in proving the criminal origin of the property from a comparative perspective.[278] It will then conclude with an analysis on why extended criminalisation should not be used as an instrument to overcome the difficulties surrounding the proof of the underlying criminality that generated the property, and an alternative mechanism to deal with this problem should be explored.

Illicit-enrichment offence

The illicit-enrichment offence is a relatively new criminal offence created primarily to deal with the ramifications of corruption.[279] Corruption, which is generally defined as the "abuse of public or private office for personal gain",[280] constitutes a major problem in most countries. The outcome of Transparency International's Corruption Perceptions Index revealed that two-thirds of countries examined scored below 50, suggesting that most suffer from serious corruption issues.[281] Kuwait scored 40 on the 2019 Corruption Perceptions Index, suggesting that corruption remains a significant problem in Kuwait.[282] The Stolen Asset Recovery Initiative estimated that 20$ billion to 40$ billion are acquired by corrupt public officials in

[278] The reason for undertaking a comparative analysis in relation to money-laundering but not illicit enrichment offence is that illicit enrichment offence does not exist in Australia nor the UK. The purpose for undertaking a comparative analysis of money laundering laws in Australia and the UK compared with Kuwait is that Australia and the UK have considerably more experience of these laws, an established and growing jurisprudence, and a body of academic research to draw upon.
[279] Suror, Ahmad Fatehi, الوسيط في قانون العقوبات- القسم الخاص *[Meditator in the penal code - special section* (Dar Alnahdha Alarabiya, 2016) 439.
[280] Organisation for Economic and Development Co-operation, *Corruption: A Glossary of International Standards in Criminal Law, OECD Glossaries* (Organisation for Economic Co-operation and Development, 2008) 22.
[281] Transparency International, 'Corruption Perceptions Index 2018' (2019). It should be noted, however, that measuring corruption is a challenging task. Transparency International's Corruption Perceptions Index does not actually measure the extent of corruption. Instead, it is only a perception index.
[282] Transparency International, 'Corruption Perceptions Index 2019' (2020).

developing countries each year.[283] The existence of widespread corruption can have a number of negative impacts on a nation. For example, it impedes economic growth, diminishes the quality of public services and impairs the rule of law.[284] Research indicates that investment in nations where corruption flourishes is less likely than in those where it does not constitute a major problem, since there is a high likelihood that a significant amount of the investment in such countries will be lost within five years.[285] It should come as no surprise that the World Bank describes corruption as "the single greatest obstacle to economic and social development".[286]

As mentioned in Chapter One, the reliance on prosecuting traditional corruption crimes such as bribery, embezzlement, trading in influence, and abuse of function has been increasingly recognised as an inadequate approach to combatting corruption.[287] The concealed nature of corruption makes prosecution of criminal conduct extremely difficult. Corruption is fraught with secrecy.[288] The parties involved in corrupt practices are beneficiaries of such illicit transactions, so maintaining secrecy is of common interest to all parties.[289] There is no direct victim to lodge a complaint about the offence and assist in providing evidence.[290] The problem is compounded by the likelihood that perpetrators often occupy positions of power and can destroy documentation or evidence pointing to the commission of the criminal offence or their involvement in it.[291] While lack of evidence of criminal conduct makes corruption offences extremely difficult to detect and prosecute, the matter most likely to point to their existence is

[283] Theodore S Greenberg, *Stolen Asset Recovery: A Good Practices Guide for Non-Conviction Based Asset Forfeiture* (World Bank Publications, 2009) 1.
[284] L Gray, et al, *Few and Far: The Hard Facts on Stolen Asset Recovery* (The World Bank, 2014) 1.
[285] See Press release, Tenth United Nations Crime Congress in Vienna (Apr. 6, 2000), available at https://www.un.org/press/en/2000/20000406.soccp214.doc.html.
[286] Ibid.
[287] See, eg, Aloumi, Noura, ' جريمة الكسب غير المشروع دراسة تحلبلية مقارنة للمرسوم بقانون رقم (24) لسنة 2012 بإنشاء الهيئة العامة لمكافحة الفساد و الأحكام الخاصة بكشف الذمة المالية ['The Crime of Illicit Enrichment: A Comparative Study of the Legislative Decree No. (24) for the year 2012 on the establishment of the General Authority for Combating Corruption'] (2015) 39(4) *Journal of Law* 79-85.
[288] Alkandari, Faisal ' فلسفة المشرع الكويتي و العربي في مكافحة جرائم الفساد['The Philosophy of Kuwaiti and Arab Legislators to Fight against Corruption Crimes'] (2013) 4 *Kuwait International Law School* 397-410.
[289]See, eg, Wilsher, Dan, 'Inexplicable Wealth and Illicit Enrichment of Public Officials: A Model Draft that Respects Human Rights in Corruption Cases' (2006) 45(1) *Crime, Law and Social Change* 27.
[290] See, eg, Jayawickrama, N, Pope, J, & Stolpe, O, 'Legal Provisions to Facilitate the Gathering of Evidence in Corruption Cases: Easing the Burden of Proof' in *Forum on Crime and Society* (United Nations, 2002) vol 2 23.
[291] Alkandari, Faisal, ' فلسفة المشرع الكويتي و العربي في مكافحة جرائم الفساد[The Philosophy of Kuwaiti and Arab legislator to fight against corruption crimes]' (2013) 4 *Kuwait International Law School* 397 410.

wealth derived from their commission.[292] Such wealth can take the form of expensive cars, a yacht, or accumulations of money in bank accounts. This is especially likely when there is a significant disproportion between the total wealth and the lawful income of a public official.

The illicit-enrichment offence has been invoked to overcome the difficulties associated with prosecuting corruption by altering the focus of criminalisation from specific criminal conduct to the property generated from corruption crimes generally. It essentially criminalises the possession of disproportionate wealth that cannot be justified by public officials. Article 20 of the United Nations Convention Against Corruption (UNCAC) defines the offence as the "significant increase in the assets of a public official that he or she cannot reasonably explain in relation to his or her lawful income."[293] A similar definition has been provided by the Inter-American Convention Against Corruption (IACAC) and the African Union Convention on Preventing and Combating Corruption (AUCPCC).[294] In Kuwait, illicit enrichment is defined as "every increase in wealth or decrease in liabilities occurring, because of tenure, to the person subject to this law, or to his or her minors, in a situation where such increases in wealth or decreases in liabilities do not correspond to his/her lawful resources and cannot be explained."[295]

The genesis of the introduction of illicit enrichment has been outlined by Muzila, who describes its introduction in Argentina by a congressman named Rodolfo Segura:[296]

> *Rodolfo Corominas Segura was travelling by train from his home in Mendoza to Buenos Aires when he encountered a public official displaying the wealth he had*

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[292] Aloumi, Noura, ' جريمة الكسب غير المشروع دراسة تحلبلية مقارنة للمرسوم بقانون رقم (24) لسنة 2012 بإنشاء الهيئة العامة لمكافحة الفساد و الأحكام الخاصة بكشف الذمة المالية [The crime of illicit enrichment: A comparative study of the Legislative Decree No. (24) for the year 2012 on the establishment of the General Authority for Combating Corruption]' (2015) 39(4) *Journal of Law* 85.

[293] *United Nation Convention Against Corruption* (entered into force 15 December 2005) art 20.

[294] *Inter-American Convention Against Corruption* (entered into force 6 March 1997) art 9; *African Union Convention on Preventing and Combating Corruption* (entered into force 5 August 2006) art 8.

[295] Law No. 2 of 2016 section 1.

[296] Muzila, Lindy et al, 'On the Take: Criminalizing Illicit Enrichment to Fight Corruption' (2012) *World Bank Publications* 7-8. Some scholars argue that the idea of the illicit-enrichment offence existed in the early years of Islam. For instance, Omar Bn Alkhtab applied a system of declaration of wealth on officials. If there was an increase in wealth, half of the increased wealth was confiscated. However, it was not a necessary condition for the confiscation that the increase in wealth had been a result of forbidden conduct. The confiscation can apply to the increase in wealth generated by a legitimate source of income. The rationale is that officials should be devoted to the office. In other words, except for the wealth generated from the office, any wealth can subject to confiscation. See, eg, Rabayiea, A, جريمة الكسب غير المشروع في النظام الجزائي الفلسطيني *[Illicit-Enrichment Offence in the Palestinian Penal System]* (PhD Thesis, Naif Arab University for Security Sciences, 2014) 79-81.

accumulated since taking office, wealth that Corominas Segura felt could not possibly have come from a legitimate source. Inspired, Corominas Segura introduced a bill stating that the government would penalize 'public officials who acquire wealth without being able to prove its legitimate source'.

The elements of the illicit-enrichment offence

In a study including 44 countries that have criminalised illicit enrichment, Muzila identified five common elements.[297] They consist of determining the persons who can be prosecuted and held liable for an illicit-enrichment offence; the existence of disproportionate wealth; their inability to justify the lawful origin of the increase in wealth; the period through which the increase in wealth can give rise to liability for an illicit-enrichment offence; and the mental element of the offence (*mens rea*). The following sub-sections will examine the position of Kuwait in these elements. It must be noted, however, that no prosecution for the illicit-enrichment offence has yet taken place in Kuwait. Therefore, the examination of the elements will be based on the definition of the illicit-enrichment offence and the general principles of criminal law.

Persons of interest

Not all individuals can be prosecuted for commission of the illicit-enrichment offence. The illicit-enrichment offence mainly targets public officials, but the scope of the concept of 'public officials' varies among nations. The majority of countries provide for an expansive concept of public officials that may include any individual who performs any service or function in the public domain.[298] An example of this expansive concept can be seen in the United Nations Convention Against Corruption, which stipulates that:[299]

> *'Public official' shall mean: (i) any person holding a legislative, executive, administrative or judicial office of a State Party, whether appointed or elected, whether permanent or temporary, whether paid or unpaid, irrespective of that person's seniority; (ii) any other person who performs a public function, including for a public agency or public enterprise, or provides a public service, as defined in the domestic*

[297] Muzila, Lindy et al, 'On the take: criminalizing illicit enrichment to fight corruption' (2012) *World Bank Publications.*
[298] Ibid 13-14.
[299] *United Nation Convention Against Corruption* (entered into force 15 December 2005) art 2.

law of the State Party and as applied in the pertinent area of law of that State Party; (iii) any other person defined as a 'public official' in the domestic law of a State Party.

In Kuwait, there is some controversy on the issue of who can be prosecuted for illicit-enrichment offences.[300] Article 1 of Law No. 2 of 2016 provides the definition of certain concepts, including an expansive definition of the concept of public officials.[301] However, in a list of individuals with certain occupations, Article 2 of the same law stipulates which ones are subject to it without including the concept of public officials in general. It generated controversy, mainly because defining 'public official' does not have substantive impact since the term is not used in any other provisions of that law. Nevertheless, as Article 2 clearly does not include the term 'public official' in the list, the scope of individuals who can be prosecuted for the illicit-enrichment offence should be confined only to those clearly listed in Article 2 of the law.[302] In other words, the narrow interpretation of criminal law requires excluding all

[300] See generally Alkandari, Faisal, 'فلسفة المشرع الكويتي و العربي في مكافحة جرائم الفساد [The Philosophy of Kuwaiti and Arab legislator to fight against corruption crimes]' (2013) 4 *Kuwait International Law School* 397 404-405; Aloumi, Noura, 'جريمة الكسب غير المشروع دراسة تحلبلية مقارنة للمرسوم بقانون رقم (24) لسنة 2012 بإنشاء الهيئة العامة لمكافحة الفساد و الأحكام الخاصة بكشف الذمة المالية [The crime of illicit enrichment: A comparative study of the Legislative Decree No. (24) for the year 2012 on the establishment of the General Authority for Combating Corruption]' (2015) 39(4) *Journal of Law* 65 89.

[301] Law No. 2 of 2016 section 1.

[302] 1- Prime minster, Deputy Prime Minister and ministers, and those who are running executive positions as Minister.
2- President and Vice-President and members of the National Assembly.
3- The President and the Supreme Council of the Judiciary and the President and advisors of the Constitutional Court and the technical organ of the Court and judges and members of the public prosecution and the head of the members of the Department of Legal Advice and Legislation and the General Director and the members of the General Directorate of Investigations in the Ministry of Interior and the legal department of the Municipality of Kuwait and the arbitrators and experts of the Ministry of Justice, the liquidators, the judicial guards, the agents of the creditors, the notaries and the notary in the Department of Real Estate Registration and Documentation at the Ministry of Justice.
4- President, and Vice-President and members of the Kuwait Municipality Headquarters.
5- The President and members of the Councils, Authority and committees that carry out executive functions and issue a law or decree or a decision from the Council of Ministers to form it or appoint its members.
6- Head of the bureau of financial controller, his deputy, sector heads and financial observers.
7- The leaders are:
- Incumbents of the group of leadership positions in the general salary scale (Distinction Class/ Undersecretary of the Ministry/ Undersecretary Assistant)
- The members of the Boards of Directors, the general directors, their deputies or their assistants, the secretaries general and their deputies or their assistants in public authority or institutions or any governmental entity.
- Anyone who is in the leaders ruling: Heads of departments and their deputies or administrative units or Members assigned to public authority and institutions.
- Administrations managers and those who are in their ruling – Heads of organizational units accredited in their structures with a management level or higher.

public officials from the prosecution of the illicit enrichment offence since the term 'public official' is not included in Article 2.

In addition to the list of individuals provided in Article 2, any person who has significantly benefited from the illicit-enrichment offence, with knowledge of it, can be prosecuted and punished with half of the offence's penalty, provided that a conviction has been secured for the offence with respect to those individuals in Article 2.[303]

Period of interest

The period of interest determines the permissibility to prosecute the public official for the illicit-enrichment offence according to the time during which the increase in wealth occurred.[304] The main issue that needs to be addressed in this context is whether the public official can be prosecuted for the illicit-enrichment offence with respect to the increase in wealth that occurred after leaving the office.

Muzila identified three approaches to the period of interest that were adopted in the countries examined in their study.[305] The first approach confines the period of interest to the time of the public official's tenure. In order to prosecute the public official for the illicit-enrichment

- The provisions shall apply to military, diplomatic and civilian personnel in ministries, government departments, public bodies, public institutions, and agencies with an attached or independent budget, when they assume the responsibilities or enjoy the benefits of the position, whether they are occupying the job in an original or temporary capacity.
The Authority shall, in coordination with the concerned authorities, identify and update the incumbents of these positions periodically subjected to the provisions of this law.
8- President, Vice president, members of the Board of Trustees, Secretary General, assistant Secretaries, directors and technical staff of the Kuwait Anti-Corruption authority.
9- President, Vice president, agents, managers and technical staff of the State Audit Bureau of Kuwait.
10- Representatives of the State in the membership of the boards of directors of companies in which the state, a government agency or public authorities or institutions or other public morale persons that directly contribute a share of not less than 25% of the capital.
11- Members of boards of Directors of cooperative societies and sports authorities.

[303] Law No. 2 of 2016 section 50.
[304] See generally Wodage, Worku Yaze, 'Criminalization of "Possession of Unexplained Property" and the Fight against Public Corruption: Identifying the Elements of the Offence under the Criminal Code of Ethiopia' (2014) 8(1) *Mizan Law Review* 45 59-61; Boles, Jeffrey R, 'Criminalizing the Problem of Unexplained Wealth: Illicit Enrichment Offenses and Human Rights Violations' (2014) *Journal of Legislation and Public Policy* 835-845.
[305] Muzila, Lindy et al, 'On the take: criminalizing illicit enrichment to fight corruption' (2012) *World Bank Publications* 16-18.

offence, there must be proof that the increase in wealth occurred during their tenure.[306] The weakness of this approach is that the public official can escape prosecution by postponing the payments that he/she should have received until after leaving office.[307] The second approach attempts to address this problem by extending the period of interest to a limited time beyond the end of the tenure.[308] The third approach is an open-ended one, in which the illicit-enrichment offence can be prosecuted after the official leaves office, with no time limitations.[309]

In Kuwait, the issue of the period of interest has not be regulated. However, according to the general principles of criminal law, what matters for the occurrence of the crime is the time in which the material element of the offence occurs.[310] In light of this, an illicit-enrichment offence can be prosecuted even after the public official leaves office, as long as there is proof that the increase in wealth has been acquired because of the public official holding the office.

Disproportionate wealth (increase in wealth)

One of the core elements of the illicit-enrichment offence is in the existence of disproportionate wealth. The existence of disproportionate wealth can be determined by comparing the total wealth of the public official to his/her lawful earnings. The proportion of the wealth that exceeds the lawful earnings of the public official constitutes disproportionate wealth. Nevertheless, there are a number of questions that should be considered to determine the concept of disproportionate wealth.[311] The first question is whether the total wealth is calculated by referencing only the increase in wealth or extending it to include the decrease in liabilities. In Kuwait, the definition of the illicit-enrichment offence clearly stipulates that increase in wealth and decrease in liabilities are included in determining whether the public official has disproportionate wealth. The second issue that needs to be considered is what

[306] Ibid.
[307] Ibid.
[308] Ibid.
[309] Ibid.
[310] Aloumi, Noura, ' جريمة الكسب غير المشروع دراسة تحلبلية مقارنة للمرسوم بقانون رقم (24) لسنة 2012 بإنشاء الهيئة العامة لمكافحة الفساد و الأحكام الخاصة بكشف الذمة المالية [The crime of illicit enrichment: A comparative study of the Legislative Decree No. (24) for the year 2012 on the establishment of the General Authority for Combating Corruption]' (2015) 39(4) *Journal of Law* 93-94.
[311] See generally, Wodage, Worku Yaze, 'Criminalization of 'Possession of Unexplained Property'and the Fight against Public Corruption: Identifying the Elements of the Offence under the Criminal Code of Ethiopia' (2014) 8(1) *Mizan Law Review* 45.

constitutes lawful earnings. The concept of lawful earnings can denote the salary of the public official in a narrow sense, but it can include other earnings, such as income from lawful business and inheritance and gifts, in a more expansive concept of lawful earnings.[312] It is preferable to adopt an expansive concept of lawful earnings in order to prevent subjecting the public official to unnecessary prosecution and burden. In Kuwait, the concept of lawful resources has not yet been defined. It is therefore unclear whether the illicit-enrichment offence entails an expansive concept of lawful resources or a narrow one.

Another issue of interest is whether there is a qualification in the concept of disproportionate wealth. International conventions, such as the UNCAC, IACAC, and AUCPCC, do not allow for any disproportionate wealth in the prosecution of illicit enrichment. Instead, they require a significant increase in wealth to hold the public official liable for the illicit-enrichment offence.[313] This qualification is important to prevent subjecting the public official to prosecution unreasonably.[314] In Kuwait, however, such a qualification does not exist.

Another issue that needs to be addressed is how to determine whether the public official possesses disproportionate wealth. Even if the prosecution is able to establish that the public official has acquired disproportionate wealth, the public official may claim that the wealth in question was, for example, acquired prior to the occupancy of the office and therefore should not be counted. This issue, however, poses no great problem in Kuwait, mainly because the law has established a declaration system.[315] The declaration system requires the subject of the law to declare their wealth during the first sixty days from the time of issuing the law or the occupancy of public office, and every three years from the first declaration, and again when leaving the office. The declaration system, therefore, can facilitate proving the existence of disproportionate wealth.[316]

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[312] See generally Wodage, Worku Yaze, 'Criminalization of 'Possession of Unexplained Property'and the Fight against Public Corruption: Identifying the Elements of the Offence under the Criminal Code of Ethiopia' (2014) 8(1) *Mizan Law Review* 45 61-63.
[313] *The United Nation Convention Against Corruption* (entered into force 15 December 2005) art 20; *Inter-American Convention Against Corruption* (entered into force 6 March 1997) art 9; *African Union Convention on Preventing and Combating Corruption* (entered into force 5 August 2006) art 8.
[314] Muzila, Lindy et al, 'On the take: criminalizing illicit enrichment to fight corruption' (2012) *World Bank Publications* 18.
[315] Law No. 2 of 2016 sections 30-36.
[316] Ibid section 32.

The mental element of the offence

The issue under discussion in this section is whether an illicit-enrichment offence requires the existence of the mental element of the offence or whether it is a strict liability offence. The mental element represents the subjective element of the offence.[317] In modern criminal law, it is accepted that no criminal punishment should be imposed without establishing some fault on the part of the perpetrator.[318]

The United Nations Convention against Corruption provides that an illicit-enrichment offence must be committed intentionally.[319] In Kuwait, the definition of an illicit-enrichment offence does not include any mention of the mental element offence. However, the absence of the mental element does not mean that it is a strict liability offence. The application of the general principle of criminal law requires the existence of the mental element of the offence, which consists of knowledge and intention. It is, however, unclear whether the mental element of the offence is related to the conduct that generated the property or if it is confined to the knowledge of the increase in wealth and decrease in liabilities. What is clear is that if the public official received wealth without his/her knowledge, the mental element will be absent, and therefore, he/she should not be liable for the illicit-enrichment offence.

Absence of justification

Once the prosecution establishes an increase in wealth and that total wealth is disproportionate to the lawful earnings of the public official, the burden of proof shifts to the public official, who then needs to reasonably justify the lawful origin of the disproportionate wealth. Otherwise, it is presumed that the disproportionate wealth is a result of criminal activity committed by the accused person. In Kuwait, it is not clear what is required from the accused person to discharge the burden of proof. Nations often differentiate between legal burden of

[317] See generally, Belal, Ahmad Awad, المذهب الموضوعي و تقلص الركن المعنوي للجريمة *[The objective doctrine and diminishing the moral component of the crime]* (Dar alnadha alarabiya, 1988);
Belal, Ahmad Awadh مبادئ قانون العقوبات المصري *[The Principles of the Egyptian Penal Code]* (Dar Alnahda, 2006) 107.
[318] Abdula'al, Mohamad, النظرية العامة للجريمة و المسؤولية الجنائية في قانون الجزاء الكويتي *[The General Theory of Crime and Criminal Responsibility in Kuwait Penal Code]* (Academic Publication Council, 2015) 443-445.
[319] *The United Nation Convention Against Corruption* (entered into force 15 December 2005) art 20.

proof and evidentiary burden of proof.[320] If the accused bears the evidentiary burden of proof, in order to discharge it, he or she must provide evidence that raises doubt about the unlawful origin of the disproportionate wealth.[321] The legal burden is then placed on the prosecution, who is expected to provide evidence to the criminal standard of proof for all elements of the offence and to rebut the evidence provided by the public official.[322] If, on the other hand, the legal burden of proof is placed on the accused, it is not sufficient to raise doubt about the unlawful origin of the property in order to discharge the burden; instead, the accused must prove, normally on the balance of probabilities, the lawful origin of the disproportionate wealth.[323]

Another issue of interest is whether the public official can be held liable for an illicit-enrichment offence if he/she provides an explanation that the disproportionate wealth was generated from criminal conduct unrelated to their occupation. The fact that the accused person is a public official does not necessarily suggest that the accused can only engage in criminal activities related to their office. The public official is a normal person who could engage in drug trafficking, money laundering and other unrelated criminal activities that can generate wealth. In Kuwait, the definition of the illicit-enrichment offence clearly stipulates that an increase in wealth and a decrease in liabilities must occur because of reasons related to the public official's office. Therefore, the public official cannot be held liable for illicit enrichment with respect to proceeds generated from criminal offences unrelated to his/her office.

Examining the illicit-enrichment offence as a tool to facilitate the deprivation of the proceeds of crime

The difficulties in establishing the linkage requirement

The illicit-enrichment offence can deal with the difficulties in proving the criminal origin of property derived from corruption crimes through the use of legal presumption that an

[320] See generally Wilsher, Dan, 'Inexplicable Wealth and llicit enrichment of public officials: A model draft that respects human rights in corruption cases' (2006) 45(1) *Crime, Law and Social Change* 27 30; Muzila, Lindy et al, 'On the take: criminalizing illicit enrichment to fight corruption' (2012) *World Bank Publications* 23-26.
[321] Muzila, Lindy et al, 'On the take: criminalizing illicit enrichment to fight corruption' (2012) *World Bank Publications* 23-26.
[322] Ibid.
[323] Wilsher, Dan, 'Inexplicable wealth and illicit enrichment of public officials: A model draft that respects human rights in corruption cases' (2006) 45(1) *Crime, Law and Social Change* 27 30.

unjustifiable increase in a public official's wealth is proceeds derived from criminal conduct committed by the public official. This obviates the need to establish the particular criminal offence that generated the property and the link between the property and the particular criminal conduct—which are the main difficulties in establishing the linkage requirement.

The significance of the illicit-enrichment offence, however, would be undermined if the confiscation were limited to public officials. This is because public officials can escape confiscation simply by transferring the ownership of the property in question to a third party. In Kuwait, the confiscation of the proceeds of crime in relation to the crime of illicit enrichment not only represents an exception to the principle of personal punishment, it also represents an exception to the condition that normally applies to confiscation from a third party. The law provides that any person who has significantly benefited from an illicit-enrichment offence can be subject to confiscation or restitution without the need of his/her knowledge that the property is the proceeds of crime.[324] Therefore, the third party can be subject to confiscation even if the person is completely bona fide, provided that the conviction of the illicit enrichment against the public official is secured. However, since this provision is clearly a contravention of the principle of personal punishment, it is not clear whether this provision will be found to be compatible with the constitution.

Presumption of innocence

The offence of illicit enrichment has been subjected to considerable criticism on the grounds that it is incompatible with the presumption of innocence.[325] Specifically, illicit enrichment is alleged to violate the presumption of innocence because it entails shifting the burden of proof to the accused person, who is required to reasonably justify the lawful origin of the disproportionate wealth in order to demonstrate his or her innocence.[326]

[324] Law No. 2 of 2016 section 55; Suror, Ahmad Fatehi, الوسيط في قانون العقوبات- القسم الخاص *[Meditator in the penal code - special section* (Dar Alnahdha Alarabiya, 2016).
[325] See, eg, Boles, Jeffrey R, 'Criminalizing the Problem of Unexplained Wealth: Illicit Enrichment Offenses and Human Rights Violations' (2014) *Journal of Legislation and public policy* 835; Wodage, Worku Yaze, 'Criminalization of 'Possession of Unexplained Property'and the Fight against Public Corruption: Identifying the Elements of the Offence under the Criminal Code of Ethiopia' (2014) 8(1) *Mizan Law Review* 45.
[326] Ibid.

The illicit-enrichment offence shifts the burden of proof to the accused person through the employment of legal presumption.[327] The function of legal presumption is to relieve the party who bears the burden of proof from proving the basic fact.[328] In doing so, it assumes the occurrence of the original fact if certain other facts are proved.[329] In other words, the legal presumption alters the focus of proof from the original fact to alternative facts.[330] Proving the latter facts assumes proving the original fact.[331] In the context of the illicit-enrichment offence, proving an increase in a public official's wealth assumes that the disproportionate wealth is the proceeds of crime derived from criminal conduct committed by the public official and related to their office—unless the public official can justify the legal origin of the disproportionate wealth.

Case law in Kuwait and Egypt has consistently found that legal presumptions contained in criminal offences are unconstitutional on the grounds of violating the presumption of innocence, especially when there is no rational connection between the facts that give rise to the presumption and what is presumed. In Egypt,[332] for instance, there was an Article in the customs law that criminalised the possession of foreign goods for the purpose of trading with the knowledge that the goods were smuggled. It contained a rebuttable legal presumption of knowledge that the goods were smuggled if the possessor of the goods does not provide documents proving the payment of customs taxes in relation to them.[333] The constitutional court held that the legal presumption in that offence violates the presumption of innocence, mainly because of the absence of rationality in the legal presumption.[334] In other words, there is no rational connection between the inability to provide documents proving payment of customs taxes and knowledge that goods were smuggled. In reaching this decision, the court demonstrated that the foreign goods alleged to be smuggled does not necessarily avoid the

[327] There are two kinds of legal presumption: rebuttable presumption and conclusive presumption. In the rebuttable presumption, the presumed fact can be proven otherwise. In other words, a person can demonstrate that the assumed fact is not true. In the conclusive presumption, in contrast, no one can refute the assumed fact in any case.

[328] Foudha, Abdulhakam, أدلة الاثبات و النفي في الدعوى الجنائية *[Evidence of proof and denials in criminal proceedings]* (Mansha'at alma'aref, 2015) 49-61; Alsammak, Ahmad & Nassrallah, Fadhel, شرح قانون الاجراءات و المحاكمات الجزائية الكويتي *[Explanation of the Kuwaiti Code of Criminal Procedure and Trial]* (Kuwait University -Law School, 2015) 600-605.

[329] Ibid

[330] Ibid

[331] Ibid

[332] The Supreme Constitutional Court of Egypt, Case number 13 of 12.

[333] Ibid.

[334] Ibid.

customs by the current possessor of the goods.[335] This is because foreign goods could be transferred from one person to another with the assumption that customs taxes for the foreign goods had already been paid.[336] Therefore, the inability of the current possessor of the foreign goods to produce evidence demonstrating payment of customs taxes does not necessarily mean there was knowledge of smuggling on the part of the possessor.[337]

Similarly, the Kuwaiti Constitutional Court has found an Article in customs law unconstitutional, mainly because of the violation of the presumption of innocence.[338] The article stated that the possession or transfer of forbidden goods is considered customs smuggling unless the person provides evidence of the legal importation of these goods. The transfer or possession of the forbidden goods without providing evidence proving the lawful importation of these goods, therefore, presumes that the person has smuggled the goods and has knowledge of that smuggling. The court found that it is irrational to presume the commission of smuggling goods on the part of that specific person, along with the existence of the mental element of the offence, from the fact of possession or transfer of forbidden goods coupled with the inability to provide evidence of lawful importation of the goods.[339]

In Egypt, case law in relation to the illicit-enrichment offence are not consistent. In one case, the Court of Cassation found that the legal presumption included in the illicit-enrichment offence—which stipulates that the failure of a public official to prove the lawful origin of the disproportionate wealth constitutes the illicit-enrichment offence—violates the presumption of innocence.[340] Therefore, it decided not to enforce the law. In other cases, courts have accepted the legal presumption included in the illicit enrichment as long as the proof was not confined to the disproportionate wealth and the inability of the public official to justify its legal origin.[341] Instead, there must be proof that the nature of a public official's occupation permits him/her to exploit the office.

[335] Ibid.
[336] Ibid.
[337] Ibid.
[338] The Constitutional Court of Kuwait, Case number 2 of 2005.
[339] Ibid.
[340] The Court of Cassation of Egypt, Case number 30342 of 70.
[341] See, eg, The Court of Cassation of Egypt, Case number 12167 of 77.

It is submitted that the problems with the illicit-enrichment offence in relation to the presumption of innocence are twofold. First, placing the burden of proof on the accused person constitutes, in principle, a breach of the presumption of innocence. In criminal cases, the full burden of proof should be placed on the prosecution in order to comply with the presumption of innocence.[342] Therefore, even if the legal presumption is rational, the fact that the accused person bears the burden of proof makes the illicit enrichment always in danger of violating the presumption of innocence.

Secondly, the legal presumption as evidence to prove the case is regarded as sufficient evidence to reach the conviction in Kuwait. Therefore, if the legal presumption included is not sufficiently rational, the proof of the case, through the employment of the legal presumption, may violate the presumption of innocence. What may be rational in the illicit-enrichment offence is that acquiring disproportionate wealth that cannot be explained may suggest that the property is proceeds of crime. This is especially the case when the calculation of the disproportionate wealth is confined to a reasonable period, and a fair warning is communicated to the person that he/she may be subject to an illicit-enrichment offence. In this situation, it is rational to assume, from the existence of the disproportionate wealth coupled with a lack of justification, that the property is the proceeds of crime. However, the illegitimacy in the criminalisation is not connected to the result of the crime; rather, it is mainly connected to the conduct of the crime.[343] A person who is in possession of the proceeds of a crime is, at most, suspected of committing the crime.[344]

There are two issues that undermine the rationality of the legal presumption included in the illicit-enrichment offence. The first is that acquiring disproportionate wealth does not necessarily mean a public official committed the corruption crime himself or herself. The public official may be a third party who acquired the proceeds of corruption, regardless of the issue of whether he/she is bona fide. The crime requires the existence of disproportionate wealth resulting from the occupancy of public office. The disproportionate wealth may not be a result of his/her criminal conduct. The second issue is that the existence of disproportionate wealth during the tenure of the public official does not necessarily mean that the wealth was

[342] See chapter Two.
[343] Suror, Ahmad Fatehi, الوسيط في قانون العقوبات- القسم الخاص *[Meditator in the penal code - special section* (Dar Alnahdha Alarabiya, 2016) 458.
[344] Ibid.

acquired because of the office. A public official is an ordinary person who may commit other crimes, such as drug trafficking. Therefore, it is normal to assume that the proceeds were generated from a criminal offence unrelated to the public office. The problem is compounded, as there is a compelling reason for the public official not to mention the origin of wealth derived from other criminal offences: it may expose the public official to a more robust punishment. Therefore, the very existence of disproportionate wealth coupled with a lack of justification may not satisfy the rationality test for accepting the legal presumption.

In order to combat corruption, and because of the difficulties in proving it, some scholars argue that it is necessary to disregard the violation of the presumption of innocence.[345] This argument, however, should not be accepted, because the precedent it sets may undermine the whole of the protection regime included in criminal law and its procedures. The necessity argument and the difficulties in proving the commission of the criminal offence may be applicable to a wide range of offences.[346] Therefore, justifying the violation of the presumption of innocence because of the necessity to deal with the ramifications of corruption, and because of the difficulties in proving the commission of the crime, may lead to a criminal law in which the accused is guilty until proven otherwise. Similarly, some scholars justify the deviation from the presumption of innocence on the basis of the difficulties that globalisation brings to successful prosecution according to the criminal norms.[347] This argument should be rejected also since citing the difficulties in international cooperation as a justification for the deviation from criminal norms may also apply to most criminal offences which may result in the collapse of the whole of the protection regime of the criminal law.

The right to silence and protection against self-incrimination

The right to silence is another right at stake in regard to the illicit-enrichment offence. Many nations around the world have recognised the right to silence, whether expressly or as a

[345] See, eg, Wilsher, Dan, 'Inexplicable wealth and illicit enrichment of public officials: A model draft that respects human rights in corruption cases' (2006) 45(1) *Crime, Law and Social Change* 27; Anwar Almusaada, ' جريمة الإثراء غير المشروع بين القبول و الرفض: دراسة مقارنة'The Crime of Illicit Enrichment between Acceptance and Rejection: A Comparative Study'] (2018) 3 *Kuwait International Law School* 245.

[346] See, eg, Obaid, Osama Hasanain, السياية الجنائية في الكسب غير المشروع *[The Penal Policy in Illicit Enrichment]* (Dar Alnahdha Alarabia, 2016) 34.

[347] See, eg, Kofele-Kale, Ndiva, 'Presumed Guilty: Balancing Competing Rights and Interests in Combating Economic Crimes' (2006).

consequence of the presumption of innocence.[348] The right to silence holds that the accused person has the right to remain silent and not answer any questions.[349] It also prohibits the interpretation of such silence in a way that negatively impacts the accused.[350] The accused person, therefore, has the right to remain silent and is under no obligation to defend himself; and the silence should not be understood as conceding the criminal charge against him. In Kuwait, the criminal process law expressly provides for the right to silence for the accused person.[351] As the illicit-enrichment offence requires the accused person to provide a satisfactory explanation in order to avoid conviction, illicit enrichment may infringe on the right to silence.

The protection against self-incrimination is another issue at stake in relation to the illicit-enrichment offence.[352] This is mainly because the illicit-enrichment offence places the accused person in a situation where he/she may be obliged to incriminate him/herself. The problem with illicit the enrichment offence is that its scope is limited to certain offences related to the public official's office. Because of these limitations, the illicit-enrichment offence can effectively place the accused in a dangerous position when the source of wealth is from other unrelated criminal offences. In this situation, the accused may be obliged to provide evidence of crimes unrelated to a criminal offence in order to escape conviction for the illicit-enrichment offence. This is especially the case if the other offence entails less punishment than that included in the illicit-enrichment offence.[353]

[348] See generally Almusaada, Anwar, 'جريمة الإثراء غير المشروع بين القبول و الرفض: دراسة مقارنة[The crime of illicit enrichment between acceptance and rejection: a comparative study]' (2018) 3 *Kuwait International Law School* 245 265-267.

[349] See generally, Almusaada, Anwar, 'جريمة الإثراء غير المشروع بين القبول و الرفض: دراسة مقارنة [The crime of illicit enrichment between acceptance and rejection: a comparative study]' (2018) 3 *Kuwait International Law School* 245 265-267; Aleifan, Meshari, 'حق المتهم في عدم إجباره على تقديم دليل إدانته في القانون الكويتي - دراسة تحليلية و مقارنة مع القانون الأمريكي[The right of the accused not to be compelled to submit evidence of his guilt in Kuwaiti law - an analytical and comparative study with American law]' (2016) 40(1) *Journal of Law* 119.

[350] Ibid.

[351] Law number 17 of 1960 section 98.

[352] See generally, Skead, Natalie and Murray, Sarah, 'The politics of proceeds of crime legislation' (2015) 38 *UNSWLawJl* 455.

[353] Having said that, some of the issues arising from the protection against self-incrimination can be dealt with through providing protection of the accused in relation to the evidence provided in the illicit-enrichment offence.

The possibility of double deprivation and undermining the interests of the victim of crime

The absence of the protection of self-incrimination may generate further issues. In criminal law, the verdict of the criminal court, when it becomes final, is considered as truth that cannot be proven otherwise.[354] If, for example, the public official engaged in a criminal offence other than that which is related to his office and opts not to explain the disproportionate wealth in order to prevent conviction for another robust criminal offence, there would be a possibility for double deprivation and undermining the interests of victims of crime. For instance, if the public official is convicted for the unrelated criminal conduct, and that offence entails a value-based system of confiscation, there is a possibility that the person will be subjected to double deprivation because that person cannot demonstrate that the wealth that was confiscated due to an illicit-enrichment offence is, in fact, the proceeds of a crime arising from this unrelated criminal offence. A similar problem can arise if the second offence is a victim crime and the victim institutes a civil claim to recover, say, stolen property. Here there are two possibilities. The first is that the convicted person will be subjected to double recovery. The second is that the convicted person does not have enough property, which could undermine the right of the victim to recover his/her property.

Having discussed illicit enrichment offence as an instrument to overcome the problem of the linkage requirement, this next section examines money laundering offences.

Money laundering laws as a tool to overcome the difficulties in proving the criminal origin of the property

Having examined illicit enrichment offence as a way to overcome the problem of the linkage requirement, this section examines money laundering offences as a tool to overcome this problem. The section begins by considering money laundering offences as a way to overcome the difficulties in establishing the linkage requirement in Australia and the UK. It then considers money laundering laws in Kuwait. It concludes with an attempt to answer the question of whether Kuwait should use money-laundering offences as a tool to overcome the difficulties in proving the criminal origin of the property.

[354] See generally, Alsammak, Ahmad, & Nassrallah, Fadhel, شرح قانون الاجراءات و المحاكمات الجزائية الكويتي *[Explanation of the Kuwaiti Code of Criminal Procedure and Trial]* (Kuwait University -Law School, 2015) 616.

Money laundering laws in Australia and the UK[355]

In Australia, money-laundering offences are included under Division 400 of the *Federal Criminal Code Act 1995* (Cth). Money-laundering offences essentially criminalise dealing with money or property constituting proceeds of crime. The proceeds of crime denote "any money or other property that is wholly or partly derived or realised, directly or indirectly, by any person from the commission of an offence against a law of the Commonwealth, a State, a Territory or a foreign country that may be dealt with as an indictable offence (even if it may, in some circumstances, be dealt with as a summary offence)".[356] A person is dealing with money or other property if he/she does the following: (a) receives, possesses, or conceals money or other property; (b) imports money or other property into Australia; (c) exports money or other property from Australia; or (d) engages in a banking transaction relating to money or other property.[357] Depending on their state of mind and the value of money or property that a person deals with, Sections 400.3–400.8 provide for a wide range of money-laundering offences with different penalties.[358] Section 400.9 differs from the previous six sections in that it criminalises dealing with property that is reasonably suspected of being the proceeds of crime. Self-laundering is criminalised. In other words, the person who committed the offence from which the proceeds of crime are generated can also be prosecuted for money-laundering offences. However, case laws have prevented the prosecution of both offences on a number of occasions, especially when the predicate offence wholly covered the money-laundering offence.[359] Criminalising self-laundering is significant for using the content of the offence to overcome the difficulties in meeting the linkage requirement. This is because if self-laundering does not constitute a criminal offence, the person who committed the predicate offence may need to be identified in order to prove the criminal origin of the property in the money laundering offences.

What is important for this thesis is how to prove the criminal origin of the property in money-laundering offences. Section 400.13 stipulates that it is not a condition to establish that money or property are proceeds of crime to prove the particular criminal offence from which the proceeds are derived or realised. Nor it is necessary to establish the particular person who

[355] The confiscation laws of Australia and the UK will be analysed in more depth in chapter Four.
[356] The Criminal Code Act (Cth) (1995) s 400.1.
[357] Ibid s 400.2.
[358] Ibid s 400.3-400.8.
[359] See, eg, *Nahlous v R* [2010] NSWCCA 58; *Thorn v R* [2009] NSWCCA 294.

committed the predicate offence.[360] While it is clear that the particular person who committed the predicate offence need not be identified, it is not clear what particularities are required to establish the predicate offence. The issue of how to prove the criminal origin of the property, therefore, needs further explanation. In Chen v Director of Public Prosecutions,[361] J Garling provided guidance on what is required to establish the predicate offence:

[89] Unless the prosecution identifies the relevant indictable offence, it is not open to a jury to conclude that the money or other property constituted an instrument of crime.

[99] The effect of section 400.13 of the Criminal Code is only to excuse the prosecution from proving a particular offence, that is, an offence particularised by reference to a person, date, time, place, and any other specific fact, matter or circumstance which would need to be particularised either in the indictment or else to enable the accused to prepare a defence to a specific charge.

The effect of this proposition, in substance, may be to require the prosecution to identify the criminal offence as particularised in a provision of an act.[362] However, in Lin v R,[363] M Justice Simpson seems to suggest that it is sufficient, in relation to the degree of the specificity of the predicate offence, to establish the class of indictable offence rather than identify a breach of particular provision:

> *In each case, identification of the class of indictable offences from which the money or property is alleged to have been derived or realised (proceeds of crime) … is necessary … it is not necessary to identify a particular offence, or the commission of an offence by a particular person.*

Therefore, it is not completely settled how the prosecution needs to particularise the predicate offence in order to prove the money laundering offence.[364] It must be noted, however, that the previous discussion on how the criminal origin of the property needs to be proved was concerned with sections 400.3–400.8. Section 400.9 pertains to dealing with property reasonably suspected of being a proceed of crime. It includes a number of circumstances and

[360] The Criminal Code Act (Cth) (1995) s 400.13.
[361] *Chen v Director of Public Prosecutions* [2011] NSWCCA 205.
[362] Garling J stated that "Nowhere did it name an Act or a provision of an Act that it said was breached. It did not identify anything other than a generalised allegation of tax evasion. See Ibid 205 [90].
[363] *Lin v R* [2015] NSWCCA 204 [10].
[364] See generally, Australia's Federal Prosecution Service, 'Money Laundering – Guidance for Charging Offences under Division 400 of the Code' (National Legal Directions, 2017).

situations in which such reasonableness is taken to be fulfilled. Namely, the requirement to establish that the property in question is reasonably suspected of being a proceed of crime is taken to be satisfied in the following situations:

> *(a) the conduct referred ... involves a number of transactions that are structured or arranged to avoid the reporting requirements of the Financial Transaction Reports Act 1988 that would otherwise apply to the transactions; or*
>
> *(aa) the conduct involves a number of transactions that are structured or arranged to avoid the reporting requirements of the Anti-Money Laundering and Counter-Terrorism Financing Act 2006 that would otherwise apply to the transactions; or*
>
> *(b) the conduct involves using one or more accounts held with ADIs (Authorised deposit-taking institution) in false names; or*
>
> *(ba) the conduct amounts to an offence against section 139, 140 or 141 of the Anti-Money Laundering and Counter-Terrorism Financing Act 2006; or*
>
> *(c) the value of the money and property involved in the conduct is, in the opinion of the trier of fact, grossly out of proportion to the defendant's income and expenditure over a reasonable period within which the conduct occurs; or*
>
> *(d) the conduct involves a significant cash transaction within the meaning of the Financial Transaction Reports Act 1988, and the defendant:*
>
> *(i) has contravened his or her obligations under that Act relating to reporting the transaction; or*
>
> *(ii) has given false or misleading information in purported compliance with those obligations; or*
>
> *(da) the conduct involves a threshold transaction (within the meaning of the Anti-Money Laundering and Counter-Terrorism Financing Act 2006) and the defendant:*
>
> *(i) has contravened the defendant's obligations under that Act relating to reporting the transaction; or*
>
> *(ii) has given false or misleading information in purported compliance with those obligations; or*
>
> *(e) the defendant:*
>
> *(i) has stated that the conduct was engaged in on behalf of or at the request of another person; and*
>
> *(ii) has not provided information enabling the other person to be identified and located.*

In relation to Section 400.9, therefore, the existence of the above-mentioned situations indicates that the property or money is reasonably suspected of being a proceed of crime without a need to establish the particularities of the predicate offence.

In the UK, money-laundering offences are included in part 7 of the *Proceeds of Crime Act 2002*. In general, money-laundering offences cover concealing, acquiring, using and possessing "criminal property". Property constitutes "criminal property" if the following conditions are met. The first is that "it constitutes a person's benefit from criminal conduct or it represent such a benefit".[365] The second is that the alleged offender knows or suspects that "it constitutes or represents such a benefit".[366] The issue as to how the Crown can prove the property is criminal property had not been settled until the case of Anwoir.[367] In Anwoir, the court of appeal provided two approaches to prove the property was criminal property. The first was "by showing that it derive[d] from conduct of particular kind or kinds and that conduct of that kind or those kinds is unlawful". The second was "by evidence of the circumstances in which the property [was] handled, which [was] such as to give rise to the irresistible inference that it can only [have been] derived from crime".

Money laundering laws in Kuwait[368]

In Kuwait, money-laundering offences are regulated under the law number 106 of 2013.[369] A person commits a money-laundering offence if he/she knows that the property is the proceeds of crime and he/she intentionally commits the following:[370]

[365] *Proceeds of Crime Act (2002)* s 340 (3).
[366] Ibid.
[367] See generally, McCluskey, D, 'Money Laundering: The Disappearing Predicate' (2009) 10 *Crim LR* 719; R E Bell, 'Abolishing the Concept of "Predicate offence"' (2002) 6(2) *Journal of Money Laundering Control* 137; Walters, V, 'Prosecuting Money Launderers: Do the Prosecution Have to Prove the Predicate Offence?' (2009) 8 *Crim. LR* 571.
[368] For a discussion on money laundering offences in Arabic legislations, see Abdulthaher, Ahmad, المواجهة الجنائية لغسيل الأموال في التشريعات العربية *[Facing Money Laundering in Arabic Legislations]* (Dar Alnahdha Alarabia, 2013); Alharbi, Alyamama, غسيل الأموال الظاهرة الاقتصادية دراسة تحليلية تطبيقية مقارنة *[Money Laundering Economic Phenomenon A Comparative Analytical Study]* (Master Thesis, Kuwait University, 2002); alosaimi, Samera, جريمة غسيل الأموال في ظل قوانين دول مجلس التعاون الخليجي دراسة مقارنه *[The crime of money laundering under the laws of the Gulf Cooperation Council countries comparative study]* (Master Thesis, Kuwait University, 2008); Althaferi, Fayez, مواجهة جرائم غسيل الأموال *[Confronting Money Laundering Crimes]* (Academic Publication Council, 2004).
[369] Law No. 106 of 2013.
[370] Law No. 106 of 2013 section 2.

"(a) Transfers, delivers or exchanges the property to hide or conceal the criminal nature of the property or assist the perpetrator of the predicate offence to escape the legal consequences.

(b) Conceals or disguises the true nature of the property, its origin, its location, or its ownership

(c) acquires, possesses or uses the property."

The proceeds of crime are defined as any money or property arising or obtained directly or indirectly from the commission of an offence, including the profits, interests, rent or other output of such funds, whether they remain intact or transferred, in whole or in part, to other funds.[371] Some nations confine the predicate offence that can give rise to a money-laundering offence to specific offences.[372] Other countries provide for a non-specific approach for the predicate offence, in which every criminal offence can give rise to a money-laundering offence. This non-specific approach is adopted in Kuwait. Therefore, every criminal offence can give rise to money-laundering offences, subject to double criminality.[373]

Self-laundering is criminalised in Kuwait. In other words, the person who committed the predicate offence that generated the property that has been laundered can be prosecuted and convicted for both the predicate offence and the money-laundering offence.[374] However, there is a controversy over whether self-laundering is criminalised in all situations. For some scholars, self-laundering is not criminalised in relation to the acquisition and possession of the proceeds of crime, since in these situations, the predicate offence completely covers the money-laundering offence.[375] In other words, the commission of the predicate offence would necessarily entail the acquisition and possession of the proceeds of crime with knowledge of that, and therefore, self-laundering cannot be applied in the situation of the acquisition and possession in principle.[376] For others, however, self-laundering is criminalised in all situations.

[371] Ibid section 1.
[372] See generally, Abdulthaher, Ahmad, المواجهة الجنائية لغسيل الأموال في التشريعات العربية *[Facing Money Laundering in Arabic Legislation]* (Dar Alnahdha Alarabia, 2013) 188-219.
[373] Law No. 106 of 2013 section 1.
[374] Ibid section 2.
[375] Suror, Fatehi, Ahmad, الوسيط في قانون العقوبات- القسم الخاص *[Meditator in the penal code - special section* (Dar Alnahdha Alarabiya, 2016) 995.
[376] Ibid.

The issue as to how the predicate offence that generated the property needed to be proved has generated controversy. The new law of money laundering is clear in that the conviction of the predicate offense does not need to be secured. However, the law is silent on the particularities of the predicate offence. For some scholar, the existing of the predicate offence is the existing of the material element of the offence only.[377] Any matters related to the person who committed the predicate offence should be disregarded.[378] According to this view, the property can be considered as proceeds of crime even though the perpetrator of the criminal offence has not been identified.[379] Moreover, even if the predicate offence has been accompanied by permissibility causes which should in principle render the act lawful, the property still considered as proceeds of crime,[380] since permissibility causes are related to the individual.

Case laws, however, seem to indicate that the particular criminal offence that generated the property needs to be proven, as it is particularised in a specific provision of law.[381] In other words, the elements of the particular criminal offence, including the material element and the mental element, that generated the property must be proved to the level of intimate conviction in order to prove that the property is a proceed of crime.

The question is, should Kuwait use money-laundering offences as a tool to overcome the difficulties in proving the criminal origin of the property? It seems that there are some concerns and obstacles to doing so in Kuwait.

First, it may be problematic to make the proof of money-laundering offences easier than the proof of the predicate offence. Money-laundering offences are often more serious offences than predicate offences. The danger in easing the standard of proof in money laundering is that these offences may become the ones most commonly prosecuted for profit-driven crimes. While it is true that the prosecution of money laundering (which is a more serious offence) is not unjust, it should only occur when the harm in the commission of a money-laundering offence is obvious and probable. A money-laundering offence is often drafted broadly to capture conduct unlikely to harm or risk harming the interests protected in the criminalisation. As a result, relaxing the way in which money-laundering offences should be proven may lead to a criminal

[377] Al-Manea, Adel Ali, 'Crime of Money Laundry' (2005) 29(1) *Journal of Law* 71 92-93.
[378] Ibid.
[379] Ibid.
[380] Ibid.
[381] The Court of Cassation, Case number 685 of 2005.

law that lacks retrospective proportionality.[382] This is because the utilisation of the money-laundering offence as a way to overcome the difficulties in establishing the linkage requirement, coupled with the broad drafting of the money-laundering offence, may blur the line between a serious crime and a less serious one.

Secondly, since self-laundering may not be criminalised in Kuwait in the situation of the acquisition and possession of the proceeds of crime, the use of money laundering as a tool to overcome the difficulties in establishing the linkage requirement would be problematic. This is especially the case when the manner in which the criminal origin of the property is proved does not entail conduct beyond mere possession or acquisition of the proceeds of crime. For instance, if it is allowed to infer from the disproportionate wealth of the person that the property is proceeds of crime, then the person may be punished for money laundering even though self-laundering is not criminalised. In such situations, the person cannot be liable for the money-laundering offence. In other words, it is necessary to enquire on whether the person the subject of money laundering offence is the same person who committed the criminal offence that generated the proceeds of crime which may render the utilisation of money laundering offence as a tool to overcome the difficulties associated with the linkage requirement difficult.

One of the main obstacles to proving the criminal origin of the property through the class of crime or through the concept of irresistible inference is in whether the court is allowed to declare the existing of the criminal offence without establishing the violation of a specific provision. The requirement of matching the criminal conduct committed with a specific provision is often connected to the principle of legality (*nullum crimes sine lege, nulla poena sine lege*).

The principle of legality, however, does not have substantive meaning without requiring the court to be satisfied with the existence of all the elements of the particular criminal offence. Permitting the court to declare the existence of a criminal offence without establishing the particular criminal offence would undermine, in substance, the objective and the protection of the principle of legality. For instance, the protection of the principle of legality against establishing vague criminal offence would be useless if the court were allowed to declare the

[382] Retrospective proportionality refers to the imposition of a punishment for a crime committed in the past that acknowledges the seriousness of the crime concerned.

existence of a criminal offence without referring to a specific criminal offence. In order to obey the principle of legality, the court is required to establish that the facts of the case match a particular criminal offence exactly as stated in a specific provision.[383] It is not sufficient for the court to be satisfied that the facts of the case are subject to the criminal law in general.[384]

Extended criminalisation explained

Previous sections have examined extended criminalisation as a solution to overcome the problem of the linkage requirement of conviction-based confiscation. It has been demonstrated that extended criminalisation as an instrument to overcome the problem of the linkage requirement may involve violation of individuals' rights and undermining their interests. This section attempts to get a deeper understanding of the use of extended criminalisation to overcome the of the linkage requirement.

Extended criminalisation offers an indirect route to circumvent the conception of crime as wrongdoing. This is especially the case when the nature of confiscating the proceeds of crime is regarded as punishment. Extended criminalisation attempts to accomplish two main aims. The first is to penalise the offender for the crime committed, and the second is to remove or recover a property representing a significant value. Specifically, the properties involved in such criminalisation are likely to be the harm or the risk of harm that the criminalisation sought to prevent and protect. In a money laundering offence, the harm of property consists of protecting the economy, while in an illicit enrichment offence, it consists of combating corruption generally and protecting public money mainly.

Money laundering offences and illicit enrichment offences attempt to overcome the conception of crime as wrongdoing. In order to deal with proceeds of crime generally as opposed to

[383] See generally, Husni, Mahmood Najeeb, شرح قانون العقوبات- القسم العام- النظرية العامة للجريمة و النظرية العامة للعقوبة و التدبير الإحترازي *[Explanation of the Penal Code -General Section- The general theory of crime and general theory of punishment and precautionary measure]* (Dar Almatboa'at Aljama'eya, 8th ed, 2017) 78; Alsaifi, Abdulfattah, المطابقة في مجال التجريم*[Conformity in Criminalization]* (Dar Almatboaat Aljameaa, 2017).

[384] See Sowailem, Mohamad Ali, تكييف الواقعة الإجرامية *[Adaptation of Criminal Offense]* (PhD Thesis, Ain Shams University, 2010) 164.

specific conduct that generated the property, the criminalisation becomes less concerned with the behaviour and more concerned with the property as proceeds of crime. In doing so, rather than prescribing the prohibited conduct that generated the proceeds of crime, what is prescribed is the result of proceeds generated in the past regardless of the specific conduct. Because there is a lack of an adequate legal mechanism that allows for the deprivation of the proceeds of crime generally at the stage of the response to crime, the property is attached to the crime as proceeds of crime through the criminalisation.

Money laundering offences consist of a predicate offence that generated the proceeds of crime and dealing with such proceeds. One of the main aims of money laundering offence is to deal with harm steams from property. Since the aim is not to impose retributive punishment for the predicate offence, the conception of crime of the predicate offence is not wrongdoing. This permit regarding the property as proceeds of 'crime' without identifying the perpetrator or the specific conduct that generated the property. The deviation from the conception of crime as wrongdoing be correct in theory; in reality, however, money laundering offences can indirectly punish the perpetrator of the predicate offence. Therefore, adhering to the conception of crime as wrongdoing in the situation where money laundering offences punish the perpetrator indirectly is preferable.

Contrary to the money laundering offence, in which the conception of crime can prevail over the conception of crime as wrongdoing in relation to the predicate offence, illicit enrichment involves a partial move away from the conception of crime as wrongdoing. An illicit enrichment offence criminalises the unjust enrichment rather than the wrongdoing committed. The proof is not placed on whether the person committed the crime but rather whether the person acquires proceeds of crime. However, an acquisition of the proceeds of crime assumes the commission of the wrongdoing by the person. The focus on the unjust enrichment rather than the wrongdoer can partly explain why the presumption included in the offence may not be fully rationale. The focus is placed more on removing the unjust enrichment rather than punishing the wrongdoer. Illicit enrichment offence offers partial concentration on the wrongdoer through the focus on the proceeds of crime in the stage of criminalisation. This necessarily marginalised the concept of the wrongdoer. This can explain why illicit enrichment offences which include presumption are not fully rational, since the rationality is more concerned with the criminal provenance of the property rather than the wrongdoing of the person.

The move towards the proceeds of crime as the centre of criminalisation can also explain the lack of proportionality in both money laundering offences and illicit enrichment offences. In illicit enrichment offence, the same conduct could have different kinds and amounts of punishment, depending on whether the specific conduct that generated the proceeds can be established and the conviction for it can be secured. In money laundering offence, different kinds of conduct may result in the same amount of punishment.

The concentration on the provenance of the property rather than the specific behaviour that is considered wrong (and the wrongdoer within the framework of punishment as retribution) has a number of negative impacts. One is that the only justification for the deviation from criminal norms is the necessity to combat crime rather than have concrete justification. This can have a devastating impact on criminal protection at large if it is accepted. Moreover, the concentration on the property rather than the specific behaviour and the wrongdoer has a negative impact on achieving retrospective proportionality. Since the focus is placed more on the provenance of the property rather than the wrongdoing and the wrongdoer, the rationality may be undermined in relation to the wrong committed and the wrongdoer.

Conclusion

Extended criminalisation in which property is regarded as having a criminal origin, even-though the state has not proven the specific criminal conduct from which the property is derived, has been invoked indirectly to overcome the conception of crime as wrongdoing. It mainly provides for an indirect route to circumvent the requirements to prove the specific criminal offence that generated the property. The methods through which the proof of specific criminal offence is circumvented vary between illicit enrichment offences and money laundering offences.

In illicit enrichment offences, the employment of the legal presumption serves as a way to prove the criminal derivation of the property and the commission of the criminal offence by the accused person in question.

Money laundering offences, on the other hand, consist of a predicate offence and deal with the proceeds generated from that predicate offence. Since the aim of a money laundering offence is not to punish the predicate offence, the specific criminal act from which the proceeds are generated becomes less significant. The common method of proving the criminal origin of the property is through establishing the class of crime rather than the specific criminal act that generated the property. Another approach is through the employment of legal presumption that in certain situations, the property is regarded as proceeds of crime or through the concept of irresistible inference that the property has a criminal origin. In both money laundering offences and illicit enrichment offences, the criminal origin of the property is not proved by establishing the particular criminal conduct that generated the property, but rather by evidence that points to the criminal derivation of the property in a general sense.

This chapter demonstrated that money laundering offences should not be considered as a way in which to overcome the linkage requirement, mainly because this may blur the line between a serious offence and a less serious one. Moreover, illicit enrichment offences should not be maintained in Kuwait, mainly because the justifications for not affording the accused person the criminal law safeguards are unjustifiable. That is, the reliance on needing to deal with the practical difficulties as the sole justification may result in undermining the whole protective regime of the criminal law. Therefore, it is recommended that an alternative approach be explored to deal with the practical difficulties in establishing the linkage requirement, which may overcome the deficiencies in dealing with it by way of extended criminalisation.

CHAPTER 4 The move towards non-conviction-based confiscation

Introduction

Having established the need to explore alternative approaches to overcome the problem of the linkage requirement, this chapter examines NCBC. Chapter one highlighted some of the practical difficulties that provoked the move towards a non-conviction-based confiscation model. This move cannot be properly understood, however, without also examining its theoretical justifications. Therefore, this chapter is primarily concerned with the development of non-conviction-based confiscation. It explores both the justifications advanced for the move towards non-conviction-based confiscation and the features of property-directed confiscation and unexplained-wealth confiscation in Australia and the UK.[385] Because Australian confiscation law varies considerably among the States and Territories as well as the Commonwealth of Australia, the present discussion is limited to an examination of Commonwealth laws only.[386]

The development of the confiscation regime in Australia

Before proceeding to examine the features of non-conviction-based confiscation, it will be helpful to provide a brief overview of the development of confiscation laws in Australia and the UK. In Australia, the impetus for the introduction of laws regulating the comprehensive confiscation of the proceeds of crime was a number of royal commissions of inquiry established to combat organised crime and corruption in the 1970s and 1980s. They stressed the need to

[385] The justifications for exploring non-conviction-based confiscation in Australia and the UK and the relevance to Kuwait are set out in the methodology section above.

[386] For an analysis of the State and Territory confiscation provisions, see Andrew Goldsmith, David Gray and Russell G Smith, 'Criminal assets recovery in Australia' in Colin King and Clive Walker (eds.) *Dirty Assets*, Farnham: Ashgate (2014), pp. 115-40.

focus on the financial aspect of crime in order to combat crime effectively.[387] For instance, Frank Costigan QC stated that "the most successful method of identifying and ultimately convicting major organised criminals is to follow the money trail".[388] Some of the royal commissioners urged implementation of the confiscation of the proceeds of crime independently of the conviction of an offender.[389] It was predicted that conviction, especially of heads of criminal organisations, would be difficult to secure.[390] Nonetheless, the Attorney-General's standing committee did not act upon the calls for NCBC by the royal commissioners. Instead, in 1985, it developed a confiscation scheme that depends on securing a conviction in order to trigger the confiscation regime.[391]

At the Commonwealth level, the first comprehensive confiscation regime was developed through the *Proceeds of Crime Act 1987* (Cth). The confiscation scheme provided by that law, however, was not strictly speaking conviction-based confiscation. The typical conviction-based confiscation model requires that the property and benefits sought for confiscation be limited to those proved to be connected to the criminal offence for which the conviction was secured.[392] In the *Proceeds of Crime Act 1987* (Cth), the conviction of certain serious offences allows not only for confiscating property connected to the offences for which a conviction has been secured, but extends to all the property of the convicted person, including that over which the defendant has effective control, unless it was proven by the defendant that the property in question was legitimately acquired.[393]

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[387] J Moffitt, 'Royal Commission of Inquiry in Respect of Certain Matters Relating to Allegations of Organised Crime in Clubs' (New South Wales Government, 15th August 1974); E S Williams, 'Australian Royal Commission of Inquiry Into Drugs: Report' (Australian Government Publishing Service, 1980); Donald Gerard Stewart, 'Royal Commission to Inquire Into Certain Matters Related to Drug Trafficking' (0642870373, March 1983); Frank Costigan, 'Royal Commission on the Activities of the Federated Ship Painters and Dockers Union' (0644037466, Legislative Assembly, 26 October 1984).

[388] Frank Costigan, 'Organized Crime and a Free Society' (1984) 17(1) *Australian & New Zealand Journal of Criminology* 7-12.

[389] See, eg, E S Williams, 'Australian Royal Commission of Inquiry Into Drugs: Report' (Australian Government Publishing Service, 1980) cited in Donald Gerard Stewart, 'Royal Commission to Inquire Into Certain Matters Related to Drug Trafficking' (0642870373, March 1983) 646.

[390] Athol Moffitt, *A Quarter to Midnight: The Australian Crisis: Organised Crime and the Decline of the Institutions of State* (Angus & Robertson, 1985) 142-143.

[391] David Lusty, 'Civil Forfeiture of Proceeds of Crime in Australia' (2002) 5(4) *Journal of Money Laundering Control* 345-347.

[392] Michael Kilchling, 'Comparative Perspectives on Forfeiture Legislation in Europe and the United States' (1997) 5 *Eur. J. Crime Crim. L. & Crim. Just.* 342-347.

[393] *Proceeds of Crime Act 1987* (Cth) Division 4.

This kind of confiscation is often called 'extended confiscation' in legal literature.[394] It is called 'extended confiscation' because the range of the property and benefits that can be confiscated extends beyond what is available under the conviction-based confiscation model. Although the extended confiscation model shares with the conviction-based confiscation model the notion that a conviction is necessary to trigger confiscation, it differs in that the extended confiscation model does not require a linkage requirement. Whereas a conviction for at least one (certain) offence is a requirement under the extended form of confiscation, the scope of property subject to confiscation is not confined to the property generated by the offence for which conviction was secured. Instead, the range of property that can be subject to confiscation goes beyond the property derived from the offences for which conviction is secured. It can extend to proceeds generated from other criminal conduct.[395] A conviction of at least one (certain) offence, therefore, allows for the deprivation of a wide range of property derived from other criminal activities.

The development of extended confiscation rests mainly on the assumption that conviction-based confiscation is not well-suited for confiscating criminally acquired assets committed in the form of serial and continuing activities.[396] In the case of serial and continuing criminal activities, it is a requirement to convict the person for all criminal offences from which the proceeds are derived in order to fully deprive the convicted person of illicit assets under the criminal confiscation model. In many situations, however, law enforcement authorities fail to intercept previous criminal activities committed by the convicted person and thus lack sufficient evidence to warrant prosecution and conviction for all offences committed. Since, under the conviction-based confiscation model, a link must be established between the property sought to be confiscated and the offence for which conviction is secured, the inability to secure a conviction for all of the offences from which criminally acquired assets are derived and to

[394] Michele Simonato, 'Extended Confiscation of Criminal Assets: Limits and Pitfalls of Minimum Harmonisation in the EU' (2016) *European Law Review* 727; Johan Boucht, 'Extended Confiscation: Criminal Assets or Criminal Owners?' in Michele Simonato, Katalin Ligeti (ed), *Chasing Criminal Money: Challenges and Perspectives on Asset Recovery in the EU* (Hart publishing, 1st ed, 2017); ForSaith, J et al, 'Study for an Impact Assessment on a Proposal for a New Legal Framework on Confiscation and Recovery of Criminal Assets' (Technical Report for European Commission Directorate General Home Affairs, European Union, 2012).

[395] See, eg, Boucht, Johan, 'Extended Confiscation and the Proposed Directive on Freezing and Confiscation of Criminal Proceeds in the EU: On Striking a Balance between Efficiency, Fairness and Legal Certainty' (2013) 21(2) *European Journal of Crime, Criminal Law and Criminal Justice* 127-129.

[396] See generally 'Confiscation that Counts: A Review of the Proceeds of Crime Act 1987' (0642476322, Australian Law Reform Commission, 1999) 48-83.

link the assets to these offences will prevent the full deprivation of illicit benefits from the convicted person.

The development of extended confiscation may also challenge criminal law norms in relation to the standard and burden of proof. Boucht claims that extended confiscation may be viewed as "an instrument relaxing the otherwise strict standards for the rules of evidence in criminal proceedings relating to confiscation".[397] The way in which the standards of evidence are relaxed varies among jurisdictions. One way of reducing the standards of evidence for confiscation is through lowering the standard of proof required to determine the criminal derivation of the property. For example, some scholars argue that the change of wording in the EU Directive regarding freezing and confiscation of proceeds of crime (from requiring the court to be *fully convinced* that the property in question has a criminal origin to only *convinced*) entails a relaxation to the standard of proof.[398]

A more robust and common way for relaxing the standards of evidence in cases of extended confiscation is to trigger presumptions that certain property has been criminally acquired.[399] It is the burden of the convicted person to exclude the property in question from confiscation by rebutting the presumption through proving the lawful acquisition of the property. Failing to do so will normally result in confiscation of the property.

Although the *Proceeds of Crime Act 1987* (Cth) entailed an extended confiscation model in addition to conviction-based confiscation, the need for relaxing the requirements for confiscation persisted. In 1999, the Australian Law Reform Commission (ALRC) concluded that the confiscation regime provided by the *Proceeds of Crime Act 1987* (Cth) failed to achieve the Act's objectives and did not meet public expectations.[400] It recommended the introduction of confiscation without a need to secure a conviction on two main grounds. The first is the practical difficulties in establishing the criminal derivation of the property from a specific

[397] Boucht, Johan, *The Limits of Asset Confiscation: On the Legitimacy of Extended Appropriation of Criminal Proceeds* (Hart Publishing, 2017) 28.
[398] Simonato, Michele, 'Extended confiscation of criminal assets: limits and pitfalls of minimum harmonisation in the EU' (2016) *European Law Review* 727.
[399] See, eg, Fernandez-Bertier, Michaël, 'The Confiscation and Recovery of Criminal Property: A European Union State of the Art' (2016) 17(3) *Journal of the Academy of European Law* 323-329.
[400] 'Confiscation that counts: A review of the Proceeds of Crime Act 1987' (0642476322, Australian Law Reform Commission, 1999) 48-83.

criminal offence—not only for the serious offence but also for other indictable offences.[401] The second is in the perception that the confiscation of the proceeds of crime does not constitute a criminal punishment; instead, the confiscation of the proceeds of crime rests on the unjust enrichment principle, which justifies the confiscation of the proceeds of crime without a need to secure a conviction.[402] As a result of the report, the *Proceeds of Crime Act 2002* (Cth) was introduced, which included a range of legal avenues that allow for the deprivation of the proceeds of crime without a need to secure a conviction.[403] One of these avenues is property-directed confiscation,[404] whose main aim is to deal with situations when property can be proved to have been derived from a criminal offence, but there is an inability to identify or convict the perpetrator of the criminal offence.[405]

The requirement to prove the existence of, at least, a criminal offence was maintained until the introduction of unexplained-wealth provisions to the *Proceeds of Crime Act 2002* (Cth) by the Commonwealth's *Crimes and Legislation Amendment (Serious and Organised Crime) Act 2010* (Cth). The reason for the introduction of unexplained-wealth provisions was mainly to extend the reach of confiscation provisions to those who are able to distance themselves from criminal activities,[406] as well as to increase the effectiveness of crime prevention.[407]

The development of the confiscation regime in the United Kingdom

In the UK, the development of laws for the confiscation of crime proceeds can be traced back to the Case of R v *Cuthbertson*, in which the House of Lords overturned the confiscation of assets derived from drug trafficking activities because the existing confiscation laws in the *Misuse of Drugs Act* 1971 (UK) did not allow for the confiscation of the whole profits from

[401] Ibid.
[402] Ibid 29.
[403] *Proceeds of Crime Act 2002* (Cth) s47; *Proceeds of Crime Act 2002* (Cth) s49; *Proceeds of Crime Act* 2002 (Cth) s116 (ii).
[404] Ibid s49.
[405] Lusty, David, 'Civil forfeiture of proceeds of crime in Australia' (2002) 5(4) *Journal of Money Laundering Control* 345 375.
[406] Commonwealth, Parliamentary Debates, 24 June 2009, (Robert McClelland, Attorney-General).
[407] Parliament of Australia, 'Parliamentary Joint Committee on the Australian Crime Commission: Inquiry into the Legislative Arrangements to Outlaw Serious and Organised Crime Groups' (2009)114[5.66].

criminal enterprises.[408] As a result of that case, a committee led by Sir Derek Hodgson was formed to examine and deal with loopholes in the laws pertaining to confiscation of the proceeds of crime.[409] The Hodgson Committee recommended the introduction of new confiscation laws, which led to the introduction of the *Drug Trafficking Offences Act* 1986. The Act did not permit confiscation without a need to secure a conviction, but it did entail an extended confiscation model within the confiscation scheme. The *Drug Trafficking Offences Act* 1986 was followed by a series of statutes that allow for confiscation of the proceeds of crime, but the structure of the confiscation regime remains the same.[410]

In extended confiscation, the scope of benefits that can be taken into account in deciding the amount of benefits obtained by the defendant and the burden of proving the criminal provenance of the property or its pecuniary advantage depend on whether or not the defendant maintains a criminal lifestyle. According to Section 75 of the Proceeds of Crime Act, a convicted person is regarded as having a criminal lifestyle if he or she fulfils any of the three tests mentioned in that section. The first is the commission of one of the offences contained in Schedule 2, which include drug trafficking, money laundering, directing terrorism, people or arms trafficking, counterfeiting, intellectual property crimes, offences related to prostitution and child sex, and blackmail.[411] It also includes the inchoate offences related to the above-mentioned offences as well as offences contained in section 44 of the Serious Crime Act 2007.

If at least one of the offences committed by the convicted person is not included in Schedule 2, criminal lifestyle provisions may be activated if the offence constitutes conduct forming part of a course of criminal activity.[412] Section 75 (3) defines two circumstances that qualify conduct as forming part of a course of criminal activity. The first is where the defendant is convicted of three or more offences in the same proceedings, provided that the convicted person has benefited from at least three of these offences.[413] The second way to form part of a course of criminal activity is in the situation where the defendant is convicted on at least two separate

[408] *R v Cuthbertson* [1981] AC 470. See generally, Bullock, Karen & Lister, Stuart, 'Post-Conviction Confiscation of Assets in England and Wale Rhetoric and Reality' in King & Walker (ed), *Dirty Assets: Emerging Issues in the Regulation of Criminal and Terrorist Assets* (Routledge, 2016).
[409] See, Hodgson, Derek, 'Profits of Crime and their Recovery' (Ashgate Pub Co, 1984).
[410] *The Criminal Justice Act 1988*; *The Criminal Justice (International Cooperation) Act 1990*; *The Criminal Justice Act 1993*; *The Drug Trafficking Act 1994*; *The Proceeds of Crime Act* (Cth)*1995*.
[411] *Proceeds of Crime Act 2002* (UK) s75 (2) (a).
[412] Ibid s75 (2) (b).
[413] Ibid s75 (3) (a).

occasions from which he has benefited within the period of the last six years from the start of the confiscation proceedings in question.[414] The third approach to triggering the lifestyle provisions is in the situation where the defendant has committed an offence over a period of at least six months, provided that benefits have been obtained by the defendant from that offence.[415] In the second and third ways to trigger the criminal lifestyle provisions, the law requires that the benefits obtained by the defendant should not be less than 5000 pounds.[416] If this threshold is not satisfied, the lifestyle provisions cannot be activated.

If the defendant is found to have a criminal lifestyle, the scope of benefits that can be taken into account and the burden of proving the origin of the property differs. The first result of determining that the defendant has a criminal lifestyle is that the scope of property liable for confiscation is not limited to his or her 'particular criminal conduct'. Rather, it extends to his 'general criminal conduct'.[417] General criminal conduct refers to conduct occurring before or after the passing of the act and regards property representing the benefits whether obtained before or after the passing of the act.[418] The second result is that four mandatory assumptions contained in Section 10 of the Proceeds of Crime Act are activated regarding whether the defendant has benefited from his general criminal conduct and the quantity of the benefits.

The first assumption is that, over a period of six years from the day when proceedings for the offence against the defendant are started, any property transferred to the defendant at any time within this period is regarded to be obtained as a result of the defendant's general criminal conduct.[419] This does not mean that property obtained before the six-year period is immune from confiscation. Rather, it means that the assumption is not applicable to such property. The confiscation of such property, therefore, requires the applicant to establish that the property is obtained by the balance of probability. The second assumption demands that any property held by the defendant at any time after the date of conviction is to be regarded as property obtained as a result of the defendant's general criminal conduct.[420] The third assumes that any expenditure by the defendant, within the six years starting from the day when proceedings

[414] Ibid s75 (3) (b).
[415] Ibid s75 (2) (c).
[416] Ibid s75 (4).
[417] Ibid s6 (4) (b).
[418] Ibid s76 (2).
[419] Ibid s10 (2).
[420] Ibid s10 (3).

against the defendant for the offence are started, is to be regarded as met by property obtained by the defendant's general criminal conduct.[421] The fourth assumes that the property in question is free from any interests for the purpose of valuing property obtained or assumed to be obtained by the defendant.[422]

In 1995, research conducted by Levi and Osofsky in relation to the existing confiscation of the proceeds of crime laws in England and Wales revealed many difficulties and concerns about the laws and their confiscation practices.[423] One of the key findings was that:[424]

> *Relatively few "Mr Bigs" have been convicted in the courts, and consequently, few are available to have their assets confiscated. Indeed, few have been charged and, therefore, had their assets frozen.*

In 2000, a Cabinet Office Performance and Innovation Unit Report in relation to 'Recovering the Proceeds of Crime' was released,[425] which highlighted the inadequacy of the then confiscation regime and justified the introduction of property-directed confiscation (civil recovery regime). The motivation behind the introduction of a civil recovery scheme is to extend the reach of the confiscation provisions beyond that offered by conviction-based confiscation.[426] Specifically, a civil recovery scheme offers a legal avenue for depriving the proceeds of crime to those who were able to distance themselves from the criminal offence that generated the property.

As a result, the *Proceeds of Crime Act 2002* (UK)was enacted. This Act entails a number of confiscation models, including conviction-based confiscation, extended confiscation, and property-directed confiscation. Unexplained-wealth confiscation is introduced in the *Proceeds of Crime Act 2002* (UK) through the *Criminal Finances Act 2017* (UK). The introduction of unexplained wealth was a result of several government reports concerning corruption and

[421] Ibid s10 (4).
[422] Ibid s10 (5).
[423] Levi, Michael & Osofsky, Lisa, *Investigating, Seizing and Confiscating the Proceeds of Crime* (Citeseer, 1995).
[424] Ibid vi.
[425] A, Performance and Innovation Unit, 'Recovering the Proceeds of Crime' (Cabinet Office, June 2000).
[426] Ibid [5.14].

serious crime.[427] The reports highlighted the need for a more effective proceeds-of-crime regime, especially in relation to assets coming from overseas and hidden in the UK. In order to confiscate such assets, the UK needs international cooperation in gathering evidence concerning their origin.[428] However, the efforts to gather evidence may be hindered. One of the reasons for the introduction of unexplained wealth in the UK is to obviate the need for evidence or reduce the inability to secure evidence in relation to corruption and other serious offences for the purpose of confiscation.[429]

There are, however, numerous arguments against such an approach including the tendency for regulators to go after 'small fry' rather than the 'big fish', thus permitting serious and organised crime to escape financial consequences. In addition, the impact of the regulatory regime on financial institutions needs to be taken into consideration.[430]

The Features of property-directed confiscation

Property-directed confiscation in the UK

Property-directed confiscation is regulated under the term 'civil recovery' in Part 5 of the *Proceeds of Crime Act 2002* (UK).[431] The proceedings for the recovery take place in the High Court against any person whom the enforcement authority thinks is holding 'recoverable property',[432] which is defined as "property obtained through unlawful conduct".[433] Conduct is considered 'unlawful' if: (a) having been committed in any part of the UK, it is unlawful under the criminal law of the part of the UK in which it occurs;[434] or (b) having been committed

[427] HM Government, 'National Security Strategy and Strategic Defence and Security review 2015: A Secure and Prosperous United Kingdom' (The Stationery Office London, 2015); Great Britain Home Dept, Secretary of state United Kingdom, 'Serious and Organised Crime Strategy' (Her Majesty's Stationery Office, 2013); HM Government, 'UK Anti-Corruption Plan' (2014); Transparency International UK, 'Empowering the UK to Recover Corrupt Assets: Unexplained Wealth Orders and Other New Approaches to Illicit Enrichment and Asset Recovery' (2016).
[428] Ibid.
[429] Ibid.
[430] See, eg, Bullock, Karen & Lister, Stuart, 'Post-Conviction Confiscation of Assets in England and Wale Rhetoric and Reality' in King & Walker (ed), *Dirty Assets: Emerging Issues in the Regulation of Criminal and Terrorist Assets* (Routledge, 2016).
[431] This section deals with the main civil recovery scheme in the UK. It does not deal with the forfeiture of cash in Part 5 of the *Proceeds of Crime Act 2002* (UK).
[432] *Proceeds of Crime Act 2002* (UK) s243 (1).
[433] Ibid s304(1).
[434] Ibid s241 (1).

outside the UK, it is considered unlawful under the criminal law of the country or territory in which it occurs and would be unlawful under the criminal law of any part of the UK, had it occurred in that part.[435] A property is 'obtained' through unlawful conduct if a person obtains it by or in return for the conduct.[436] It is not required that a defendant commits an unlawful act himself in order for a property to be regarded as obtained through unlawful conduct; rather, the property can be considered to be obtained by the defendant through unlawful conduct even if the unlawful conduct was committed by another person.[437]

The disposal of property obtained through unlawful conduct does not make it unrecoverable, subject to certain defences, if it is traced to the hands of the person holding it.[438] Moreover, civil recovery is not limited to original property obtained through unlawful conduct. It also extends to property representing the original property in exchange for the original property.[439] If the original recoverable property has been sold, therefore, both the original property and the money acquired as a result of the transaction are, in principle, recoverable. However, in specific circumstances, a civil recovery order is not allowed to be made in regard to both the original property and the property that represents it.[440]

This, however, does not mean there is no protection for those who acquire recoverable property. Section 308 of the *Proceeds of Crime Act* 2002 (UK) stipulates that a property ceases to be recoverable if both of the following conditions are met: "(i) a person disposes of recoverable property; and (ii) the person who obtains it on the disposal does so in good faith, for value and without notice that it was recoverable property".[441]
As part of proving that a property is obtained through unlawful conduct, it is not a requirement to prove that such property is obtained through "the commission of any specific criminal offence, in the sense of proving that a particular person committed a particular offence on a particular occasion";[442] instead, it is sufficient to prove that such property is obtained through

[435] Ibid s241 (2).
[436] Ibid s242 (1).
[437] Ibid.
[438] Ibid s304 (2).
[439] Ibid s305.
[440] Ibid s379.
[441] Section 308 of POCA 2002 (UK) also provides for other situations where a property ceases to be recoverable.
[442] *The Director of Assets Recovery Agency v Szepietowski & Ors* [2006] EWHC (Admin) 3228 [107].

a specific kind or kinds of unlawful conduct.[443] In *Director of Assets Recovery Agency* v *Green*, the court provides more guidance on how the underlying criminal conduct needs to be proved:[444]

> *a description of the conduct in relatively general terms should suffice—'importing and supplying controlled drugs,' 'trafficking women for the purpose of prostitution,' 'brothel keeping,' 'money laundering' are all examples of conduct that are considered unlawful under criminal law if they occur in the United Kingdom. If conduct outside the United Kingdom was being relied on, it is possible that more detail might be*

It is not solely sufficient to demonstrate that "a respondent has no identifiable lawful income to warrant his lifestyle" to prove that a property is obtained through unlawful conduct.[445] However, an inference of the unlawful source of the property can be drawn from the respondent's failure to provide an explanation for that lifestyle or their providing a dishonest explanation.[446] Even if the claimant fails to prove a specific kind of crime from which the property in question has been obtained, the property can be regarded as having been obtained through unlawful conduct if 'irresistible inference' can be drawn from the facts of the case to that effect.[447]

Although the state is only required to prove the case on the balance of probabilities,[448] cogent evidence is also generally required, because civil recovery proceedings may entail serious allegation that a person is engaged in criminal conduct.[449]

An example of the quality of evidence required to prove the unlawful source of the property can be found in the case of *Serious Organised Crime Agency* v *Arran Charlton Coghlan, Claire Lisa Burgoyne*.[450] In this case, the relevant agency brought a civil recovery action against Mr Coghlan in relation to property alleged to be derived from drug dealing. Although Mr Coghlan

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[443] *Proceeds of Crime Act* 2002 (UK) s242 (b).
[444] *Director of Assets Recovery Agency v Green* [2005] EWHC (Admin) 3168 [17].
[445] *Director of Assets Recovery Agency v Olupitan* [2007] EWHC (QB) 162 [22].
[446] *Serious Organised Crime Agency v Gale* [2009] EWHC (QB) 1015 [14].
[447] *Serious Organised Crime Agency v Gale* [2009] EWHC (QB) 1015 [17].
[448] *Proceeds of Crime Act 2002* (UK) s241 (3).
[449] In *R(N) v Mental Health Review Tribunal* [2006] (QB) 468 [62], the court provided guidance on the quality of evidence required when the issue involves serious allegation of the commission of a criminal conduct: "*Although there is a single civil standard of proof on the balance of probabilities, it is flexible in its application. In particular, the more serious the allegation or the more serious the consequence if the allegation is proven, the stronger the evidence must be before a court will find the allegation to be proven on the balance of probabilities".*
[450] *Serious Organised Crime Agency v Coghlan* [2012] EWHC (QB) 429.

denied such allegations, the court was satisfied with the evidence submitted that he had engaged in drug dealing and that this drug dealing was the source of the property. In reaching this conclusion, the court relied on the following evidence:[451]

(1) The lack of evidence of either a legitimate or any source of income;

(2) The evidence of Durr that Mr Coghlan was a drug dealer;

(3) Mr Coghlan's association with known and convicted drug dealers;

(4) His lifestyle;

(5) The cash found following Mr Coghlan's arrest;

(6) The file containing information about money-laundering legislation;

(7) The payment for the development and refurbishment of the Chapel from an unidentified source.

If the High Court is satisfied that a property in question is recoverable, it must make a recovery order,[452] provided that the aggregate value of the recoverable property is not less than GBP 10,000.[453] However, certain exceptions exist. The first exception occurs if the making of a recovery order would be incompatible with any of the Convention rights within the meaning of the Human Rights Act 1988 (UK).[454] In addition, the Court may not make a recovery order if it would be unjust and inequitable to make the order and all of the following conditions are met:[455]

(a) The respondent obtained the recoverable property in good faith;

(b) He took steps after obtaining the property which he would not have taken if he had not obtained it, or he took steps before obtaining the property which he would not have taken if he had not believed he was going to obtain it;

(c) When he took the steps, he had received no notice that the property was recoverable;

(d) If a recovery order were made in respect of the property, it would, by reason of the steps, be detrimental to him.

Section 266 (6) determines two factors that should be taken into account when deciding whether it is just or equitable to make an order. The first is "the degree of detriment that would

[451] Ibid 429[99].
[452] *Proceeds of Crime Act 2002* (UK) s266 (1).
[453] Ibid s278 and *Proceeds of Crime Act 2002* (UK) (Financial Threshold for Civil Recovery) Order 2003.
[454] *Proceeds of Crime Act 2002* (UK) s266 (3) (b).
[455] Ibid and (4).

be suffered by the respondent if the provisions were made". The second is "the enforcement authority's interest in receiving the realised proceeds of the recoverable property".

As a general rule, the power to initiate civil recovery proceedings is not affected by any proceedings in relation to an offence to which the property in question is connected.[456] Civil recovery proceedings, therefore, can be brought regardless of whether a criminal charge has been brought against perpetrators of the offence in question. Even if the perpetrator of the offence has been acquitted, civil recovery proceedings are not precluded.

Property-directed confiscation in Australia

In the Commonwealth of Australia, property-directed confiscation is regulated under section 49 of the POCA 2002 (Cth), which provides for a forfeiture order of property suspected of being the proceeds of one or more indictable offences,[457] foreign indictable offences,[458] or indictable offences of Commonwealth concern.[459] Property is widely defined to include every possible description.[460] Property is considered 'proceeds' of an offence if it is wholly or partly derived or realised, whether directly or indirectly, from the commission of an offence.[461] Acquiring property utilising, wholly or partly, the proceeds of an offence makes the acquired property the proceeds of an offence.[462] The disposal of the proceeds of the offence to another person does not change the identity of the property as being proceeds of an offence.[463] However, the property ceases to be proceeds of an offence if "it is acquired by a third party for

[456] But see *Serious Organised Crime Agency v Gale* [2009] EWHC (QB) 1015.
[457] Section 338 (Cth) defines the term 'indictable offence' to mean: an offence against a law of the commonwealth, or a non-governing Territory, that may be dealt with as an indictable offence (even if it may also be dealt with as a summary offence in some circumstances).
[458] Section 337A (Cth) generally requires double criminality.
[459] Section 338 (Cth) defines the term 'indictable offence of Commonwealth concern' to mean: an offence against a law of a State or a self-governing Territory (a) that may be dealt with on indictment (even if it may also be dealt with as a summary offence in some circumstances); and (b) the proceeds of which were (or were attempted to have been) dealt with in contravention of a law of Commonwealth on: (i) importation of goods into, or exportation of goods from Australia; or (ii) a communication using a postal, telegraphic or telephonic service within the meaning of paragraph 51 v) of the constitution; or (iii) a transaction in the course of banking (other than State banking (other than State banking that does not extend beyond the limits of the State concerned).
[460] See section 338 (Cth) , in which the property is defined to mean "real or personal property of every description, whether situated in Australia or elsewhere and whether tangible or intangible, and includes an interest in any such real or personal property".
[461] *Proceeds of Crime Act 2002* (Cth) s329.
[462] Ibid s330 (b).
[463] Ibid s330 (3) (b).

sufficient consideration without the third party knowing, and in circumstances that would not arouse a reasonable suspicion, that the property was proceeds of an offence".[464]

The power to confiscate property under section 49 bears no relationship to the issue of the conviction or acquittal of the offence from which the property in question is suspected to be derived or realised.[465] In other words, forfeiture of property suspected of being proceeds of an offence can take place without the need to secure a conviction for the offence from which the proceeds are derived, and regardless of the outcome of the criminal case.

Before proceeding to examine section 49, it will be necessary to examine the issue concerning restraining orders, since the restraining order plays a vital role in the operation of section 49. Section 19 of the POCA 2002 (Cth) regulates restraining orders for property suspected of being proceeds of crime. It lists specific conditions whereby a restraining order by a court with proceeds jurisdiction becomes mandatory.[466] In order to obtain a restraining order, an application must be made by a proceeds-of-crime authority,[467] and there must be reasonable grounds to suspect that the property is the proceeds of an indictable offence, a foreign indictable offence or an indictable offence of Commonwealth concern.[468] However, reasonable grounds need not necessarily be based on the commission of a particular offence.[469] The application must be supported by an affidavit of an authorised officer stating the grounds on which he or she suspects that the property is proceeds of the offence.[470] If the indictable offence from which the property in question is suspected to be derived is not a serious offence, the court may refuse to issue a restraining order, provided that the making of the order is not in the public interest.[471] Section 29 provides for the exclusion of property from the restraining order. It requires a person whose interest in the property is covered by the restraining order to prove that his or her interest is not the proceeds of an indictable offence, a foreign indictable offence or an indictable offence of Commonwealth concern in order to exclude his/her interests from the restraining order.[472]

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[464] Ibid s303 (4) (a).
[465] Section 51 states that "the fact that a person has been acquitted of an offence with which the person has been charged does not affect the court's power to make a forfeiture order under section 47 or 49 in relation to the offence".
[466] *Proceeds of Crime Act 2002* (Cth) s19 (1).
[467] Ibid s19 (1) (c).
[468] Ibid s19 (1) (d).
[469] Ibid s20 (4).
[470] Ibid s19 (1) (e).
[471] Ibid s19 (3).
[472] Ibid s29 (d) (i).

Section 49 of the POCA 2002, pertaining to the making of a forfeiture order in respect of property suspected of being the proceeds of an offence, differentiates between two situations for the making of the forfeiture order. In both situations, the responsible authority for the restraining order that covers the property in question must apply for a forfeiture order of property suspected of being the proceeds of crime,[473] the restraining order must have been in force for at least 6 months,[474] and the court must be satisfied that the authority has taken reasonable steps to identify and notify persons with an interest in the property.[475] If no application has been made to exclude the property from the restraining order, or if it has been made but withdrawn, a forfeiture order must be made in relation to the property without a need for proving that the property is the proceeds of an indictable offence, a foreign indictable offence, or an indictable offence of Commonwealth concern.[476] If an application for excluding property for the restraining order has been made, however, the authority needs to prove that the property is the proceeds of an indictable offence, a foreign indictable offence, or an indictable offence of Commonwealth concern.[477]

In order to prove that property is the proceeds of an offence, the evidence does not need to be based on a finding that a particular person committed any offence.[478] Nor does it need to be based on a finding as to the commission of a particular offence.[479] Instead, it is sufficient to prove the kind of offence that was committed.[480] The standard of proof required to answer any question of fact is to be decided on the balance of probabilities.[481] However, the standard of proof should be implemented as expressed by the High Court in *Briginshaw* v *Briginshaw*[482] to acknowledge the seriousness of the conduct involved.

[473] Ibid s49 (1) (a).
[474] Ibid s49 (1) (b).
[475] Ibid s49 (1) (e).
[476] Ibid s49 (3).
[477] Ibid s49 (1) (c).
[478] Ibid s49 (2) (a).
[479] Ibid s49 (2) (b).
[480] Ibid.
[481] Ibid s317 (2).
[482] *Briginshaw v Briginshaw* (1938) 60 CLR 336. In short, the quality of the evidence required to establish the case on the balance of probabilities may depends on the seriousness of the allegations.

The principal features of property-directed confiscation

Having outlined the features of property-directed confiscation in the Commonwealth jurisdiction in Australia and in the UK, this section next identifies the principal features of property-directed confiscation.

Subject of confiscation

The first element to be considered is who can be the subject of confiscation. In Australia and the UK, the subject of confiscation need not be involved in the commission of the criminal offence that generated the property. In fact, what matters for confiscation is whether the property in question is the proceeds of a crime, in which case, it can be confiscated regardless of the person holding it. The concept of enrichment is more dominant than the concept of fault. As a result, individuals who own property that is or represents the proceeds of a crime can be subject to confiscation even if they are completely bona fide. In order for the bona fide third party to protect his interests in the property subject to confiscation, they need to demonstrate that they acquired their interests in the property for value or sufficient consideration. If, for example, a person acquired the proceeds of a crime by means of gift, the property can be confiscated even if the person is completely bona fide, in the sense that he or she does not know that the property is the proceeds of crime. The difference between Australia and the UK is that in Australia the third party is protected if he or she acquires the proceeds of crime for sufficient consideration, while in the UK, the third party is protected if he or she acquired the proceeds for value. It is not clear what the value should be in order to meet the 'for value' requirement.

Civil law approach

The second issue that needs to be considered is how the underlying criminal conduct that generated the property needs to be proven. In both Australia and the UK, the standards of evidence required to prove the criminal derivation of the property are less, compared with conviction-based confiscation. The relaxation of the standards of evidence can be seen to obviate both the need to establish the underlying criminal conduct specifically and the need to prove the criminal offence that generated the property to the criminal standard of proof.

In Australia and the UK, the ability of property-directed confiscation to deviate from the criminal norms for the purpose of confiscation rests mainly on the application of a civil law approach to the proceeds of crime strategy.[483] This may entail *complete* application of a civil approach to the proceeds of crime strategy or a *partial* approach that may include elements of civil law and procedure even in a conviction-based confiscation model.

In Australia, for example, the confiscation proceedings that depend on securing a conviction are considered civil proceedings.[484] One of the main consequences of regarding the proceedings as civil is that the standard of proof applicable to establish the criminal origin of the property is the civil standard of proof.[485] It is, however, considered partial adoption of a civil law approach to the proceeds of crime strategy because the trigger of the confiscation regime depends on criminal prosecution processes. In other words, the confiscation proceedings cannot be initiated unless they are triggered by conviction of a criminal offence. In the UK, the confiscation proceedings that depend on securing a conviction are not considered civil proceedings; instead, the proceedings are considered criminal in nature.[486] However, some of the attributions of civil proceedings are incorporated in confiscation proceedings, including the civil standard of proof.[487]

The introduction of property-directed confiscation represents a complete adoption of a civil approach to the proceeds of crime strategy since the nature of the confiscation proceedings is considered civil, and the dependence of confiscation proceedings on the criminal prosecution processes is severed. The complete separation of the confiscation issue from the conviction issue, coupled with the civil nature of the proceedings, allows for deciding the whole issue of confiscation on the balance of probabilities. The result of complete adoption of a civil approach to the proceeds-oriented strategy is not only in removing the need to establish the criminal offence to the criminal standard of proof, but also in allowing for the confiscation of the proceeds of crime even if the subject of the confiscation has been acquitted in the criminal case. If the full, adequate response to crime, which requires punishing the perpetrators and depriving them of the proceeds of crime, cannot be achieved, confiscation of the proceeds of crime is not

[483] For more critical analysis of the civil law approach see chapters Five and Six.
[484] *Proceeds of Crime Act 2002* (Cth) s315 (1).
[485] Ibid s317 (2).
[486] Alldridge, Peter, 'Proceeds of Crime Law Since 2003 – Two Key Areas' (2014) *Criminal Law Review* 171.
[487] *Proceeds of Crime Act 2002* (Cth) s6 (7).

precluded and may be regarded as a minimum reasonable response to the crime. As Anthony Kennedy stated, "The operative theory is that 'half a loaf is better than no bread'".[488] The standard of proof is, therefore, considered the hallmark of property-directed confiscation;[489] without it, the effectiveness of property-directed confiscation would be considerably reduced[490] and there would be an inability to achieve the minimum reasonable response to crime.

The features of unexplained-wealth confiscation

Unexplained-wealth confiscation in the UK

In the UK, an unexplained wealth order (UWO) is an investigatory tool.[491] It is designed to facilitate the confiscation of the proceeds of crime through other mechanisms for depriving the proceeds of crime in the *Proceeds of Crime Act* (2002) (UK), especially under the property-directed confiscation scheme (civil recovery). The UWO requires the person holding the property in question to provide certain information or documents in relation to the property.[492] One piece of information that may be required is a demonstration of "the nature and extent of the respondent's interests" in the property.[493] Another requirement is to explain how the person obtained the property, especially "how any costs incurred in obtaining it were met."[494] It is a criminal offence if the person, in compliance with the UWO, provides a false or misleading document or information, provided that he or she knows or is reckless in doing so.[495] In the case of a failure to meet the requirements of the UWO, the property is presumed to be recoverable for the purpose of civil recovery proceedings.[496]

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[488] Kennedy, Anthony, 'Justifying the Civil Recovery of Criminal Proceeds' (2005) 12(1) *Journal of Financial Crime* 8-10; Mary M Cheh, 'Constitutional Limits on Using Civil Remedies to Achieve Criminal Law Objectives: Understanding and Transcending the Criminal-Civil Law Distinction' (1990) 42 *Hastings LJ* 1325-1345.
[489] Smith, Lan, 'Civil Asset Recovery: The English Experience' in Rui & Sieber (ed), *Non-Conviction-Based Confiscation in Europe: Possibilities and Limitations on Rules Enabling Confiscation without a Criminal Conviction* (Duncker & Humblot, 2015) 31-34.
[490] Ibid 31-35.
[491] *Proceeds of Crime Act 2002* (UK) Chapter 2 Part 8.
[492] Ibid s362A (3).
[493] Ibid s362A (3) (a).
[494] Ibid s362A (3) (b). Section 362A also provides two additional pieces of information that may be required to be produce by the person: the first is "where the property is held by the trustees of a settlement, setting out such details of the settlement as may be specified in the order"; the second is "setting out such other information in connection with the property as may be so specified".
[495] Ibid s362E (1).
[496] Ibid s362C (2).

To make an unexplained wealth order, several preconditions must be met. It is a requirement for one of the enforcement authorities, prescribed in section 362A (7), to make an application for the UWO to the High Court specifying the property that is the object of the UWO and identifying the person who is holding that property.[497] In order for the High Court to issue the UWO, an enforcement authority must demonstrate that there is "reasonable cause to believe" the respondent of the UWO must be holding a property the value of which is more than GBP 50,000.[498] Moreover, it must satisfy the High Court that there is a reasonable ground for suspecting that the known lawful income of the person holding the property is not sufficient to purchase the property in question.[499] Furthermore, it must satisfy the court that the respondent is a member of the group of individuals prescribed in section 362B (4), which restricts the person who can be subject to a UWO to two groups of individuals. The first group comprises individuals who meet the description of a politically exposed person.[500] Descriptions of politically exposed persons are limited in some respects and extended in others. They are limited because not all politically exposed persons can be respondents to a UWO; instead, they are confined to those "entrusted with prominent public functions by an international organisation or by a State other than the United Kingdom or another EEA State".[501] The description is extended because the term 'politically exposed person' is not restricted to those who are entrusted with a prominent public function; it also encompasses those who are connected to that person, including family members and known close associates.[502] The second group of individuals who can be respondents to the UWO is comprised of those for whom there are reasonable grounds for suspicion of involvement in a serious crime, and those connected to these individuals.[503] It must be noted that even if all the prerequisites for the UWO are fulfilled, the High Court can still refuse to make the order, since the making of the order is discretionary.[504]

If the respondent of the UWO fails to submit the required information and documents in the time and manner prescribed by the UWO without a reasonable excuse, the respondent's

[497] Ibid s362A (1) and s362A (2).
[498] Ibid 2002 s362B (2).
[499] Ibid s362B (3).
[500] Ibid s362B (4) (a).
[501] Ibid s362B (7) (a).
[502] Ibid s362B (7).
[503] Ibid s362B (4) (b).
[504] Ibid s362A (1).

interests in the property valued at more than GBP 50,000 are presumed to be recoverable under the civil recovery scheme, unless it is proven otherwise.[505]

Unexplained-wealth confiscation in Australia

Unexplained-wealth confiscation is regulated under the name unexplained wealth order in part 2-6 in the Proceeds of Crime Act 2002 (Cth). In general, under the unexplained wealth order scheme, if a court is satisfied that there is reasonable ground to suspect that a person possesses wealth exceeding what could be legitimately acquired, the person must appear before the court to satisfy it, in the balance of probabilities, that the proportion of wealth surpassing his/her legitimately acquired wealth is not derived from certain kinds of offences. Otherwise, the court must make an order against the person to pay the amount to the commonwealth equal to that proportion of that wealth. The concept of wealth is considerably extensive. It includes property owned by the person at any time, property that has been under the effective control of the person at any time, and property that the person has disposed of (whether by sale, gift or otherwise) or consumed at any time.[506]

The scheme involves three kinds of unexplained wealth order: the unexplained wealth restraining order, the preliminary unexplained wealth order, and the unexplained wealth order. The unexplained wealth restraining order is an order restricting the dealing or disposing of the property in question.[507] In order to have the order granted, the proceeds of crime authority must first satisfy the court that there are reasonable grounds to suspect that a person's total wealth exceeds what could be lawfully acquired.[508] It must also have reasonable grounds to suspect that the person has committed an offence against a law of the Commonwealth, a foreign indictable offence or a state offence that has a federal aspect,[509] or that the whole or any part of the person's wealth was derived from an offence against a law of the Commonwealth, a foreign indictable offence or a state offence that has a federal aspect.[510] If the conditions are met, the making of the unexplained wealth restraining order becomes mandatory.[511] However,

[505] Ibid s362C (2) and (3).
[506] Ibid s179G (1).
[507] Ibid s20A (1) (a) and (b).
[508] Ibid s20A (1) (d).
[509] Ibid s20A (1) (g) (i).
[510] Ibid s20A (1) (g) (ii).
[511] Ibid s20A (1).

it must be noted that a restraining order is not a precondition for the making of an unexplained wealth order.

The second kind of order is a preliminary unexplained wealth order. It is an order requiring a person to appear in court for the purpose of determining whether an unexplained wealth order should be made.[512] This order cannot be made unless an application has been made for an unexplained wealth order,[513] and the court is satisfied that there are reasonable grounds for suspecting that a person possesses wealth that exceeds his/her lawful income.[514] If the preconditions are met, the court must make the preliminary unexplained wealth order.[515] However, if the court is not satisfied that the proportion of wealth that exceeds what was lawfully acquired is more than AUD 100,000, the court can refuse to make the preliminary unexplained wealth order.[516]

The person against whom a preliminary unexplained wealth order has been made must satisfy the court that the proportion of the wealth that exceeds what was legitimately acquired is not derived from of a foreign indictable offence or state offence or an offence with a federal aspect in order to protect their property from confiscation.[517] If the court itself is not satisfied that the whole or a proportion of the person's wealth is not the result of a foreign indictable offence or state offence or an offence with a federal aspect, the court must make the unexplained wealth order.[518] Therefore, if the state has met its initial burden of proof that the person's total wealth exceeds wealth legitimately acquired, the burden of proof shifts to the person, who must prove that the wealth is not derived from the above-mentioned kinds of offences. Otherwise, the court must make an unexplained wealth order. However, the court may refuse to make the unexplained wealth order if it is satisfied that the amount of unexplained wealth is less than 100000 AUD or it is not in the public interest to make the order.[519] An unexplained wealth order is an order requiring a person to pay an amount to the Commonwealth equal to the value of the proportion of wealth that could not be explained.[520]

[512] Ibid s179B (1).
[513] Ibid s179B (1) (a).
[514] Ibid s179B (1) (b).
[515] Ibid s179B (1).
[516] Ibid s179B (4).
[517] Ibid s179E (1) (a) (b).
[518] Ibid s179E (1).
[519] Ibid s179E (6).
[520] Ibid s179E (2).

The principal features of unexplained-wealth confiscation

The previous section outlined the features of unexplained-wealth confiscation in the Commonwealth jurisdiction in Australia and in the UK. This section identifies the principal features of unexplained-wealth confiscation.[521] Unexplained-wealth confiscation shares with property-directed confiscation the complete adoption of a civil law approach to the proceeds of crime strategy. In other words, unexplained-wealth confiscation is completely detached from criminal prosecution processes. Confiscation proceedings can be initiated regardless of the outcome of the criminal case regarding the criminal offence that generated the property. Yet unexplained wealth goes one step further. In property-directed confiscation, the burden of proving that the property is derived from the commission of an offence is placed upon the authority. With unexplained wealth, by contrast, the person holding the property in question bears the burden of proving that the property was acquired legitimately, if the initial burden of the state has been met.

There is considerable variation between unexplained-wealth confiscation in Australia and the UK. In the UK, an unexplained wealth order is an investigatory power, the effect of which is not to confiscate the proceeds of crime directly but to presume that the property is recoverable under the property-directed confiscation. In Australia, it is a confiscatory tool, the effect of which is to confiscate the unexplained wealth. Moreover, in the UK, the confiscation system employed to confiscate the property is property-based system confiscation, in which the confiscation order is directed at specific property. In contrast, a value-based system of confiscation is utilised for the confiscation of unexplained wealth in Australia, which requires the person to pay the valued amount of the unexplained wealth. In addition, while any person can be the subject of unexplained-wealth confiscation in Australia, in the UK, the range of persons who can be subject to unexplained wealth orders is limited to certain kinds of groups. Furthermore, in order to allow an unexplained wealth order to be made in the UK, there is a threshold requirement that should be met in relation to the value of the property that exceeds the respondent's lawful source. Such a threshold does not exist in Australia. Moreover, there are no limits to the offences that can be subject to an unexplained wealth order in the UK.

[521] For more critical analysis of unexplained wealth orders, see the discussion under the heading' NCBC as an instrument to overcome the problem of the linkage requirement', chapters Five, and Six.

Therefore, the person holding the property needs to establish its lawful derivation in order to avoid the making of an unexplained wealth order. In contrast, there is a limitation on the offences that can be subject to an unexplained wealth order in Australia. Therefore, an unexplained wealth order cannot be made in relation to property derived from that other than these prescribed offences. This limitation has not been set willingly to confine the operation of unexplained wealth but because of a constitutional issue relating to the commonwealth's legislative power.

The introduction of unexplained wealth extends the importance of the confiscation of the proceeds of crime to a new area. The first chapter of this thesis has demonstrated that a significant influence on the introduction of the confiscation of the proceeds of crime has been the lack of adequate legal mechanisms to allow for the deprivation of the proceeds of crime in all situations. Specifically, the importance of confiscation as a tool to deprive the proceeds of crime is evident in the case of victimless crimes. In the case of crime with a victim, the significance of confiscating the proceeds of crime is considerably diminished, because civil law provides for mechanisms that allow for the deprivation of the crime's proceeds. The introduction of property-directed confiscation has facilitated the ability to confiscate the proceeds of victimless crime in a manner relatively similar to private remedies. The need for property-directed confiscation to deal with victim crime is significantly limited, such as in the case of victims who do not initiate civil proceedings to recover the proceeds of crime. With the introduction of unexplained-wealth confiscation, the significance of confiscation extended to the area of victim crime. The move away from requiring the state to prove the criminal offence that generated the property to only requiring it to establish that the person's total wealth or income exceeds the known lawful source has significantly increased the importance of confiscation not only to victimless crime but to victim crime as well. This is because unexplained-wealth confiscation can provide an easier mechanism to deprive the proceeds of crime than that provided by private remedies. This means that unexplained-wealth confiscation may be regarded as a major instrument not only to fight organised crime but also victim crime, such as corruption offences. That is the clear position in the UK.

Justifications for the adoption of a civil law approach to the proceeds of crime strategy in Australia and the UK

The previous sections have shown that non-conviction-based confiscation entails many elements that deviate from the traditional requirements for the state not to interfere with people's property. Procedural safeguards associated with obtaining a criminal conviction, for example, are essential to protect individuals from the arbitrary application of sanctions, are discarded in non-conviction-based confiscation proceedings. The question is, how can the removal of such safeguards be justified?

One of the vital justifications for the adoption of a civil law approach to the proceeds-oriented strategy is based on the notion that confiscating the proceeds of crime is aimed at preventing future harm from occurring. One of the ideas behind prevention as a justification for NCBC is that the confiscation of the proceeds of crime is not backwards-looking, aimed at confiscating the proceeds because they were derived from a crime committed in the past. Instead, it is forward-looking, aiming at confiscating the proceeds of crime to prevent the reinvestment of such proceeds in further criminal activities. It is, therefore, an expression of preventive justice rather than of retributive justice.

The notion that confiscating the proceeds of crime can prevent further criminal activities from taking place is more prominent when the main target area of such confiscation is organised crime. As mentioned in the first chapter, one of the essential rationales for confiscating the proceeds of crime is to undermine the structure of organised crime. Organised crime relies on money in order to function. If organised crime's assets are not attacked, it could be expected that efforts to prevent the utilisation of its money to finance further criminal activities are likely to fail. NCBC is a prevention method employed to overcome two main practical difficulties in dealing with organised crime. The first concerns the shortcomings of conviction-based confiscation in dealing with the serial and continuing kinds of criminality. The second is the ability of organised criminals, especially heads of criminal organisations, to distance themselves from the crime. It should be noted that the ability of heads of criminal organisations to stay beyond the reach of conviction-based confiscation is not confined to their ability not personally to commit crimes that generated the property. The use of money laundering-offences can provide one legal avenue for dealing with such issues.

The problem also extends to issues of cost-effectiveness and the inability to secure evidence warranting a conviction, due to the unwillingness of persons to become witnesses to such criminal activity from fear of possible threats against them. As Justice Moffitt stated:[522]

> *Most Australians have come to realise that, despite the many inquiries, convictions—particularly of leading criminals—are few and that organised crime and corruption still flourish. The path to conviction is slow, tortuous and expensive … The criminal justice system is not adequate to secure the conviction of many organised crime figures… those participating in organised crime are usually highly intelligent and often more intelligent than police who deal with them. They have the best advice. They exploit every weakness and technicality of the law. When they plan their crimes, they do so in a way that will prevent their guilt being proved in a court of law. They exploit the freedoms of the law, which most often are not known and availed of by poorer and less intelligent members of the community. Crimes are planned so there will be no evidence against those who plan and, if by accident there is, it is often suppressed by murder or intimidation.*

Because organised crime is the main target for confiscating the proceeds of crime in Australia and the UK, significant emphasis is placed on the preventive value of confiscation. In Australia, one of the principal objectives of confiscating the proceeds of crime is to prevent the reinvestment of the proceeds into further criminal activities.[523] The aim is also to undermine the profitability of criminal enterprises.[524] In the UK, one of the main rationales for the introduction of NCBC is to extend the reach of the confiscation regime in order to capture the proceeds retained by heads of criminal organisations.[525]

The reinvestment of the proceeds of crime to commit other criminal activities is not the only future harm that confiscation as prevention is seeking to control. Another preventive justification for confiscating the proceeds of crime is in protecting the economy. As mentioned in the rationale for the criminalisation of money laundering, the circulation of the proceeds of crime could have a number of negative impacts on financial institutions, including undermining

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[522] Moffitt, Athol, *A Quarter to Midnight: The Australian Crisis: Organised Crime and the Decline of the Institutions of State* (Angus & Robertson, 1985) 138-139.
[523] *Proceeds of Crime Act 2002* (Cth) s5 (d).
[524] Ibid s5 (da).
[525] Performance and Innovation Unit, 'Recovering The proceedsceeds of Crime' (Cabinet Office, June 2000) [5.14].

stakeholders' confidence in them.[526] One of the various aims attached to the confiscation of the proceeds of crime in NCBC is to protect the economy. In the UK, for instance, the prevention of the circulation of the proceeds of crime is considered one of the primary objectives of non-conviction-based confiscation.[527]

In the UK, a more central justification for NCBC is in the notion that the confiscation of the proceeds of crime does not penalise the offender for the crime committed; instead, it only restores the position of the subject of confiscation to his or her position before the commission of a criminal offence.[528] The idea behind restoration as a basis for the move towards NCBC is based on a distinction that should be drawn between repressive measures and measures that restore the position occupied before the commission of a criminal offence. While both measures are backwards-looking in dealing with unlawful conduct committed in the past,[529] they differ in one essential aspect.

Criminal punishment aims at dealing with the culpable violation of the criminal conduct.[530] In contrast, restoration is not concerned with the criminal culpability of the perpetrator of the crime. It aims only to restore the position occupied before the commission of a criminal offence. The culpability of the perpetrator of the crime does not play a role in deciding whether the confiscation of the proceeds of crime should take place or the amount of confiscation.[531] Confiscation of the proceeds of crime is reparative and grounded on the theory of corrective

[526] See, eg Gallant, Mary Michelle, *Money Laundering and the Proceeds of Crime: Economic Crime and Civil Remedies* (Edward Elgar Publishing, 2005) 4; Rui, JP and U Sieber, *Non-conviction-based confiscation in Europe. Bringing the picture together,* Non-Conviction-Based Confiscation in Europe. Possibilities and Limitations on Rules Enabling Confiscation Without a Criminal Conviction (Duncker & Humblot, 2015) 294.
[527] *Serious Organised Crime Agency v Gale* [2009] EWHC (QB) 1015 [123].
[528] A, Performance and Innovation Unit, 'Recovering The proceedsceeds of Crime' (Cabinet Office, June 2000) [5.12].
[529] Rui, JP and U Sieber, *Non-conviction-based confiscation in Europe. Bringing the picture together,* Non-Conviction-Based Confiscation in Europe. Possibilities and Limitations on Rules Enabling Confiscation Without a Criminal Conviction (Duncker & Humblot, 2015) 252.
[530] Esser, Robert, 'A Civil Asset Recovery Model – The German Perspective' in Rui & Sieber (ed), *Non-Conviction-Based Confiscation in Europe Possibilities and Limitations on Rules Enabling Confiscation without a Criminal Conviction* (2015) 78.
[531] Rui, JP and U Sieber, *Non-conviction-based confiscation in Europe. Bringing the picture together,* Non-Conviction-Based Confiscation in Europe. Possibilities and Limitations on Rules Enabling Confiscation Without a Criminal Conviction (Duncker & Humblot, 2015) 252.

justice rather than retributive justice.[532] Because of that, the general principles of punishment should not govern the confiscation of the proceeds of crime; instead, it should be governed by principles related to unjust enrichment and restitution in civil law.[533] It is not clear whether confiscation of the proceeds of crime as restoration is a measure similar to restoration under unjust enrichment, or whether it is an application of the unjust enrichment principle.[534]

In Australia, the nature of the state's claim towards the proceeds of crime in NCBC is complex. Prior to the introduction of legal avenues permitting confiscation without the need to secure a conviction, the main justification advanced for it was that confiscation of the proceeds of crime was either similar to restitution under the unjust enrichment principle, or it was an application of the unjust enrichment principle. For example, the Australian Working Party on the Proceeds of Crime stated that:[535]

> *a major aim of the confiscation legislation is to eliminate the advantages and benefits which the person has gained through his or her illegality … to allow criminals to enjoy the profits of their crimes would offend the sense of justice of most Australians. In this respect, the orders try to restore the status quo, not to punish, and are not unlike the civil use of orders for restitution in response to unjust enrichment*.

Moreover, in the introduction to the Proceeds of Crime Bill 2001 (Cth), the then Attorney-General justified the introduction of NCBC as necessary "to remedy the unjust enrichment of criminals who profit at society's expense".[536] In the *Confiscation that Counts* report, the ALRC recommended the introduction of NCBC based on the perception that the confiscation of the proceeds of crime rests on the notion that no person should be entitled to be unjustly enriched from any unlawful conduct.[537]

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[532] Ashworth agrees that the confiscation of the proceeds of crime, at least in theory, is grounded on corrective justice. Ashworth, Andrew, *Sentencing and Criminal Justice* (Cambridge University Press, 6th ed, 2015) 383.
[533] Rui, JP and U Sieber, *Non-conviction-based confiscation in Europe. Bringing the picture together*, Non-Conviction-Based Confiscation in Europe. Possibilities and Limitations on Rules Enabling Confiscation Without a Criminal Conviction (Duncker & Humblot, 2015) 294.
[534] For instance, Lord Falconer stated that "the proceeds of crime belong to the victim, where one is identifiable, and to society, where one cannot be identified".
[535] Australia National Crime Authority, *Proceeds of Crime Conference, Sydney, June 1993: Working Party Paper* (Australian Govt. Pub. Service, 1994) 91.
[536] Commonwealth, Parliamentary Debates, 20 September 2001, (Williams, Attorney-General).
[537] 'Confiscation that Counts: A Review of the Proceeds of Crime Act 1987' (0642476322, Australian Law Reform Commission, 1999) 29.

A look at the Proceeds of Crime Act 2002, however, renders the significance of the restoration justification for the move towards NCBC suspect. One of the main objectives of the proceeds of crime act is "to punish and deter persons from breaching laws of the Commonwealth or the non-governing Territories".[538] The question is, what justifies the civil nature of confiscation proceedings, given that one of the main objects of confiscation is to punish and deter persons? In order to answer this question, the traditional conception of criminal law and civil law must be considered.

The traditional conception of criminal law is that it is designed to protect collective interests through the criminalisation of conduct violations that constitute harm to society.[539] The sanction imposed for the violation of a criminal offence is designed to punish the perpetrator in order to control antisocial behaviour.[540] The conventional conception of civil law, in contrast, is that it is designed to protect individual interests rather than collective interests.[541] The sanction imposed in the civil law sphere is not primarily designed to punish a person or control antisocial behaviour.[542] Instead, it is designed to compensate the injured party for the harm incurred.[543]

The traditional conceptions of criminal law and civil law are blurred in Australia. The civil procedure can be used to deal with a contravention that constitutes harm to collective interests. The sanction imposed for a civil contravention is not confined to the aim of remedying the damage caused by it; the sanction extends to punishing and deterring a person. Civil law and criminal law, therefore, share the aim of combatting antisocial behaviour. It is recognised in Australia that the sanction imposed as a result of a contravention is not "inherently criminal, civil, or administrative in nature; rather, it is the procedure by which the penalty is imposed which is so categorised".[544]

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[538] *Proceeds of Crime Act 2002* (Cth) s5 (c).
[539] 'Principled Regulation: Report: Federal Civil & Administrative Penalties in Australia' (0642502706, Australian Law Reform Commission, 2002) 67.
[540] Mann, Kenneth, 'Punitive Civil Sanctions: The Middleground Between Criminal and Civil Law' (1992) *Yale Law Journal* 1795-1807.
[541] Ibid 1795-1799.
[542] Steiker, Carol S, 'Punishment and Procedure: Punishment Theory and the Criminal-Civil Procedural Divide' (1997) 26 *Ann. Rev. Crim. Proc.* 775-784.
[543] Ibid.
[544] 'Principled Regulation: Report: Federal Civil & Administrative Penalties in Australia' (0642502706, Australian Law Reform Commission, 2002) 64.

Mann explains this blurring between criminal law and civil law as due partly to the changing philosophy of sanctioning.[545] The author argues that the introduction of utilitarian philosophy, which contributed to deterrence theory, has also contributed to changing the focus of both criminal law and civil law.[546] Criminal law and civil law, he argues, both became focused on manipulating pain and pleasure in order to achieve the greatest good.[547] In light of this, instead of viewing the requirement to pay an injured party as a form of compensation, it is viewed as a form of deterrence to causing injury.[548] Given deterrence theory's notion that the more severe the sanction the greater its deterrent effect, and that the deterrent effect varies with the probabilities of a sanction's actual application, a sanction imposed in the civil law sphere can go beyond remedying the damage to the injured party in order to achieve its purpose.[549] Therefore, the differences between criminal law and civil law become a matter of quantity rather than quality.[550] This shift in the purpose of civil law has led to clear similarities between criminal law and civil law in terms of the aims of the sanction. These similarities ultimately influence how civil law and its proceedings are conceived.

In Australia, the main justification for the civil nature of confiscation proceedings is that, despite its punitive aim, the sanction imposed through confiscation of the proceeds of crime is not a criminal form of punishment, and the proceedings do not create any criminal liability or findings of criminal guilt.[551] The result is, however, said to be effective from a general and specific deterrence perspective.

NCBC as an instrument to overcome the problem of the linkage requirement

NCBC differs from extended criminalisation in that it does not justify the deviation from criminal norms in relation to the standard and burden of proof through the argument of

[545] Mann, Kenneth, 'Punitive Civil Sanctions: The Middleground Between Criminal and Civil Law' (1992) *Yale Law Journal* 1795-1845.
[546] Ibid 775, 784-787.
[547] Ibid 1795-1845.
[548] Ibid 1795, 1845-1846.
[549] Ibid 1795, 1845-1846.
[550] Ibid 1795-1846.
[551] Crimes Legislation Amendment (Organised Crime and Other Measures) Bill 2012, Explanatory Memorandum, 6.

necessity. Justifying the deviation from criminal norms in relation to the standard and burden of proof on the ground of the necessity to deal with the ramifications of the criminal offence may undermine the safeguards provided by the criminal law. However, NCBC shifts the issue from the argument of necessity to whether the true legal nature of confiscation proceedings is criminal or not. If it is, then the whole of NCBC regime is undermined. If it is not, then the deviation of the criminal norms in relation to the standard of proof and burden of proof may be better justified than that in extended criminalisation. Therefore, NCBC may be better pursued than extended criminalisation if the deviation from the criminal norms is in substance justified.

In addition, by concentrating on the issue of the provenance of the property itself rather than the criminal conduct that generated proceeds, NCBC may be better able to rationalise the presumption that the existence of unexplained wealth presumes that the property is proceeds of crime. This is unlike the situation of illicit enrichment offence in which the rationality of the presumption is not confined to the criminal provenance of the property but also the commission of a specified kind of offence by the person who is unable to justify their wealth.

Moreover, by severing the issue of conviction from the issue of confiscation of the proceeds of crime, NCBC avoid the ramifications of extended criminalisation in relation to retrospective proportionality. The use of extended criminalisation as an instrument to overcome the problem of the linkage requirement produces concerns regarding the proportionality of sentencing. Separating the issue of conviction from confiscation leads to avoidance of such ramifications.

NCBC, however, is not panacea. Although NCBC is better than extended criminalisation in that it justifies the move away from criminal law safeguards beyond the necessity argument, the theoretical justifications of NCBC are contested. If the theoretical justifications of NCBC are not sound, then NCBC is similar to extended criminalisation in that the deviation from the criminal law norms in relation to the standard and burden of proof is not properly justified.

Moreover, there are a number of concerns to individuals' rights and interests, especially in relation to the unexplained wealth confiscation. The main concern is in creating risks to individuals' rights and interests without corresponding safeguards to ensure the protection of

individuals' interests.[552] The core issue of the proportionality of unexplained wealth confiscation lies mainly in reversing the burden of proving the lawful origin of the wealth to the person in question, instead of requiring the state to prove the criminal origin of the wealth. Reversing the burden of proof entails a risk of wrongful confiscation of legitimately acquired property.

There are many factors that can diminish the ability of the person to provide sufficient evidence of the lawful provenance of the wealth in question. For example, there is a high likelihood that unexplained wealth confiscation targets legitimately acquired property as a result of a lack of preservation of receipt of the wealth acquired.[553] This is especially the case when there is no sufficient and fair warning that the person may be subjected to unexplained wealth confiscation proceedings. The problem is compounded if the time frame for examining the existence of disproportionate wealth is wide.[554] The wider this time frame, the greater the risk of confiscating legitimately acquired property, as the ability of the person to provide the required evidence is diminished.

This issue of the time frame for examining disproportionate wealth is mainly attributed to absence of retrospective proportionality. Unexplained wealth confiscation is not a response to one incident of crime; instead, it concerns general criminal conduct. Therefore, no specific crime can be related to retrospective proportionality. The absence of retrospective proportionality in unexplained wealth confiscation may result in a negative impact on placing normative limits on determining the time frame through which the disproportionate wealth is examined. The absence of retrospective proportionality renders, setting the time frame for examining the disproportionate wealth mainly depends on the wisdom of the parliament. There is no normative guide that confines the limits of the time frame to a reasonable period.

Moreover, unexplained wealth confiscation has the potential to place an excessive burden on the confiscation subject. The problem is compounded because the excessive burden may not

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[552] See generally Skead, N, Tubex H, Murray, S & Tulich, T 2020. Pocketing the proceeds of crime: Recommendations for legislative reform. Canberra: Criminology Research Grants Report No CRG 27/16-17. https://www.aic.gov.au/crg/reports/crg-2716-17.

[553] See Australia, Parliament of, 'Parliamentary Joint Committee on the Australian Crime Commission: Inquiry into the legislative arrangements to outlaw serious and organised crime groups' (2009) [5.60].
[554] See generally Freiberg, Arie, 'Criminal Confiscation, Profit and Liberty 1' (1992) 25(1) *Australian & New Zealand Journal of Criminology* 44 54.

necessarily be placed on the perpetrator of the criminal offence that generated the property, but also can be placed on a blameless third party.[555] Unexplained wealth confiscation, therefore, can have similar attributions of general confiscation. In other words, there is an inherent risk that unexplained wealth confiscation may be used against the adversaries of the state. As a result, without providing for certain limits that ensure the proper targeting of unexplained wealth confiscation, it can unreasonably place a burden on the subject of confiscation and increase the likelihood of being abused.[556] In other words, unexplained wealth confiscation can provide negative and positive consequences. Without providing for certain limits that diminish the possible negative consequences, it can deviate from the intended purposes for which it was created.

The main problem in securing justice for individuals is that despite the fact that unexplained wealth confiscation regime entails serious risk, the theoretical justifications of NCBC does not recognise such risk and is, therefore, unable to provide safeguards that will ensure that justice for individuals is preserved.

The reparative justification for unexplained wealth confiscation does not provide normative limits that ensure a reasonable balance between the need for effective confiscation of the proceeds of the crime and securing individuals' interests. Despite the risk of wrongful confiscation of property and the potential excessive burden on the confiscation subject, the reparative justification does not provide for inherent limits in terms of who is eligible to subject to unexplained wealth confiscation and the offences that can give rise to unexplained wealth confiscation order. The reparative justification views those in possession of the proceeds of crime as persons who are unjustly enriched at the expense of society, and therefore there is no compelling reason to limit the confiscation under unexplained wealth confiscation to certain persons. Furthermore, because the proceeds of any offence can constitute unjust enrichment, there should be no limits on the offences that can give rise to unexplained wealth confiscation. The general application of unexplained wealth confiscation to any person and offences may give rise to serious concerns in relation to prospective proportionality. Prospective

[555] See generally, Skead, N, Tubex H, Murray, S & Tulich, T 2020. Pocketing the proceeds of crime: Recommendations for legislative reform. Canberra: Criminology Research Grants Report No CRG 27/16-17. https://www.aic.gov.au/crg/reports/crg-2716-17 71-75.

[556] Clarke, Ben, 'Confiscation of Unexplained Wealth: Western Australia's response to Organised Crime Gangs' (2002) 15 *S. Afr. J. Crim. Just.* 61 87.

proportionality, which ensures that the means employed is proportional to the aim sought to be achieved, may be at risk with respect to unexplained wealth confiscation. Unexplained wealth confiscation may entail an excessive burden, not only to the perpetrator of the criminal offence but also to the blameless third party. Moreover, the risk of wrongful confiscation should not be underestimated. This, coupled with the general application of unexplained wealth confiscation to any person and any offence, may be likely to render unexplained wealth confiscation incompatible with prospective proportionality. Although the European Court of Human Rights has upheld the proportionality of unexplained wealth confiscation, the court seems to suggest that this is only the case with respect to serious offences such as drug trafficking offences, mafia-type criminal organisations, and corruption.[557]

In addition, the reparative justification does not work well with respect to safeguards that should be afforded to the confiscation subject in unexplained wealth confiscation. For example, one of the main safeguards intended to reduce the possibility of wrongful confiscation and excessive burden on the confiscation subject without reasonable cause is the requirement of a threshold in order to permit unexplained wealth confiscation. However, the existence of this threshold may place reparative justification in jeopardy. The existence of such a threshold may undermine unexplained confiscation schemes justified by the reparative nature of confiscation. This is because the existence of a threshold could suggest that the imposed sanction is serious enough to be punitive.[558] Reparative justification for unexplained wealth confiscation, therefore, may not be able to provide sufficient limits to protect individual interests.

Conclusion

This chapter examined the move towards non-conviction-based confiscation in Australia and the UK. It demonstrated that the ability of Australia and the UK to deviate from criminal law norms for the purpose of confiscation rests mainly on the adoption of a complete civil law approach to the proceeds of crime strategy.

The nature of the state's ability to adopt this approach is, however, complex. The complexity mainly stems from the mixture of purposes that the confiscation of the proceeds of crime seeks

[557] Gogitidze v Georgia (2015) application no. 36862/5 [107].
[558] King, Colin, 'Civil forfeiture and Article 6 of the ECHR: due process implications for England & Wales and Ireland' (2014) 34(3) *Legal Studies* 371 379.

to accomplish. A number of these purposes point in different directions, yet they are considered to be primary objects of the confiscation of the proceeds of crime. Nevertheless, there are two focal points that allow for the adoption of a completely civil law approach to confiscation: the fact that the confiscation proceedings do not determine criminal liability for the criminal offence that generated the property; and the denial that the confiscation of the proceeds of crime of inflicts 'criminal' punishment. Whether confiscation of the proceeds of crime under NCBC constitutes a criminal punishment to crime will be considered in the following chapters.

CHAPTER 5 - The Problematic Nature of Non-conviction-based Confiscation

Introduction

The previous chapter demonstrated that non-conviction-based confiscation entails a relaxation of the requirements for the confiscation of the proceeds of crime compared with traditional conviction-based confiscation. It also showed that this relaxation stems mainly from the claim that NCBC proceedings are civil, not criminal, which, in turn, is based mainly on the claim that no criminal punishment is imposed in NCBC proceedings.

There is, however, considerable disagreement whether 'punishment' is the true nature of NCBC. If it is, then, in principle, a person against whom a confiscation order is sought should be afforded many criminal-process safeguards, which could undermine the effectiveness of an NCBC regime. If punishment is not the true nature of NCBC, then, in principle, that person can be deprived of the criminal-process safeguards without his/her rights being infringed. Some scholars such as Lusty and Kennedy reject the claim that the legal nature of NCBC is punishment, asserting that its nature is actually reparative, based on unjust enrichment, and preventive, based on preventing the utilisation of the proceeds of crime to finance further criminal activity.[559] The move towards NCBC, however, has been subject to severe objections from those who view the true legal nature of NCBC as punishment.[560]

[559] Kennedy, Anthony, 'Justifying the Civil Recovery of Criminal Proceeds' (2005) 12(1) *Journal of Financial Crime* 8 17; David Lusty, 'Civil Forfeiture of Proceeds of Crime in Australia' (2002) 5(4) *Journal of Money Laundering Control* 345 345.

[560] See, eg, Skead, Natalie, and Murray, Sarah, 'The Politics of Proceeds of Crime Legislation' (2015) 38 *UNSW Law Journal* 455 464; Campbell, Liz, 'Theorising Asset Forfeiture in Ireland' (2007) 71(5) *The Journal of Criminal Law* 441 453; Gray, Anthony Davidson 'Forfeiture Provisions and the Criminal/Civil Divide' (2012) 15(1) *New Criminal Law Review: An International and Interdisciplinary Journal* 32; King, Colin, 'Civil Forfeiture and Article 6 of the ECHR: Due Process Implications for England & Wales and Ireland' (2014) 34(3) *Legal Studies* 371.

This chapter examines the contested nature of NCBC. The question under discussion is whether the true legal nature of NCBC is punishment. The chapter begins with an examination of the nature of NCBC from a philosophical perspective, followed by an examination of the jurisprudence of the European Court of Human Rights. It then explores how both approaches can contribute to an understanding of when NCBC constitutes a criminal punishment.

The Concept of Punishment

In criminal justice, the term 'punishment' formally denotes the punitive consequences inflicted on a criminal as a response to the commission of a criminal offence.[561] Although such a definition is broad enough to accommodate most circumstances where punishment is inflicted,[562] it is inadequate for distinguishing punishment from other measures that may be considered unpleasant. For instance, the definition cannot be relied on to determine whether the legal nature of confiscating the proceeds of crime is punishment or reparative since in both interpretation the confiscation of the proceeds of crime could be imposed on the criminal for the offence committed and the consequences may be regarded as punitive. It also entails circularity, since the definition of a criminal offence is often dependent on the imposition of punishment,[563] and the definition of punishment often requires a reference to a criminal offence.[564] Yet, neither criminal offence nor punishment can be independently defined,[565] rendering it necessary to explore the character of punishment beyond a simple definition that accommodates most circumstances in which punishment is inflicted.

Conceptual discussion of punishment often commences[566] with Hart's account of the five elements that represent 'the central case of punishment':[567]

(i) It must involve pain or other consequence normally considered unpleasant.

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[561] See, eg, Zedner, Lucia, *Criminal Justice*, Clarendon Law Series (Oxford, 2004) 72.

[562] See, eg, Suror, Ahmad Fatehi, الوسيط في قانون العقوبات - القسم العام [The Penal Code – The General Part] (Dar Alnahdha Alarabia, 2015) 915.

[563] See, eg, Abdula'al, Mohamad, النظرية العامة للجريمة و المسؤولية الجنائية في قانون الجزاء الكويتي [The General Theory of Crime and Criminal Responsibility in Kuwait Penal Code] (Academic Publication Council, 2015) 196–7.

[564] See, eg, Suror, Ahmad Fatehi, الوسيط في قانون العقوبات - القسم العام [The Penal Code – The General Part] (Dar Alnahdha Alarabia, 2015) 913.

[565] See, eg, Alsaeed, Alsaeed Mustafa العامة في قانون العقوبات الأحكام [General Provisions of the Penal Code] (Dar Almaaref Bimasser, 1962) 670.

[566] See, eg, Steiker, Carol S, 'Punishment and procedure: punishment theory and the criminal-civil procedural divide' (1997) 26 *Ann. Rev. Crim. Proc.* 775 800.

[567] Hart, Herbert Lionel Adolphus, *Punishment and Responsibility: Essays in the Philosophy of Law* (Oxford University Press, 2008) 4–5.

(ii) It must be for an offence against legal rules.
(iii) It must be to an actual or supposed offender for his or her offence.
(iv) It must be intentionally administered by human beings other than the offender.
(v) It must be imposed and administered by an authority constituted by a legal system against which the offence is committed.

Although Hart's account is significant, it is subject to objections. One of these objections is that it fails to distinguish penalties or price-tags (such as parking tickets) from true punishments.[568] It has also been criticised for a lack of one of the most essential components that define the character of punishment. Feinberg, for instance, criticised Hart's work for leaving 'the very element that makes punishment theoretically puzzling and morally disquieting',[569] which is that punishment expresses 'attitudes of resentment and indignation' and a 'judgment of disapproval and reprobation'.[570] Punishment, therefore, involves expressions of condemnation for the wrongdoing committed.[571] Of the six elements that define punishment, two, in particular, are considered distinguishing features of its character: the imposition of deliberate hard treatment and its capacity for censure.[572] To determine whether, from a philosophical perspective, the legal nature of NCBC is punishment, the question then becomes whether NCBC entails intentional hard treatment and censure. The following sections discuss whether the imposition of NCBC involves intentional hard treatment and censure.

Intentional Hard Treatment

The previous section demonstrated that hard treatment is considered one of the distinguishing features defining punishment. In this section, the question under discussion is whether NCBC entails some kind of suffering for the confiscation subject. If NCBC imposes hard treatment on the confiscation subject, there is a high likelihood of finding that it is a form of punishment. Thus, the whole of the NCBC regime would be undermined. If, however, the imposition of NCBC does not result in hard treatment for the confiscation subject, one of the essential components that define punishment would be absent and the likelihood of finding that NCBC

[568] Feinberg, Joel, 'The Expressive Function of Punishment' (1965) 49(3) *The Monist* 397 398–9.
[569] Ibid 397.
[570] Ibid 400.
[571] Von Hirsch, Andrew, *Censure and Sanctions* (Oxford University Press, 1996) 9.
[572] See, eg, Ashworth, Andrew and Zedner, Lucia, *Preventive Justice* (OUP Oxford, 2014) 14; Belal, Ahmad Awad, النظرية العامة للجزاء الجنائي [The General Theory of Criminal Punishment] (Dar Alnahdha Alarabiya, 1996) 14–20.

is a form of punishment would be diminished. The problem with this question is in determining what perspective should be adopted to identify whether NCBC involves hard treatment. Boucht relied on the economic perspective in this matter.[573] Campbell saw the effect on the individual of restoring the status quo ante—beyond the economic impact—as a criterion to determine whether the NCBC process is criminal.[574] For the sake of a comprehensive examination of whether NCBC entails hard treatment, the question will be examined from both perspectives—the economic and the non-economic.

From an economic perspective, the central question is, 'Does the imposition of NCBC place the confiscation subject in a position economically inferior to that before the commission of the criminal offence?' Ostensibly, it would seem that the question of hard treatment depends exclusively on whether restoring the position of the confiscation subject to that before the commission of the offence should be regarded as suffering. The view is premised on the assumption that the maximum impact of confiscation of the proceeds of crime on the confiscation subject is limited to restoring his or her position before the commission of the offence. Assuming that a person has acquired $1 million as a result of bribery, under this view, the confiscation order would be limited to restoring the status quo and could only deprive the subject of this $1 million. The assumption that the confiscation of the proceeds of crime can only result in restoring the status quo is, however, not always appropriate. There are many factors that should be considered in judging the economic impact of the confiscation of the proceeds of crime on the confiscation subject.

One factor that should be considered is the availability of alternative mechanisms to deprive offenders of their profits.[575] This is especially the case when there is a direct victim of the offence. When, for example, a robbery offence is committed, the victim of the crime is likely to institute civil proceedings, which may lead to restoring all the stolen property. If the victim of the offence recovers the defendants' proceeds of crime in entirety, any subsequent confiscation order would not, in fact, restore the status quo; rather, the position of the offender

[573] Boucht, Johan, *The Limits of Asset Confiscation: On the Legitimacy of Extended Appropriation of Criminal Proceeds* (Hart Publishing, 2017) 119.
[574] Campbell, Liz, 'Theorising Asset Forfeiture in Ireland' (2007) 71(5) *The Journal of Criminal Law* 448.
[575] See generally Alldridge, Peter, *Money Laundering Law: Forfeiture, Confiscation, Civil Recovery, Criminal Laundering and Taxation of the Proceeds of Crime* (Bloomsbury Publishing, 2003) 50–7; *R v Waya* [2012] UKSC 51.

would be inferior to what it was before the commission of the offence. Therefore, due to the availability of alternative mechanisms, the fact that confiscation of proceeds of crime is calculated with reference to the benefits and advantages of crime does not necessarily lead to a restoration of the status quo. A confiscation order that is directed towards removing the same sum again cannot be seen as a non-punitive measure; rather, it amounts to an additional financial penalty.[576] Therefore, to ensure that NCBC does not place the confiscation subject in a position inferior to before the commission of the criminal offence, the confiscation regime should be coordinated with civil claims in a way that does not permit the removal from the confiscation subject of an amount exceeding the profit of the crime.

The concept of the proceeds of crime is another critical factor in this discussion. The main argument against the existence of hard treatment in confiscating the proceeds of crime is that it only restores the status quo of the confiscation subject. However, this argument relies on the supposition that proceeds of crime are limited to the profits gained as a result of the commission of a criminal offence. The question that needs to be asked is whether 'proceeds' of crime equals 'profits' of crime.[577] If the conceptualised 'proceeds of crime' exceed the profits obtained through the commission of a criminal offence, the claim that the confiscation of the proceeds of crime only restores the status quo may be undermined. If the confiscation of the proceeds of crime merely results in restoring the status quo ante, this should mean that confiscation corresponds to the net profits of crime, which are 'the gross revenues of illegal activity minus any demonstrable expenses'.[578] If the concept of the proceeds of crime is not limited to net profits but extends to gross receipts, it could be argued that confiscation does not restore the position of an individual; instead, the confiscation subject is worse off.[579]

[576] *R v Waya* [2012] UKSC 51 [29].
[577] See generally Gallant, Mary Michelle *Money Laundering and the Proceeds of Crime: Economic Crime and Civil Remedies* (Edward Elgar Publishing, 2005) 15; Brent Fisse, *Confiscation of Proceeds of Crime: Funny Money, Serious Legislation* (Institute of Criminology, Sydney University Law School, 1989) 375–9.
[578] Gallant, Mary Michelle, *Money Laundering and the Proceeds of Crime: Economic Crime and Civil Remedies* (Edward Elgar Publishing, 2005) 2.
[579] See generally Pimentel, David, 'Forfeitures Revisited: Bringing Principle to Practice in Federal Court' (2012) 13(1) *Nevada Law Journal* 38; Freiberg Arie, et al, 'Forfeiture, Confiscation and Sentencing' (1992) *The Money Trail: Confiscation of the Proceeds of Crime, Money Laundering, and Cash Transactions Reporting* 136–7.

To illustrate,[580] assume that a drug trafficker pays $1 million to a supplier for heroin and another $1 million to a customs officer to 'look the other way' to ensure importation through customs unchecked. The heroin is then sold for $3 million. Clearly, the profits obtained as a result of the commission of this offence is $1 million, not $3 million. Consequently, it could be argued that the effect of a confiscation order that allows for the confiscation of more than $1 million is not a restoration of the defendant's position prior to the commission of the offence; rather, the offender is worse off.

In fact, there are compelling reasons to argue that the confiscation of the proceeds of crime should extend beyond net profits. One argument is that it is offensive to allow criminals to subtract the expenses they have incurred for the purpose of obtaining illicit wealth.[581] Allowing a criminal to deduct expenses associated with committing a crime 'would be to treat his criminal enterprise as if it was a legitimate business'.[582] Preventing criminals from offsetting the costs incurred in committing criminal activities may also be justified for pragmatic reasons. For net profits to be assessed, evidence must be available to support the assertion of any expenses and outgoings, as well as the eventual sum retained by a person after distributing profits. What may prevent the assessment of net profits is that 'drug traffickers and other of their ilk are not noted for maintaining accounting records from which the relevant financial information can be obtained'.[583] In *R v Fagher*, Roden J observed the following:[584]

> *Calculation or assessment of the value of the benefits derived by a particular offender from any criminal transaction, is likely to be difficult. There will be no audited accounts available, nor can one expect a contract or other documentation evidencing the nature of the dealings among the several participants who may be involved. Additionally, if the participants themselves give evidence of the details of those transactions, their evidence is unlikely to be the most reliable, and to the extent that it may be relied upon is unlikely to disclose clearly defined legal relationship.*

[580] The example is taken Fisse, Brent, *Confiscation of Proceeds of Crime: Funny Money, Serious Legislation* (Institute of Criminology, Sydney University Law School, 1989) 376–7.
[581] Stessens, Guy, *Money Laundering: A New International Law Enforcement Model* (Cambridge University Press, 2000) 53.
[582] *R v Waya* [2012] UKSC 51 [26].
[583] Fisse, Brent, *Confiscation of Proceeds of Crime: Funny Money, Serious Legislation* (Institute of Criminology, Sydney University Law School, 1989) 378.
[584] *R v Fagher* (1989) 16 NSWLR 67.

It is submitted that the main problem with NCBC is that its construction does not allow for thorough scrutiny of whether the position of the confiscation subject would be inferior to that before the commission of a criminal offence. In property-directed confiscation, for instance, what matters is whether the property sought for confiscation meets the description of proceeds of crime, in which case the property is allowed to be confiscated regardless of the circumstances of its acquisition by the person owning it. As a result of the concentration of the provenance of the property, adhering to net profits would be uncertain.

The construction of unexplained-wealth confiscation may unintentionally allow for the deduction of costs incurred in obtaining the proceeds of crime. To illustrate this point, assume that a drug trafficker has $1 million of legitimately acquired property and then pays $1 million to a supplier for heroin. The heroin is then sold for $2 million. Clearly, the profits obtained as a result of the commission of the criminal offence is $1 million. If the drug trafficker is subjected to unexplained-wealth confiscation, he or she may be able to demonstrate the lawful origin of $1 million of the wealth, even though it was used to supply the heroin. Therefore, the unexplained-wealth confiscation order may be limited to $1 million.

One might argue that because unexplained-wealth confiscation entails shifting the burden of proof to the confiscation subject, there is a possibility that the confiscation subject might not be able to justify the legal origin of wealth that has in fact been legally acquired. Therefore, the position of the confiscation subject might be inferior to that before the commission of the criminal offence. However, this issue cannot be regarded as related to hard treatment; instead, it is at risk of wrongful hard treatment.

Confiscation of mixed property is another issue that should be considered in determining whether the concept of the proceeds of crime allows only for the confiscation of profits. For a confiscation law to be effective, property wholly derived from the commission of criminal offences should not be the only type liable for confiscation; it should also include property partly derived from the commission of criminal offences. Otherwise, the mixing of legitimately acquired property with property derived from the commission of a criminal offence would place the proportion of the property representing the proceeds of crime beyond the reach of the confiscation regime. This would especially be true if the legitimate portion of the property could not be isolated from the other portion and the property-based system of confiscation were the sole system of confiscation utilised for confiscation. For instance, assume that a person

purchased a house worth $2 million and that $1 million of the money paid derived from the proceeds of crime, while the remaining was legitimately acquired. If the concept of the proceeds of crime were limited to property wholly derived from the commission of an offence, the proceeds of crime would go beyond the scope of the confiscation scheme. Permitting the confiscation of such mixed property, however, would place the confiscation subject in an inferior position relative to before the commission of the criminal offence because legitimately acquired property could also be subject to confiscation.

In the UK, if a recoverable property has been combined with legitimately acquired property, only the portion attributable to the recoverable property can be confiscated.[585] In Australia, proceeds are defined to encompass property wholly or partly derived or realised from the commission of an offence.[586] Consequently, a forfeiture order could be directed at a mixed property. This, however, does not necessarily suggest that confiscation of the proceeds of crime would place the confiscation subject in an inferior position because the confiscation scheme provides for a compensation order that aims at ensuring that the owner of the mixed property is justly compensated for the legitimately acquired portion of the property.[587] In light of this, the imposition of a forfeiture order is not hindered by mixing legitimately acquired property with the proceeds of crime, as the confiscation of legitimately acquired property is compensated.

To summarise, whether NCBC entails hard treatment from an economic perspective depends on whether the position of the confiscation subject is inferior to their position before the commission of the criminal offence. Allowing the confiscation of the proceeds of crime beyond net profits would, in principle, constitute hard treatment of the confiscation subject. It is important to examine the whole of the confiscation regime (how all of the provisions work together) and its relationship with alternative methods that can result in removing the proceeds of crime from the confiscation subject to determine whether their position would be inferior to that before the commission of the criminal offence. Although there are practical difficulties

[585] *Proceeds of Crime Act 2002(UK)* s306.
[586] Ibid s329. It should be noted, however, that the proceeds of crime confiscation can go beyond the confiscation of the actual proceeds of crime in some Australian jurisdictions. For instance, The Western Australian and Northern Territory drug-trafficker confiscation provisions enable confiscation of all the property of a person declared or taken to be declared a drug-trafficker. See, eg, Criminal Property Forfeiture Act 2002 (NT) s94; Criminal Property Confiscation Act 2002 (WA) s8.
[587] *Proceeds of Crime Act 2002(UK)* s77.

that may constitute an obstacle to limiting the confiscation of the proceeds of crime to net profits, without offsetting the costs incurred in obtaining the proceeds of crime, NCBC is likely to be regarded as entailing hard treatment. While it is true that it is offensive to allow criminals to deduct expenses in committing a crime, confiscation of the proceeds of crime beyond the net profits of crime can be conducted based on a criminal confiscation model in which the aim of punishment may justify confiscation beyond net profits. Alternatively, depriving the offender of gross receipts could be effected through the imposition of a fine.[588]

From a non-economic perspective, the underlying argument in favour of understanding the confiscation of the proceeds of crime as not entailing hard treatment is that confiscation of the proceeds of crime removes from the confiscation subject the advantages and benefits arising from the commission of criminal activity, thereby restoring the status quo ante. The effect of confiscation of the proceeds of crime on the confiscation subject is, therefore, similar to that of the restitution of the illegally obtained property in civil law.[589] In the same way that civil actions force the defendant to restore, say, stolen property to the victim of the crime, the confiscation of the proceeds of crime also forces the defendant to return to the state what he or she has illegally obtained, regardless of the availability of a victim. In light of this, if the effect of restitution is not regarded as entailing hard treatment and punishment, there is no reason to argue that the confiscation of the proceeds of crime is punishment.

At first sight, this argument, that the confiscation of the proceeds of crime should not be regarded as punishment because of the analogy to restitution in civil law, may appear compelling. Closer examination, however, reveals that the argument is flawed. Restitution in civil law is regarded as not entailing punishment. This is for reasons unrelated to the effect of restitution; restitution is regarded as not entailing punishment because, even if it entails hard treatment, the hard treatment is not intentionally inflicted. This, however, does not mean that the confiscation of the proceeds of crime with a restorative function inflicts hard treatment; it only means that relying on the analogy to civil law to assert there is no hard treatment is flawed.

[588] See generally Boucht, Johan, *The Limits of Asset Confiscation: On the Legitimacy of Extended Appropriation of Criminal Proceeds* (Hart Publishing, 2017) 98–101.
[589] See generally Campbell, Liz, 'The Recovery of Criminal Assets in New Zealand, Ireland and England: Fighting Organised and Serious Crime in the Civil Realm' (2010) 41 *Victoria University of Wellington Law Review* 15 26.

Moreover, it might be argued that since a fine entails hard treatment, there is no reason that confiscation of the proceeds of crime should not similarly be regarded as entailing hard treatment. While restorative function is the main argument advanced in support of the view that confiscation of the proceeds of crime does not impose hard treatment on the confiscation subject, this restorative function can also be visible in a fine.[590] A fine could be calculated with reference to the benefits and advantages derived by the commission of an offence. Since such a fine is still regarded as entailing hard treatment, although it only results in restoring the status quo ante, there is no compelling reason not to treat confiscation of the proceeds of crime in the same vein. The key weakness in this argument, however, is that the fine is not intended to restore the status quo ante, especially with the passage of the confiscation of the proceeds of the crime. A fine may be needed to fulfil the restorative function when there are no other legal mechanisms to do so.[591] With the introduction of a legal mechanism devoted to fulfilling the restorative function (confiscation), a fine should no longer be used. Further, even if the fine is calculated in a way that ensures that it only results in restoring the status quo, this does not necessarily preclude classifying the fine as a punitive sanction. This is because, normally, the non-payment of the fine may result in imprisonment by default. In short, relying on the analogy may not provide assistance in determining whether the confiscation of the proceeds of crime entails hard treatment.

Another argument supporting the idea that confiscation of the proceeds of crime entails hard treatment (despite the fact that it is derived from the commission of an offence) is that offenders may often regard the proceeds of crime as their entitlement;[592] thus, depriving them of what they regard as theirs could be perceived as a punitive sanction.[593] Douglas stated that 'while offenders may never have had a right to their ill-gotten gains, the taking of what was not properly theirs may nonetheless amount to a negative sanction. Losing something is more painful than never having it'.[594]

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[590] Freiberg, Arie, et al, 'Forfeiture, Confiscation and Sentencing' (1992) *The Money Trail: Confiscation of the Proceeds of Crime, Money Laundering, and Cash Transactions Reporting* 136.
[591] Ibid.
[592] Levi, Michael, 'Taking the Profit Out of Crime: The UK Experience' (1997) 5 *European Journal of Crime, Criminal Law and Criminal Justice* 228.
[593] Ibid.
[594] Douglas, Roger Neil, 'The Relevance of Confiscation to Sentencing and its Limitations' (Criminal Law Journal 2007) 354.

A rebuttal to this point might be that whether confiscation of the proceeds of crime is punitive in effect should not be determined solely from the perspective of defendants; from a defendant's point of view, any sanction, even if clearly remedial, might be viewed as punitive.[595]

To summarise, it is ambiguous whether, from the non-economic perspective, confiscation of the proceeds of crime entails hard treatment. A key issue that might assist in understanding the question is how criminals' right to the proceeds of crime is conceived in a nation. If the prevailing view is that offenders should never have a right to their proceeds, or that the proceeds of crime are never 'properly belonging' to criminals,[596] confiscation of the proceeds of crime may fairly be regarded as not entailing hard treatment. If the proceeds of crime are regarded as properly belonging to the criminal, but are confiscated because of their connection to a criminal offence,[597] it can be argued that confiscation of the proceeds of crime entails hard treatment, since the deprivation of this right clearly involves an unpleasant consequence. However, this argument cannot be relied on to determine the substance of the nature of a sanction. It might be argued that the only clear case where the confiscation of the proceeds of crime could be said to entail hard treatment from this perspective is in the situation where the proceeds of crime consist of a salary from a job acquired by illegal means, since, in this case, the person spent time and effort in legitimate work to obtain the salary. Other than this case, the confiscation of the proceeds of crime can objectively be viewed as an unpleasant consequence or as not entailing hard treatment.

The existence of hard treatment is not solely sufficient to meet the first key component that defines punishment; in addition, the hard treatment must be deliberately inflicted. The effect of the deliberate component is to exclude measures from the concept of punishment that might entail hard treatment if these are not intentionally imposed. In other words, confiscation of the proceeds of crime may not be considered punishment, even though it entails hard treatment, if its intention is not to impose hard treatment. One of the consequences of requiring that hard

[595] See Campbell, Liz, 'Theorising Asset Forfeiture in Ireland' (2007) 71(5) *The Journal of Criminal Law* 448 nn 45.
[596] See generally Alldridge, Peter, *Money Laundering Law: Forfeiture, Confiscation, Civil Recovery, Criminal Laundering and Taxation of the Proceeds of Crime* (Bloomsbury Publishing, 2003) 57–8.
[597] See, eg, Husni, Mahmood Najeeb شرح قانون العقوبات- القسم العام- النظرية العامة للجريمة و النظرية العامة للعقوبة و التدبير الإحترازي [Explanation of the Penal Code – General Section – The General Theory of Crime and General Theory of Punishment and Precautionary Measure] (Dar Almatboa'at Aljama'eya, 8th ed, 2017) 886–7.

treatment must intentionally be imposed on a person is to exclude the confiscation of the proceeds of crime primarily aimed at preventing the commission of further criminal activities,[598] or at compensating the victim of the crime for the damage incurred because of the criminal offence.

The intentional aspect of hard treatment is, however, more suited to differentiating between punishment and other measures when the other measures are recognised and clearly defined in terms of when they cannot be considered punishment. This, however, is not the case for confiscation of the proceeds of crime, which can manifest a mixture of purposes.[599] It could be viewed as serving a punitive purpose. Moreover, it may be viewed as serving a non-punitive purpose, since it may aim at preventing unjust enrichment by depriving offenders of benefits and advantages derived as a result of the commission of a criminal offence. It also could serve a preventive purpose, since confiscation of the proceeds of crime may aim at eliminating the financial ability to finance further criminal activity. These various aims render the issue of determining the paramount purpose of confiscation difficult. Michael Levi observed that the confiscation of proceeds of crime means different things to different people: 'It may be viewed as a general or individual deterrent, as retribution, and – inasmuch as money may be needed as capital to commit other major crimes (including the establishment of businesses as fronts for crime) – as incapacitation'.[600]

The main problem is how to determine the true purpose behind the confiscation of the proceeds of crime. Relying on the formal designation of the legislator would lead to circumventing individual safeguards simply by stating the aim of the confiscation of the proceeds of crime as not constituting punishment. Therefore, the salient question is how to determine the true purpose behind the confiscation of the proceeds of crime beyond this formal designation.

Censure

The first component that defines the character of punishment having been discussed, this section focuses on the second component—censure. Through censure, a message publicly

[598] See generally Ashworth, Andrew and Zedner, Lucia, *Preventive Justice* (OUP Oxford, 2014) 15–16.
[599] Freiberg, Arie, 'Criminal Confiscation, Profit and Liberty 1' (1992) 25(1) *Australian & New Zealand Journal of Criminology* 44 50.
[600] Quoted in Fisse, Brent, *Confiscation of Proceeds of Crime: Funny Money, Serious Legislation* (Institute of Criminology, Sydney University Law School, 1989) 374.

declaring the wrongfulness of his or her conduct is conveyed to the perpetrator of the criminal offence. The censuring capacity of punishment is connected to the notion of wrongdoing in many aspects. First, it conceives of crime as wrongdoing, and therefore the notion of crime necessarily entails not only the material element of the offence but also criminal fault.[601] It also conceives of the criminal as a wrongdoer. This does not mean that the person has contravened some moral code in the community, rather that the criminal has directed his or her will against interests protected by the criminal offence.[602] This also assumes recognition that the criminal has the capacity to 'make the right choices'.[603] In other words, the legal reason for censure stems mainly from the finding that a person who has this capacity has directed his or her will wrongfully against the interests protected by the criminal offence, either by intentionally committing the criminal offence or by being thoughtless in committing the criminal conduct. The question is whether the confiscation of the proceeds of crime under NCBC conveys to the confiscation subject a critical message of denunciation—but the question is complex.

In the conviction-based confiscation model, even if the mental culpability is not a precondition for the confiscation of the proceeds of crime, such culpability has already been established by the preceding conviction of the person who committed the criminal offence.[604] This is not the case, however, with NCBC. The imposition of NCBC does not require any finding of fault committed by the confiscation subject. Indeed, NCBC may be imposed without a need to establish that a particular criminal offence has been committed or a particular person has committed the criminal offence. NCBC can be imposed on a third party even if the third party is completely bona fide. As a result, it could be argued that the legal justification of censure is absent in NCBC so long as criminal fault is not a requirement. This is especially the case given that confiscation of the proceeds of crime is not in itself a 'shaming' punishment.

However, when a court finds that the confiscation subject has engaged in criminal conduct, as is normally the case in property-directed confiscation, the complete exclusion of censure is implausible. Although culpability is not a requirement, it can be argued that, from a social

[601] See Zedner, Lucia, Zedner*Criminal Justice,* Clarendon Law Series (Oxford, 2004) 53.
[602] Belal, Ahmad Awad النظرية العامة للجزاء الجنائي [The General Theory of Criminal Punishment] (Dar Alnahdha Alarabiya, 1996) 18.
[603] See Zedner, Lucia, *Criminal Justice,* Clarendon Law Series (Oxford, 2004) 49.
[604] Boucht, Johan, *The Limits of Asset Confiscation: On the Legitimacy of Extended Appropriation of Criminal Proceeds* (Hart Publishing, 2017) 120.

perspective, the finding that a person has committed a criminal offence results in censuring.[605] This might also be applicable in the situation of unexplained-wealth confiscation when the basis for the 'unexplained' aspect is suspicion of committing a criminal offence.

To summarise, the issue of whether NCBC conveys censure is complex. Depending on the legal justification for censure, it would likely result in the finding that NCBC does not entail censure. If, however, the confiscation of the proceeds of crime entails a finding of commission of a criminal offence, and one's approach extends beyond the legal reason for censure to what the community is likely to understand from the infliction of NCBC, property-directed confiscation is likely to be found as constituting censure. For example, a finding that a property represents proceeds from drug trafficking is likely to satisfy the censuring component from a social perspective, even without establishing fault by the person in question.

The European Court of Human Rights Jurisprudence

Having discussed the legal nature of NCBC from philosophical perspective, this section examines the jurisprudence of the European Court of Human Rights in relation to the legal nature of NCBC. The jurisprudence of the European Court of Human Rights may provide more guidance on whether confiscation of the proceeds of crime should be considered punishment. The question of whether a particular measure is regarded as a punishment or constitutes a criminal charge has been dealt with in light of Articles 6 and 7 of the *European Convention on Human Rights*. Article 7 is concerned with the principle of legality.[606] It mainly prohibits the retrospective imposition of a 'penalty' within the meaning of the Convention. Article 6 is concerned with the protection of the right to a fair trial and the presumption of innocence.[607] It

[605] See generally Steiker, Carol S, 'Punishment and Procedure: Punishment Theory and the Criminal-Civil Procedural Divide' (1997) 26 *Ann. Rev. Crim. Proc.* 775.

[606] *European Convention on Human Rights*, Article 7 states:

> 1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed. 2. This article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations.

[607] *European Convention on Human Rights*, Article 6 states:

> 1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or

provides more stringent protection of these rights if the imposition of the measure constitutes a 'criminal charge' within the meaning of the Convention. In determining whether a measure constitutes a penalty or a criminal charge, both concepts are subject to the same criteria developed in the case of *Engel v The Netherlands*.

In *Engel v The Netherlands*,[608] the Court outlined the criteria via which assessment of the applicability of the criminal aspect of Article 6 should be determined. Assessment starts with how the measure is classified under domestic law.[609] If the domestic classification of the measure is criminal, then the application of the criminal aspect of Article 6 should not be questioned, since such criminal classification is considered decisive in this issue. If the national classification of the measure is not criminal, the Court extends its assessment beyond the national classification to the substance of the measure in question. In doing so, it examines the nature of the offence in question and the severity of the penalty that the person concerned risks incurring.[610] The examination of the nature of the relevant offence and the examination of the severity of the penalty are regarded as alternative and not necessarily cumulative.[611] A cumulative approach is utilised if a separate analysis of the nature of the relevant offence and the severity of the penalty cannot provide clear guidance on whether the measure constitutes a criminal charge.[612] In assessing the nature of the relevant offence, the Court considers a number of factors to reach a conclusion on whether the measure constitutes a criminal charge. One of the factors taken into consideration is whether the legal rule in question has a punitive or a

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national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice. 2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law. 3. Everyone charged with a criminal offence has the following minimum rights:
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(a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him; (b) to have adequate time and facilities for the preparation of his defence; (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require; (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him; (e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

[608] *Engel v The Netherlands* (1976) Application Nos 5100/71, 5101/71, 5102/71, 535/72 and 3570/72.
[609] Ibid [82].
[610] Ibid.
[611] See *Lutz v Germany* (1987) Application No 9912/82 [55].
[612] *Bendenoun v France* (1994) Application No 12547/86 [47].

deterrent purpose.[613] Another factor is whether a finding of guilt is a necessary precondition for the imposition of the measure.[614] In addition, the Court takes into consideration the procedures involved in the making and enforcement of the measure.[615] Further, the Court considers whether the provision in question is concerned with a specific group of individuals or is of general application to all individuals.[616] Moreover, the Court considers how a similar measure is classified in other member states of the Convention.[617] In general, the Court assesses the norms of the measure in question. If the norms are comparable with the features of criminal law, it considers the measure 'criminal' or a 'penalty', and vice versa.[618]

The European Court of Human Rights Case Laws

In *Welch v The United Kingdom*,[619] the Court was required to deal with a complaint alleging a violation of Article 7 on the grounds that the confiscation order imposed on Mr Welch constituted the infliction of a retrospective criminal penalty. The circumstances of the case are as follows. Mr Welch was convicted of several drug offences and had been sentenced to 22 years of imprisonment. A confiscation order of GBP 66,917 was imposed pursuant to the *Drug Trafficking Offences Act 1986*. In addition, in the case of default on the payment, Mr Welch was required to serve an additional two years of imprisonment. The confiscation order was imposed pursuant to the extended confiscation model, in which several assumptions in relation to the criminal origin of a property were triggered. Moreover, the confiscation order imposed was based on offences committed prior to the beginning of the operation of the *Drug Trafficking Offences Act 1986*. The Court of Appeal reduced the overall sentence to 20 years of imprisonment and the confiscation order to GBP 59,914. Mr Welch complained before the European Court of Human Rights, alleging that he was subjected to a retrospective criminal penalty in violation of Article 7 of the Convention.

Despite the government's contention that the confiscation order did not amount to a 'penalty', since its true purposes were reparative and preventive, the Court reached the decision that the

[613] *Öztürk v Germany* (1984) Application No 8544/79 [53].
[614] *Benham v The United Kingdom* (1996) Application No 19380/92 [56].
[615] *Welch v The United Kingdom* (1995) Application No 17440/90 [28].
[616] *Bendenoun v France* (1994) Application No 12547/86 [47].
[617] *öztürk v Germany* (1984) Application No 8544/79 [53].
[618] Rui, J P and Sieber, U 'Non-conviction-based Confiscation in Europe. Bringing the Picture Together' in *Non-Conviction-Based Confiscation in Europe: Possibilities and Limitations on Rules Enabling Confiscation Without a Criminal Conviction* (Duncker & Humblot, 2015) 256.
[619] *Welch v The United Kingdom* (1995) Application No 17440/90.

confiscation order constituted a 'penalty' and thus entailed a violation of Article 7 of the Convention. In reaching this decision, the Court first observed that pursuing reparative and preventive purposes does not necessarily exclude the punishment objective of a confiscation order, which can be inferred from the broad powers of confiscation in the present case. It also emphasised that 'the aims of prevention and reparation are consistent with a punitive purpose and may be seen as constituent elements of the very notion of punishment'.[620] In reaching the conclusion that Mr Welch was the subject of a retrospective criminal penalty, the Court stated the following:[621]

> *There are several aspects of the making of an order under the 1986 Act which are in keeping with the idea of a penalty as it is commonly understood even though they may also be considered as essential to the preventive scheme inherent in the 1986 Act. The sweeping statutory assumptions in section 2 (3) of the 1986 Act that all property passing through the offender's hand over a six-year period is the fruit of drug trafficking unless he can prove otherwise … the fact that the confiscation order is directed to the proceeds involved in drug dealing and is not limited to actual enrichment or profit … the discretion of the trial judge, in fixing the amount of the order, to take into consideration the degree of culpability of the accused … and the possibility of imprisonment in default of payment by the offender … are all elements which, when considered together, provide a strong indication of, inter alia, a regime of punishment.*

In *Butler v the United Kingdom*,[622] the Court was required to deal with a complaint regarding contravention of Article 6 of the Convention in relation to cash recovery proceedings in English law. The circumstances of the case are as follows. A friend of Mr Butler's was carrying GBP 240,000 in cash belonging to Mr Butler when he was stopped at Portsmouth by a Customs and Excise officer. The officer asked him about the quantity of cash he was carrying; he answered GBP 500. The officer conducted a search of the car Mr Butler's friend was driving and discovered that he was carrying GBP 240,000 in cash. Mr Butler's friend claimed that the cash belonged to Mr Butler and he was carrying the cash to Mr Butler in Spain where he wanted to buy an apartment. The cash was seized in accordance with Section 42 of the *Drug Trafficking*

[620] Ibid [30].
[621] Ibid [33].
[622] *Butler v The United Kingdom* (2002) Application No 41661/98.

Act 1994[623] and then confiscated pursuant to Section 43 of the same Act.[624] The reason for the confiscation was based on the finding on the balance of probabilities that the cash was to be used for drug trafficking. In reaching this conclusion, the Court relied on a number of factors, including that a large proportion of the cash was of Scottish notes, often utilised to finance drug transactions conducted abroad, and that 'the south coast of Spain is known to Customs officials as the source of a large number of consignments of drugs destined for the United Kingdom'. Mr Butler filed an application with the European Court of Human Rights contending that the seizure and forfeiture proceedings infringed his right to be presumed innocent.

In determining whether there had been a violation of Article 6, the Court applied the Engel criteria and found that there had been no violation of the presumption of innocence. In reaching this conclusion, the Court stated the following:[625]

> *The forfeiture order was a preventive measure and cannot be compared to a criminal sanction, since it was designed to take out of circulation money which was presumed to be bound up with the international trade in illicit drugs. It follows that the proceedings which led to the making of the order did not involve the determination … of a criminal charge.*
>
> *In addition to Butler, the Court has accepted the preventive nature of Italian NCBC on a number of occasions.*[626]

In *Walsh v the United Kingdom*,[627] the Court was required to deal with a complaint concerning recovery proceedings that alleged a violation of Article 6, as the civil standard of proof, not the criminal standard, had been applied. Another complaint alleged a violation of Article 7:

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[623] Section 42 (1) states that:

> A custom officer or constable may seize and, in accordance with this section, detain any cash which is being imported into or exported from the United Kingdom if … he has reasonable grounds for suspecting that it directly or indirectly represents any person's proceeds of drug trafficking, or is intended by any person for use in drug trafficking.

[624] Section 43 provides that:

> A Magistrates' court … may order the forfeiture of any cash which has been seized under section 42 of this Act if satisfied, on an application made while the cash detained under that section, that the cash directly or indirectly represents any person's proceeds of drug trafficking, or is intended by any person for use in drug trafficking … The standard of proof in proceedings on an application under this section shall be that applicable to civil proceedings; and an order may be made under this section whether or not proceedings are brought against any person for an offence with which the cash in question is connected.

[625] *Butler v The United Kingdom* (2002) Application No 41661/98 9.

[626] See, eg, *M v Italy* (1991) Application No 12386/86.

[627] *Walsh v The United Kingdom* (2006) Application No 43384/05.

because the recovery order was inflicted for conduct that occurred prior to the enactment of the *Proceeds of Crime Act 2002*, it exposed Mr Walsh to a retrospective penalty. These are the circumstances of the case. Mr Walsh (who had an extensive criminal record, including four counts of burglary and eight of theft) was subject to recovery proceedings with respect to a total sum of nearly GBP 76,000 resulting from the belief that this sum was the product of unlawful conduct within the meaning of the *Proceeds of Crime Act 2002*. The national courts refused the contention on behalf of Mr Walsh that the recovery proceedings were criminal proceedings and therefore the criminal standard of proof should apply. A recovery order of the sum was issued on the basis of the satisfaction of the balance of probabilities that the property had been obtained through unlawful conduct.

Mr Walsh brought his case to the European Court of Human Rights, alleging a violation of Articles 6 and 7. The Court applied the Engel criteria to determine whether the recovery proceedings entailed a criminal charge. The Court first noted that the proceedings for recovery in national law are classified as civil, not criminal. It then went on to examine the second and the third guiding criteria to determine whether a criminal charge existed. It concluded that there was no violation of Articles 6 and 7. In reaching this decision, the Court stated the following:[628]

> *As to the second, the domestic courts considered that the purpose of the proceedings was not punitive or deterrent but to recover assets which did not lawfully belong to the applicant … The Court also notes that there was no finding of guilt of specific offences and that the High Court judge in making the order was careful not to take into account conduct in respect of which the applicant had been acquitted of any criminal offence. Lastly, the recovery order was not punitive in nature; while it no doubt involved a hefty sum, the amount of money involved is not itself determinative of the criminal nature of the proceedings (see Porter v. the United Kingdom, (dec.), no. 15814/02. 8 July 2003, where the applicant was liable to pay some GBP 33 million in respect of financial loses to the local authority during her mandate as leader).*

In *Dassa Foundation v Liechtenstein*,[629] the Court was asked to determine the admissibility of a case concerning the seizure and confiscation of property alleged to constitute a retrospective

[628] Ibid [1].
[629] *Dassa Foundation v Liechtenstein* (2007) Application No 696/05.

criminal penalty and, therefore, a violation of Article 7 of the Convention. The circumstances of the case are as follows. The Dassa Foundation and the Lefleur Foundation were subject to a seizure order in respect to all their assets deposited in Neu Bank. The reason for the seizure was that Mr Attilio Pacifico, who had been suspected of bribing judges in Rome in the 1990s, had transferred the proceeds of the offences to the above-mentioned foundations to conceal the criminal origin of the property. The period of the seizure order was extended several times. On the last occasion of prolongation, the extension was based on objective confiscation provisions that entered into force on December 2000, after the relevant offences in question had been committed.

The Court noted that the confiscation order had not yet been imposed and, therefore, the requirement that a penalty be imposed under Article 7 may not have been fulfilled. However, it decided to ignore this issue and examine whether any subsequent confiscation order would constitute a 'penalty' within the meaning of the Convention. In the assessment, the Court held the inadmissibility of the case, as any subsequent confiscation order could not constitute a penalty. It rejected the claim that the confiscation order amounted to additional punishment and contended that it was merely a civil law consequence of obtaining property through unlawful conduct.[630] In justifying this decision, which differs from the Welch case, the Court noted the following:[631]

> *There are in fact several elements which make seizure and forfeiture, in the manner in which these measures are regulated under Liechtenstein law, more comparable to a restitution of unjustified enrichment under civil law than to a fine under criminal law. In particular, seizure and forfeiture under Liechtenstein law are limited to assets which originate from a punishable act … If the suspicion that the seized assets stem from a punishable act proves to be true, forfeiture is thus restricted to the actual enrichment of the beneficiary of an offence – a factor which distinguishes the present case from the case of Welch … in which such a limitation did not exist. Moreover, other than in the Welch case … and other than in the case of criminal-law fines, the degree of culpability of the offender is irrelevant for fixing the amount of assets declared forfeited. Furthermore, unlike the confiscation orders at issue in the case of Welch … the*

[630] Ibid [16].
[631] Ibid [17].

forfeiture orders under Liechtenstein law cannot be enforced by imprisonment in default of payment.

In *Gogitidze v Georgia*,[632] the Court was required to deal with a complaint concerning the alleged violation of Article 6, among others, resulting from unexplained-wealth confiscation in Georgia. This confiscation regime allows for the confiscation, without a need to secure a conviction, of property wrongfully or inexplicably accumulated by public officials. The central issue in this case is whether unexplained-wealth confiscation that involves a shift in the burden of proof constitutes a violation of the Convention. As to the violation of Article 6, the Court accepted that Georgian unexplained-wealth confiscation does not have a punitive aim; instead, its purposes are compensatory and preventive. Its compensatory purposes are found in the way the confiscation regime allows for remedying damage incurred by the injured party by returning confiscated property to its lawful owner. Its preventive purposes are evident in the way it aims at preventing the unjust enrichment of public officials. The Court also seemed to suggest that confiscation of the proceeds of crime without a need to secure a conviction—and completely detached from criminal proceedings—cannot amount to a penalty within the meaning of the Convention. The Court stated the following:[633]

Its well-established case-law to the effect that proceedings for confiscation such as the civil proceedings in rem in the present case, which do not stem from a criminal conviction or sentencing proceedings and thus do not qualify as a penalty … cannot amount to 'determination of a criminal charge' within the meaning of Article 6 § 1 of the Convention and should be examined under the 'civil' head of that provision.

Therefore, the Court found that unexplained-wealth confiscation under Georgian law does not constitute a violation of Article 6.

A number of conclusions can be drawn from the case laws of the European Court of Human Rights. The Court accepted that the backward-looking justification for confiscation of the proceeds of crime is not necessarily punishment but can also be reparative. Although it rejected the reparative nature of the confiscation of the proceeds of crime in Welch's case, it accepted the backward-looking justification of the confiscation of the proceeds of crime as not

[632] *Gogitidze v Georgia* (2015) Application No 36862/5.
[633] Ibid [120].

constituting a penalty in the Dassa Foundation case. Further, the Court accepted the differences between the backward-looking and forward-looking justifications of the confiscation of the proceeds of crime and recognised the preventive justification for it as not constituting a penalty. However, the jurisprudence of the European Court of Human Rights makes it clear that pursuing preventive and reparative purposes does not necessarily preclude the aim of punishment. In other words, preventive and reparative justifications for confiscating the proceeds of crime may be viewed as constituent elements of the very notion of punishment. The salient question, then, concerns when the reparative and preventive justifications for confiscation of the proceeds of crime can be distinguished from the notion of punishment.

According to the approach of the European Court of Human Rights, the issue of whether reparative and preventive justifications can be distinguished from the notion of punishment depends on whether there is a clear punitive aim in the confiscation regime.[634] If the Court finds a clear punitive aim despite the government label, it declares the confiscation of the proceeds of crime a penalty. Otherwise, the reparative and preventive justifications for confiscation of the proceeds of crime as distinct from punishment are likely to be accepted.

In determining whether confiscation of the proceeds of crime serves a punitive purpose, the Court relied on many factors from which a punitive purpose can be deduced. An important factor that may strongly suggest a non-punitive aim of confiscating the proceeds of crime is the absence of conviction. Other important factors include whether the confiscation of the proceeds of crime is limited to net profits or extends to gross receipts; the impact of culpability regarding fixing the amount of the confiscation order; the possibility of imprisonment by default as a result of non-payment of the confiscation order; and the utilisation of sweeping presumptions of the criminal derivation of the property. However, the ability of each factor to decide on punitive purpose is unclear.

Consideration of the two approaches

The philosophical approach and the approach of the European Court of Human Rights have been discussed. The question of how these accounts can provide assistance in determining whether NCBC imposes a punishment on the confiscation subject remains. Both approaches

[634] See generally Simonato, Michele, 'Confiscation and Fundamental Rights across Criminal and Non-criminal Domains' (Paper presented at the ERA Forum, 2017).

can provide insights into whether NCBC is a form of punishment; however, both also suffer weaknesses. The conceptual approach focuses on the two key components that define punishment—intentional hard treatment and censure. The examination of the conceptual approach revealed that the imposition of unexplained-wealth confiscation based on the suspicion that the confiscation subject committed a criminal offence may involve some form of censuring, even if the confiscation is not based directly on moral blame. Similarly, the finding that the confiscation subject has engaged in a criminal activity in property-directed confiscation may suggest the existence of the censuring component in the punishment, even though moral culpability is not an issue. However, because moral culpability is not an issue in such confiscation proceedings, it is difficult to argue that the value of the censuring capacity of NCBC, in the case of a finding or suspicion of committing a criminal activity, is able to satisfy the censuring component of punishment fully. At most, it can be argued that NCBC in such circumstances may have 'involved the stigma of a quasi-criminal label'. This is especially the case if the assessment of the nature of confiscation includes discussion of how the community understands the NCBC and whether it entails finding that the subject of confiscation has engaged in criminal activity.

The key weakness in the philosophical approach to defining punishment is in determining the second key aspect of punishment—intentional hard treatment in the context of confiscation of the proceeds of crime. This much is clear: if the confiscation of the proceeds of crime goes beyond net profits, it could be argued that the hard treatment component is satisfied so long as the confiscation is not considered preventive or compensatory. The problem, however, regards the situation where the confiscation of the proceeds of crime is limited to restoring the status quo ante. Valid arguments can be advanced both for and against the availability of hard treatment. The philosophical approach, therefore, suffers from a vital weakness in determining how the restorative function of NCBC should be conceived.

The European Court of Human Rights, on the other hand, seems to ground its decisions on whether confiscation of the proceeds of crime is punitive in nature on the assessment of the purpose of the confiscation. If it finds a clear punitive purpose in inflicting the confiscation, it considers the nature of the confiscation to be punitive; otherwise, it does not. The approach of the European Court of Human Rights can provide more assistance in determining the punitive purpose of the confiscation of the proceeds of crime; however, there are a number of weaknesses in relying on this approach. The first is ignorance of the issue of moral blame that

may stem from the infliction of NCBC. The second is that the jurisprudence of the European Court of Human Rights has been subject to criticism for its failure to provide clear and consistent decisions in the area of confiscation of the proceeds of crime. As Ivory contends, 'the rationale behind the ECHR's classification scheme is obscure, if not incoherent and inconsistent'.[635] In *Varvara v Italy*, moreover, Judge Pinto stated that:[636]

> *Beyond the contradictions in the various cases concerning measures which are substantially analogous, the Court affords weaker safeguards for more serious, indeed more intrusive, confiscation measures, and stronger guarantees for less serious confiscation measures. Some 'civil-law' measures and some 'crime prevention' measures which disguise what is in effect action to annihilate the suspect's economic capacities, sometimes on threat of imprisonment should they fail to pay sum due, are subject to weak, vague supervision, or indeed escape the Court's control, while other intrinsically administrative measures are sometimes treated as equivalent to penalties and made subject to stricter safeguards of Articles 6 and 7 of the Convention.*

The third weakness relates to NCBC's approach in relation to victim crime. The fact that the confiscated proceeds could be vested to the victim of crime should not lead one to view the nature of confiscation as compensatory. Otherwise, the confiscation of the proceeds of crime could be considered as compensatory simply by stating that if there is a victim of the crime, the proceeds could be vested to the victim.

The fourth weakness relates to how to approach the purpose of confiscating the proceeds of crime. Ivory stated in relation to the jurisprudence of the European Court of Human Rights concerning the confiscation of the proceeds of crime that '[i]f there is a golden thread running through the cases, it is that the court is committed to enabling state parties to pursue this criminal justice policy without ceding entirely its capacity for supervision.'[637] The approach of

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[635] Ivory, Radha, *Corruption, Asset Recovery, and the Protection of Property in Public International Law* (Cambridge University Press, 2014).

[636] *Varvara v Italy* (2013) Application No 17475/09 8. In the same case, the court stated that:

> Under the nomen juris of confiscation, the States have introduced ante delictum criminal prevention measures, criminal sanctions (accessory or even principal criminal penalties), security measures in the broad sense, administrative measures adopted within or outside criminal proceedings, and civil measures in rem. Confronted with this enormous range of responses available to the State, the Court has not yet developed any consistent case-law based on principled reasoning.

[637] Ivory, Radha, *Corruption, Asset Recovery, and the Protection of Property in Public International Law* (Cambridge University Press, 2014).

the European Court of Human Rights may be objectionable because the finding that the confiscation of the proceeds of crime serves a punitive purpose depends on the existence of a clear punitive aim. Confiscation of the proceeds of crime is clearly based on the commission of a criminal offence, and sanctions imposed as a result of the commission of a criminal offence are normally a punishment.

If the approach of the European Court of Human Rights is to be avoided and the Court is required to find a clear non-punitive aim in confiscating the proceeds of crime, different results may emerge. The reparative aim of confiscation of the proceeds of crime is likely to be viewed as perfectly retributive. Mazzacuva pointed out that '[t]he idea of recreating the situation as it was before the unlawful conduct is one of the pillars of retributive conceptions of punishment where, for this reason, the proportionality between the criminal offence and the sanction is emphasised'.[638] The general application of NCBC to most crimes may further reinforce the idea that NCBC, in fact, targets the criminal and his or her inner circle, which may not exclude the punitive nature of confiscation. The preventive justification may not escape the classification of punishment unless there is a clear indication that the property will be used to finance further criminal activity.

In both the conceptual approach and the jurisprudence of the European Court of Human Rights, confining the examination of the nature of NCBC to the issue of whether it constitutes a punishment may lead to unsound reasoning. This is because limiting the issue in this way may confine the examination of the nature of confiscation to whether the norms of punishment exist in NCBC. Confiscation of the proceeds of crime can, therefore, escape the classification of punishment simply by omitting the norms of punishment. For instance, according to the jurisprudence of the European Court of Human Rights, one of the main factors suggesting the non-punitive aim of the confiscation of the proceeds of crime is the absence of conviction. Removing the requirement to secure conviction can, therefore, circumvent criminal-process safeguards without sound reasoning. Similarly, from the philosophical perspective, NCBC is unlikely to constitute a criminal punishment because no mental element is required to be established for the imposition of confiscation. The confiscation of the proceeds of crime that

[638] Mazzacuva, Francesco, 'The Problematic Nature of Asset Recovery Measures: Recent Developments of the Italian Preventive Confiscation' in Simonato, Michele and Ligeti, Katalin (eds), *Chasing Criminal Money: Challenges and Perspectives on Asset Recovery in the EU* (Hart Publishing, 1st ed, 2017) 101 111.

obviates the need to establish the mental element can thus escape the classification of punishment simply by removing the mental element.

To provide more compelling reasons for the non-punitive nature of NCBC, the examination of its legal nature should not be limited to whether the norms of NCBC are comparable to the norms of punishment. Rather, the examination should extend to the theory behind the confiscation of the proceeds of crime, which determines the requirements for this confiscation. In other words, the question that needs to be asked pertains to the theory behind NCBC that permits the confiscation of the proceeds of crime without a need to establish any fault element or that extends to a completely bona fide third party. Without a thorough examination of the underlying theory, NCBC can escape the classification of punishment without compelling reasoning. In particular, without the ability to justify the NCBC as based on civil law theory of unjust enrichment, predominantly preventive or concerned mainly with dealing with the harm of property, the nature of NCBC would be suspect.

To summarise, there are many doubts surrounding the true nature of NCBC. An important way to emphasise the non-punitive nature of NCBC would be to limit the confiscation of the proceeds of crime to net profits. Nevertheless, it is possible that the examination of the existence of hard treatment may extend to a non-economic perspective. In this case, the likelihood of finding that the confiscation of the proceeds of crime entails intentional hard treatment increases. This is especially the case if a court requires finding a clear non-punitive aim to accept the non-punitive nature of confiscation of the proceeds of crime. Further, the censuring capacity of NCBC should not be underestimated. NCBC may be viewed as punishment if the confiscation of the proceeds of crime is based on the finding of the commission of a criminal offence. This is especially the case if the existence of censure is not determined solely by the legal justification of censure, but rather extends to what the community understands by the finding of the commission of a criminal offence. Above all, without a concerted theory for NCBC that clearly does not pursue a punitive aim and can justify the requirements of NCBC, the true nature of NCBC will remain uncertain.

CHAPTER 6 Non-conviction-based confiscation in Kuwait

Introduction

The previous chapter examined the contested nature of confiscation of the proceeds of crime. It concluded with the argument that although NCBC that adheres to certain features may not constitute punishment, without theoretical justifications that not only pursue clear non-punitive aims but also explain the requirements for confiscation, the legitimacy of NCBC would be suspect. This chapter builds on the previous chapter by examining the theoretical justifications for NCBC and its legitimacy in Kuwait. The main argument of the chapter is that although the theoretical justification for NCBC may legitimise NCBC in Australia and the UK, it is difficult to legitimise NCBC in Kuwait via the same justifications.

The chapter begins by considering the four main theorical justifications in Australia and the UK for the civil law approach for confiscating the proceeds of crime. Namely, it considers the preventive justification, the restorative justification, the in-rem theory, and the idea of the punitive-civil sanction and the applicability to Kuwait. It then examines the justifications for discarding the criminal norms in relation to the standard and burden of proof.

Theoretical Justifications for NCBC and applicability to Kuwait

The nature of the claim of the state towards the proceeds of crime is one of the main obstacles to using NCBC to overcome the difficulties in proving the criminal origin of property in Kuwait. Without being able to demonstrate a nature that clearly justifies a deviation from the criminal norms for confiscating the proceeds of crime, the legitimacy of an NCBC scheme would be weakened. There are three main theoretical justifications advanced in Australia and the UK for NCBC—the nature of the confiscation of the proceeds of crime is said to be reparative, based on preventing unjust enrichment; preventive, based on preventing financing further criminal activities; and punitive, based on the notion of punitive civil sanction.

However, these theoretical justifications advanced in Australia and the UK may not provide for a satisfactory basis for NCBC in Kuwait.

Preventive justification

Relying on the preventive justification in the sense of preventing the financing of further criminal activity may not be able to offer a sound basis for NCBC in Kuwait. It is objectionable mainly because the design of NCBC in Australia and the UK does not require any indication that the property will be used to finance further criminal activities. Moreover, the preventive justification may not be able to justify the confiscation of the proceeds of crime in all situations; instead, it can offer a sound basis for only those situations where the nature of the crime suggests that the property is likely to be used to finance further criminal offences. The problem is NCBC is applied to a wide range of criminal offences that do not necessarily indicate that the property may be used to finance further criminality. In addition, the preventive justification should, in principle, be accomplished merely by the non-existence of the proceeds of crime. The problem with unexplained wealth confiscation, especially in Australia, is that the confiscation regime allows for a value-based system of confiscation in which the confiscation subject is still required to be deprived of the amount of the proceeds of crime, even when these proceeds have been consumed and therefore not represent a danger. Above all, the prevention regime, which is concerned mainly with combating crime, is considered criminal in Kuwait.[639] One of the main consequences of regarding the preventive regime as criminal is that, normally, the criminal processes safeguards apply to preventive sanctions,[640] although these may be less stringent than those in relation to the imposition of punishment.[641]

Unjust enrichment

Relying on the civil law theory of unjust enrichment to justify the reparative nature of NCBC is questionable in Kuwait. The main argument advanced in support of the claim that NCBC proceedings are civil and not criminal lies in the notion that the imposition of NCBC is not an

[639] See chapter two.
[640] See, eg, Althaferi, Fayez, المبادئ في علم الإجرام و العقاب [Principles in Criminology and Punishment] (Almuqahwi Alola, 2013) 238.
[641] See, eg, Belal, Ahmad Awad النظرية العامة للجزاء الجنائي [The General Theory of Criminal Punishment] (Dar Alnahdha Alarabiya, 1996) 61–2.

expression of retributive justice; instead, it is an expression of corrective justice.[642] Namely, the reparative nature of the confiscation of the proceeds of crime is based on the theory of unjust enrichment.[643] In fact, there are a number of similarities between NCBC and the theory of unjust enrichment.[644] Similar to unjust enrichment, for instance, the imposition of NCBC does not require any fault on the part of the person holding the property; in other words, the confiscation of the proceeds of crime can take place even if the person holding the property is completely innocent.[645] Moreover, the impact of the confiscation of the proceeds of crime on the confiscation subject may also be similar to the impact on the defendant of restitution under unjust enrichment.[646] That is, from an economic perspective, the effect of restitution under unjust enrichment on the defendant is similar to the effect of confiscation of the proceeds of crime. This is especially the case if the confiscation of the proceeds of crime is limited to the net profit.

However, the theory of unjust enrichment as understood in Kuwait cannot provide a satisfactory basis for NCBC. The theory of unjust enrichment is underpinned by the notion of corrective justice in Kuwait.[647] Corrective justice requires the existence of a loss for one person and gain for another individual that are correlative.[648] Corrective justice aims at maintaining equality between individuals by providing grounds for liability regarding the person who acquired gain to restore the position of the person who suffered a loss.[649] The civil law theory of unjust enrichment adheres to the notion of corrective justice in Kuwait. It requires the existence of a gain on the part of the defendant and a loss on the part of the plaintiff directly arising from a legal incident in Kuwait.[650] If these requirements are fulfilled, there arises a duty on the part of the defendant to correct the situation by paying the lesser amount of the gain or

[642] See, eg, Ashworth, Andrew, *Sentencing and Criminal Justice* (Cambridge University Press, 2015) 383.
[643] See, eg, Pimentel, David, 'Forfeitures Revisited: Bringing Principle to Practice in Federal Court' (2012) 37–38.
[644] Ibid.
[645] Ibid.
[646] Pimentel, David, 'Forfeitures Revisited: Bringing Principle to Practice in Federal Court' (2012) 13(1) *Nevada Law Journal*.
[647] See generally Abdulreda, A, and Alnakkas, J, مصادر الإلتزام و الإثبات [Sources of Duty and Proof] (Dar Alkotob, 2010) 313.
[648] See, eg, Weinrib, Ernest J, 'The Gains and Losses of Corrective Justice' (1994) 44 *Duke Law Journal* 277.
[649] Ibid.
[650] See generally Abdulreda, A, and Alnakkas, J, مصادر الإلتزام و الإثبات [Sources of Duty and Proof] (Dar Alkotob, 2010) 312–319.

the loss.[651] Without the existence of a loss on the part of the plaintiff, the unjust enrichment theory has no application because it would not conform to the notion of corrective justice.[652] In other words, unjust enrichment is concerned primarily with providing justice for the party who suffered a loss, without exceeding the amount of gain acquired.

Relying on the theory of unjust enrichment as a basis for NCBC suffers from serious flaws, for NCBC does not necessarily require the existence of a loss to the state.[653] NCBC is not concerned with restoring the position of the person who suffered a loss to his/her position as it was before the commission of the criminal offence; instead, it is concerned with restoring the position of the person who acquired gain to his/her position as it was before the commission of the criminal offence; in other words, the existence of equivalent loss is not a requirement for NCBC. The only way to correctly invoke the theory of unjust enrichment is by considering all the proceeds of crime as property owned by the state. For, in this situation, there is a correlative loss and gain that may legitimise unjust enrichment as a basis for NCBC. Other than this situation, which may have a number of negative impacts on a number of rights and values, the idea that a person in NCBC is unjustly enriched at the expense of society should be questioned. As a result, resorting solely to the theory of unjust enrichment to justify the non-punitive nature of the claim of the state towards the proceeds of crime in NCBC is suspect in terms of legitimacy. In fact, if NCBC purely relies on the civil theory of unjust enrichment, then there would be strong case for value-based system of confiscation. However, this is not the case in the UK, where although reparative based on unjust enrichment is the main theoretical justification for NCBC, property-based confiscation is used as the confiscation system solely.

Some scholars argue that the theory of unjust enrichment should be transferred to criminal law;[654] in other words, the basis of unjust enrichment should be altered from corrective justice to the notion that crime should not pay. Accordingly, the theory of unjust enrichment under criminal law would become concerned with restoring the position of the person who acquired gain to his/her position as it was prior to the commission of the criminal offence, regardless of

[651] Law No. 67 of 1980 Section 262.
[652] See, eg, Abdulreda, A, and Alnakkas, J, مصادر الإلتزام و الإثبات [Sources of Duty and Proof] (Dar Alkotob, 2010) 315.
[653] See chapter four.
[654] See, eg, Vogel, Joachim, 'The Legal Construction that Property Can Do Harm – Reflections on the Rationality and legitimacy of "Civil" Forfeiture' in Rui, J P, and Sieber, U, (eds), *Non-conviction-based Confiscation in Europe: Possibilities and Limitations on Rules Enabling Confiscation Without a Criminal Conviction* (Duncker & Humblot, 2015) 225 236.

the occurrence of correlative loss. Altering the basis of unjust enrichment from corrective justice to the notion that crime should not pay may be more problematic in Kuwait than in Australia and the UK. One of the main reasons for this is how property rights are conceived of in the nation. Arguably, the prevailing view in Australia and the UK is that offenders never have a right to their proceeds, or that the proceeds of crime never properly belong to criminals.[655] This is, however, not the case in Kuwait, where it is acknowledged that the proceeds of crime properly belong to criminals but their connection to the criminal offence necessitates their removal as punishment.[656] Moreover, the idea that the commission of the criminal offence provide unfair advantage to the person who committed the criminal offence is highly connected to the retributive justification of punishment. Therefore, it is difficult to conceive of the restoring of the status quo ante as not entailing deliberate hard treatment. As a result, excluding the punitive nature of the confiscation of the proceeds of crime is implausible. Moreover, the absence of corrective justice means that the likelihood of conceiving of restoring the status quo as a form of punishment is increased, as the aim of confiscating the proceeds of crime can be viewed as a form of deterrence and retribution.

In addition, a theory of unjust enrichment that does not conform to corrective justice not only renders the non-punitive nature of NCBC suspect but also leads to an obscure ground for liability for the subject of NCBC. The reparative justification for confiscating the proceeds of crime does not offer sound grounds for liability for individuals in all situations. This is especially the case if confiscation of the proceeds of crime is imposed without establishing that the subject of NCBC engaged in the criminal offence that generated the wealth, since, in this situation, the moral principle that no one should take advantage of his/her own wrong may provide sound grounds for liability for confiscating the proceeds of crime. Other than in this case, the grounds for liability for the subject of NCBC would be ambiguous.

Even if NCBC is limited to corruption offences, the theory of unjust enrichment cannot offer sound basis for it. From a legal perspective, the citizens have no civil claim in relation to the

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[655] See generally Alldridge, Peter, *Money Laundering Law: Forfeiture, Confiscation, Civil Recovery, Criminal Laundering and Taxation of the Proceeds of Crime* (Bloomsbury Publishing, 2003) 57–8; Douglas, Roger Neil, 'The Relevance of Confiscation to Sentencing and its Limitations' (Criminal Law Journal 2007) 354.

[656] See, eg, Husni, Mahmood Najeeb, العامة للعقوبة شرح قانون العقوبات- القسم العام- النظرية العامة للجريمة و النظرية و التدبير الإحترازي [Explanation of the Penal Code – General Section – The General Theory of Crime and General Theory of Punishment and Precautionary Measure] (Dar Almatboa'at Aljama'eya, 8th ed, 2017) 886–7.

proceeds generated from corruption offences in Kuwait. Similarly, the state cannot be regarded as victim in all corruption offences in Kuwait. Otherwise, the confiscation from bribery offences should not be regarded as punishment. Therefore, corruption generally cannot be based on civil law theories in Kuwait. In Australia and the UK, corrective justice may be applied even if no loss is established by resorting to civil claims based on breaching the fiduciary duty.[657] This claim is not available in Kuwait.

The significance of *in rem* confiscation

In order to understand how the reparative justification may constitute satisfactory basis for NCBC in Australia and the UK, the significance of in rem confiscation should be considered Without the notion of *in rem* confiscation, the legitimacy of property-directed confiscation would be undermined. Property-directed confiscation allows for the confiscation of the proceeds of crime based on whether the property in question meets the definition of the proceeds of crime, regardless of the involvement of the person holding it.[658] It allows for the confiscation of the proceeds of crime without the need to establish criminal fault on the part of the person holding it. Indeed, the imposition of confiscation can occur without establishing that a particular criminal offence has been committed or that a particular person has committed this criminal offence. Any person is treated as a third party under the framework of property-directed confiscation. These attributions stem mainly from the notion of in rem confiscation. The reparative nature, based on unjust enrichment, and the preventive nature, based on preventing the utilisation of the proceeds of crime to finance further criminal activities, may not be solely able to legitimatise property-directed confiscation.

The idea is that there are two kinds of confiscation, depending on the target of the confiscation proceedings. The first is *in personam*: targeting individuals because of their commission of a criminal offence.[659] This kind of confiscation proceeding normally requires a conviction to serve as a basis for property to be confiscated. The second one is in rem confiscation, in which

[657] See generally, Alldridge, Peter, *Money laundering law: Forfeiture, confiscation, civil recovery, criminal laundering and taxation of the proceeds of crime* (Bloomsbury Publishing, 2003)

[658] See chapter 2.

[659] See generally Freiberg, Arie et al, 'Forfeiture, Confiscation and Sentencing' (1992) *The Money Trail: Confiscation of the Proceeds of Crime, Money Laundering, and Cash Transactions Reporting* 141-143.

the focus is placed on the object rather than the individual.[660] It is said to target a specific object with the aim of affecting its status.[661] Since, with the in rem proceedings, the concentration is upon the characteristics of the object rather than the individual, the issue of the property holder's culpability can be disregarded.

The idea behind in rem confiscation can be traced to ancient practices that enable the deprivation of property regardless of the culpability of the individual owning it.[662] In *Calero-Toledo* v *Pearson Yacht Leasing Co*., Brennan J. provided a historical account of the concept of confiscation without a need to secure a conviction and demonstrated that in rem confiscation could be traced to the concept of deodand, among others.[663] Deodand, which means to be given to God, is a common law institution mandating that the value of personal property, animate or inanimate, that caused the death of one of the king's subjects should be forfeited to the king.[664] The basis for the confiscation of deodand is said to be the legal fiction of 'guilty thing'.[665] For example, if a horse or an inanimate object causes a person's death, these 'things' are considered guilty and, thus, should be confiscated, irrespective of the guilt of their owner.[666] As a result, anyone's guilt, innocence, knowledge or involvement in the death of a person are irrelevant for the institution of deodand. Deodand is said to have a religious root.[667] Some scholars argue that it is traceable to Biblical and pre-Judeo-Christian practices. The Book of Exodus provides that "if an ox gores a man or a woman, that they die: then the ox shall be surely stoned, and his flesh shall not be eaten".

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[660] See generally Brooks, Brittany, 'Misunderstanding Civil Forfeiture: Addressing Misconception about Civil Forfeiture with a Focus on the Florida Contraband Forfeiture Act' (2014) 69 *U Miami L Rev*. 321; Harrington, Matthew P, 'Rethinking "In Rem": The Supreme Court's New (And Misguided) Approach to Civil Forfeiture' (1994) 12(2) *Yale Law & Policy Review* 281.

[661] Harrington, Matthew P, 'Rethinking" In Rem": The Supreme Court's New (And Misguided) Approach to Civil Forfeiture' (1994) 12(2) *Yale Law & Policy Review* 281-286.

[662] See generally Meade, John, 'The Disguise of Civility; Civil Forfeiture of the Proceeds of Crime and the Presumption of Innocence in Irish Law' (2000) 1 *Hibernian LJ* 1; Freiberg, Arie & Fox, Richard 'Fighting Crime with Forfeiture: Lessons From History' (2000) 6 *Australian Journal of Legal History* 1.

[663] *Calero-Toledo v Pearson Yacht Leasing Co* 416 US 663 (1974).

[664] Freiberg, Arie and Fox, Richard, 'Fighting Crime with Forfeiture: Lessons From History'(2000) 6 *Australian Journal of Legal History* 1 33.

[665] Meade, John, 'The Disguise of Civility; Civil Forfeiture of the Proceeds of Crime and the Presumption of Innocence in Irish Law' (2000) 1 *Hibernian LJ* 1 7.

[666] Ibid.

[667] See, eg, Berg, Michael Van den, 'Proposing a Transactional Approach to Civil Forfeiture Reform' (2015) *U Penn Law Rev* 869.

The modern form of in rem confiscation is said to be a heritage of the early British Navigation Acts of the mid-seventeenth century involving provisions that restricted the transportation of merchandise to and from colonies by English-owned ships, among others.[668] Ships, and possibly their goods, are liable for confiscation in rem if they are involved in the violation of these provisions. Similarly to the concept of deodand, the issue of the guilt of the owner of the vessel is swept aside. What matters is whether the ships and goods have been used to break the law. The main rationale for an action in rem against the property rather than a person lies in the difficulties in enforcing legislation due to jurisdiction, as the owner may not be present in the jurisdiction where the vessel and its cargo are apprehended.[669] In Australia and the UK, in rem confiscation has long been used in customs legislation.[670] Given that customs was the main source of state revenue and the owner of the apprehended property was likely overseas—and thus there was no owner against whom an action could be brought—in rem confiscation was utilised to protect the revenues of the state.[671]

While property involved in the commission of a criminal offence was the main target of in rem confiscation, the range of property subject to it in the late 20th century extended to the proceeds of crime.[672] Applying the concept of in rem confiscation in the context of crime proceeds means that the focus of the confiscation is placed on the origin of the property sought to be confiscated. If it is established that the property has been derived from the commission of an offence, the ownership of the property should be transferred to the state, irrespective of the conviction issues or culpability regarding the property holder.

While it is accepted that with in rem confiscation concentration on the property is more prominent than on the culpability of the holder of the property, the issue as to whether the

[668] See, eg, Reed, Terrance G, 'On the Importance of Being Civil: Constitutional Limitations on Civil Forfeiture. (What Price Civil Forfeiture? Constitutional Implications and Reform Initiatives)' (1994) 39(1 2) *New York Law School Law Review* 255-258; Australia Law Reform Commission, *Confiscation that Counts: A Review of the Proceeds of Crime Act 1987* (Australian Law Reform Commission, 1999) 257.
[669] Freiberg, Arie and Fox, Richard, 'Fighting Crime with Forfeiture: Lessons From History'(2000)' 6 *Australian Journal of Legal History* 1 33 40-41.
[670] Ibid.
[671] Ibid.
[672] See generally Pimentel, David 'Forfeitures Revisited: Bringing Principle to Practice in Federal Court' (2012).

concept of the guilty res is the underlying justification for the in rem confiscation is controversial. In a court decision made in the US, the Supreme Court stated:[673]

> *It is well known that, at the common law, in many cases of felonies, the party forfeited his goods and chattels to the crown. The forfeiture did not, strictly speaking, attach in rem; but it was a part, or, at least, a consequence, of the judgement of conviction. It is plain, from this statement, that no right to the goods and chattels of the felons could be acquired by the crown by the mere commission of the offence; but the right attached only by the conviction of the offender. The necessary result was, that in every case where the crown sought to recover such goods and chattels it was indefensible to establish its right by producing the record of the judgment of conviction. In the contemplation of the common law, the offender's right was not divested until the conviction. But this doctrine never was applied to seizures and forfeitures, created by the status, in rem, cognisable on the revenue side of the exchequer. The thing is here primarily considered as the offender, or the offence is attached primarily to the thing; and this, whether the offence is malum prohibitum or malum in se.*

Meanwhile, in the US, the thing was, and is still, named as a defendant in the in rem confiscation; the idea of guilty res is no longer the underlying theory behind the in rem confiscation. Cassella, a leading commentator in relation to confiscation in the US, observed the following:[674]

> *At one time it was said that civil forfeiture was based on the legal fiction that the property itself was guilty of the offense. That is no longer so. It is true that the property is named as the defendant in the civil forfeiture case, but not because the property itself did anything wrong. Things do not commit crimes; people commit crimes using or obtaining things that consequently become forfeitable to the State. The in rem structure of civil forfeiture is simply a procedural convenience.*

Harrington, also supporting this view, stated that:[675]

> *The purpose of the action in rem is to declare status, rather than guilt in a criminal sense. The thing is not punished; instead, the court is asked to recognise a change in*

[673] *The Palmyra*, 25 U.S. (12 Wheat.) 1 14-15 (1827).
[674] Cassella, Stefan D, *Asset Forfeiture Law in the United States* (Springer, 2018) 15.
[675] Harrington, Matthew P, 'Rethinking "In Rem": The Supreme Court's New (And Misguided) Approach to Civil Forfeiture' (1994) 12(2) *Yale Law & Policy Review* 281 286.

the status of its ownership. The intent is to enable the government to enforce its laws without the need to ascertain the identity of the owner of the goods.

The question is, do Australia and the UK rely on the concept of guilty res to justify the confiscation of the proceeds of crime without a need to secure a conviction? The answer is no. In Australia, it was stated that "the old justification for forfeiture was that it operated in rem and was therefore directed at the property and not the person, so that is was to be regarded as remedial and not punitive. Such a rationale is too formalistic to be relied upon as a contemporary justification".[676] Moreover, unexplained-wealth confiscation allows for in personam non-conviction-based confiscation. In the UK, although property-directed confiscation and unexplained-wealth confiscation operate in rem, the concept of guilty res has not been advanced as a justification for the move towards NCBC. In both Australia and the UK, the defendant of NCBC proceedings is a person, not a piece of property. Having said that, it cannot be ignored that the existence of a legal tradition that permits confiscation based on the characteristics of the property rather than the culpability of the offender has facilitated the ability to create and expand the mechanisms that allow for the confiscation of the proceeds of crime without a need to secure a conviction. This is mainly because the existence of in rem confiscation makes the civilising of the proceeds of crime strategy depend mainly on having non-punitive aims rather than on concrete civil-law theory. Moreover, it provides for a simple construction for the confiscation of the property, even if the property was acquired by a third party.[677]

Although the notion that the property is guilty of the criminal offence is not the current understanding of in rem confiscation,[678] this confiscation type still plays a vital role in legitimising property-directed confiscation. This is because in rem confiscation is able to justify the construction of the NCBC regime without the existence of a concrete justice theory. It offers a procedural way through which the requirements of confiscation are determined based on the intended aims rather than a concrete theory of justice. In the context of property-directed

[676] Young, J, & Greenwell, A, 'Disscussion Paper: noCustoms and Excise: Seizure & Forfeture' (ALRC DP 42, The Law Reform Commission, April 1990) [21] nn[20].
[677] Rui, JP, and Sieber, U, 'Non-Conviction-Based Confiscation in Europe. Bringing the Picture Together' in Rui & Sieber (ed), *Non-Conviction-Based Confiscation in Europe: Possibilities and Limitations on Rules Enabling Confiscation without a Criminal Conviction* (Duncker & Humblot, 2015) 299.
[678] See chapter 4.

confiscation, it acts as a legitimising tool through which the aim of preventing the unjust enrichment is achieved, even though the theory of unjust enrichment fails to legitimise it. It also provides for grounds for liability, even for a completely bona fide third party. Moreover, by focusing on the description of the property rather than the person who committed the criminal offence, the ethical blame surrounding property-directed confiscation is said to be diminished.[679] As a result, the likelihood of finding property-directed confiscation as constituting a punishment is further reduced.

The problem, however, with in rem confiscation is well-documented—the legal fiction inherent in property-directed confiscation has not been accepted.[680] It is well-recognised that in rem confiscation serves as a way to circumvent criminal processes safeguards,[681] since the subject of the confiscation is the person and cannot be regarded as the property. Further, in rem confiscation is a product of legal tradition in common law countries.[682] A number of civil law countries have permitted the confiscation of the proceeds of crime without a need to secure a conviction.[683] However, the notion of in rem confiscation has not been invoked as a basis for confiscation without conviction. As a result, the features of confiscation without conviction are not similar, especially in relation to the issue of confiscation from a third party.[684] Kuwait is a civil law country; therefore, accepting the notion of in rem confiscation is highly suspect.

A more problematic issue involves considering unexplained wealth confiscation as in rem confiscation. In the UK, unexplained wealth is considered an investigatory tool. The actual confiscation of the proceeds of crime is done within the framework of property-directed

[679] Rui, JP, and Sieber, U, 'Non-conviction-based Confiscation in Europe: Bringing the Picture Together' in Non-Conviction-Based Confiscation in Europe: Possibilities and Limitations on Rules Enabling Confiscation Without a Criminal Conviction (Duncker & Humblot, 2015) 298–9.
[680] See generally Freiberg, Arie, et al, 'Forfeiture, Confiscation and Sentencing' The Money Trail: Confiscation of the Proceeds of Crime, Money Laundering, and Cash Transactions Reporting (1992) 141–3.
[681] See Steiker, Carol S, 'Punishment and procedure: punishment theory and the criminal-civil procedural divide' (1997) 26 *Ann. Rev. Crim. Proc*. 815–6.
[682] See generally Fernandez-Bertier, Michaël, 'The History of Confiscation Laws: From the Book of Exodus to the War on White-Collar Crime' in Simonato, Michele and Ligeti, Katalin, (eds), *Chasing Criminal Money: Challenges and Perspectives on Asset Recovery in the EU* (Hart, 1st ed, 2017) 53.
[683] See generally Rui, J P and Sieber, U, 'Non-conviction-based Confiscation in Europe. Bringing the Picture Together' in *Non-Conviction-Based Confiscation in Europe: Possibilities and Limitations on Rules Enabling Confiscation Without a Criminal Conviction* (Duncker & Humblot, 2015).
[684] See, eg, Esser, Robert, 'A Civil Asset Recovery Model – The German Perspective' in Rui, J P, and Sieber, U, (eds), Non-conviction-based Confiscation in Europe: Possibilities and Limitations on Rules Enabling Confiscation Without a Criminal Conviction (Duncker & Humblot, 2015) 79 79–106.

confiscation;[685] in other words, unexplained wealth confiscation depends on the concept of in rem confiscation. Indeed, even in the jurisprudence of the European Court of Human Rights, unexplained wealth confiscation has been treated as in rem confiscation.[686] Relying on the notion of in rem confiscation in the context of unexplained wealth confiscation may be problematic as it is difficult to regard unexplained wealth confiscation as in rem confiscation. This difficulty is attributed to two main issues. The first is that in rem confiscation adheres to the concept of tainted property.[687] In other words, the tainted property theory allows only for property that is, in fact, the proceeds of crime, or an alternative to the proceeds of crime, to be confiscated. This theory does not allow for other property to be confiscated.[688] As a result, if the proceeds of crime are consumed or can no longer be traced, the confiscation of property of corresponding value is not permissible under the taint theory. The confiscation under unexplained wealth is not necessarily confined to the actual proceeds of crime or its alternative. There is no tracing requirement for confiscating under unexplained wealth confiscation. If the actual proceeds of crime are consumed, unexplained wealth confiscation can include property of corresponding value. The second issue suggesting that unexplained wealth confiscation cannot be considered in rem is that in rem confiscation should ignore the enquire of the issue of who owns the property.[689] What matters for in rem confiscation is whether the property in question meets the description of the proceeds of crime. Unexplained wealth confiscation cannot be implemented without enquire on who owns the property or wealth. Identifying the owner or the person who has effective control over the wealth or the property is a necessary condition, without which unexplained wealth confiscation cannot take place. As a result, unexplained wealth confiscation cannot be considered in rem confiscation, but it is in personam confiscation.

To summarise, the nature of the claim of the state towards the proceeds of crime in NCBC constitutes a genuine barrier to implementation in Kuwait. The reparative justification, based

[685] See chapter four.
[686] See *Gogitidze v Georgia* (2015) Application No 36862/5 [91].
[687] See generally Worrall, John L, 'The Civil Asset Forfeiture Reform Act of 2000: A Sheep in Wolf's Clothing?' (2004) 27(2) *Policing: An International Journal of Police Strategies & Management* 220 234–5; Reed, Terrance G, 'On the Importance of Being Civil: Constitutional Limitations on Civil Forfeiture (What Price Civil Forfeiture? Constitutional Implications and Reform Initiatives)' (1994) 39(1 2) *New York Law School Law Review* 255.
[688] See, eg, Kennedy, Anthony, 'Designing a Civil Forfeiture System: An Issues List for Policymakers and Legislators' (2006) 13(2) *Journal of Financial Crime* 132 156.
[689] See generally Booz Allen Hamilton , 'Comparative Evaluation of Unexplained Wealth Orders' (2012) *US Department of Justice* 157.

on unjust enrichment, and the preventive justification, based on preventing further criminal activity from taking place, may not be able to offer a sound basis that excludes the punitive nature of NCBC. Although the notion of in rem confiscation may offer a legal avenue for circumventing the absence of a clear non-punitive nature of confiscation, it is unlikely to be accepted in Kuwait.

Having discussed the reparative justification for NCBC, the next section examines punitive civil sanction as a justification for NCBC.

Punitive civil sanction

The fourth justification is to regard NCBC as a punitive sanction; specifically, NCBC is to be regarded as a punitive civil sanction. The idea of this theory is that, although the sanction imposed is considered punitive, the safeguards afforded are those of civil proceedings.[690] Nevertheless, because the sanction imposed is punitive, higher procedural safeguards than a civil sanction may be afforded to the person.[691] The problem with this theory is that it is difficult to allow for punitive sanction that contravenes the principle of personal punishment in Kuwait. Even if the offence is not considered criminal, in principle, any punitive sanction should adhere to the principle of personal punishment in Kuwait.[692] In light of this, NCBC should be able to demonstrate that the confiscation subject has engaged in the criminal offence to permit the NCBC. Moreover, regarding the confiscation of the proceeds of crime as punitive may involve retribution, and necessarily requires the existence of the mental element of the offence (fault). Whether or not the person deserves the punitive sanction may be suspect without the existence of fault. Above all, permitting the theory of punitive civil sanction may set a negative precedent through which individuals may be deprived of the criminal processes safeguards without a sound basis.[693]

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[690] See chapter 4.

[691] See generally Mann, Kenneth, 'Punitive Civil Sanctions: The Middle Ground between Criminal and Civil Law' (1992) *Yale Law Journal* 1795.

[692] Mohamad, Ameen, النظرية العامة لقانون العقوبات الإداري [General Theory of Administrative Penal Code] (Dar Almatboaat Aljameaa, 2017) 195.

[693] See generally Gray, Anthony Davidson, 'Forfeiture Provisions and the Criminal/Civil Divide' (2012) 15(1) *New Criminal Law Review: An International and Interdisciplinary Journal* 32 54; Steiker, Carol S, 'Punishment and procedure: punishment theory and the criminal-civil procedural divide' (1997) 26 *Ann. Rev. Crim. Proc*. 775 814.

Justifying the standard and burden of proof

NCBC serves a number of objectives that cannot be accomplished, in principle, in the crime and punishment model of confiscation. Broadly, the objectives of NCBC can be divided into seeking to overcome two types of obstacles: legal and evidential. Legal obstacles refer to situations where there is sufficient evidence to meet the requirements for confiscating the proceeds of crime, but there are legal barriers that prevent the fulfilment of the requirements for confiscation. Examples of legal barriers include the death of the perpetrator of the criminal offence and the statute of limitations. Evidential barriers refer to situations where there is not sufficient evidence to establish the particular criminal offence to the criminal standard of proof and to link the property or the benefits to a particular criminal offence. The latter objectives are achieved by contending that NCBC proceedings are civil, and therefore, criminal processes safeguards are not necessarily applicable. These include the issues of double jeopardy, ex post facto operation, the standard and burden of proof, privilege against self-incrimination, legal counsel and unconstitutionally seized evidence.[694] Above all of these issues, the shifts of the burden of proof and the civil standard of proof are considered the hallmarks of NCBC.[695] Unexplained wealth confiscation is able to confiscate the proceeds of crime on the basis of reversing the onus of proof because of the absence of the presumption of innocence, and on the same basis, property-directed confiscation can apply the civil standard of proof. The question then becomes whether the presumption of innocence should be applicable to NCBC in Kuwait.

Although it is not a precondition for confiscation under property-directed confiscation to establish that a person has engaged in a criminal activity, in many situations, in practice, the ability to prove the criminal origin of the property does indeed depend on showing that a person engaged in criminal activity. As a result, the legitimacy of the reduction of the standard of proof becomes suspect. Similarly, unexplained wealth confiscation can be imposed on the basis of a suspicion of the commission of a criminal offence. The question becomes whether the commission of the criminal offence, or the suspicion of the commission of the criminal offence, can engage the presumption of innocence.

[694] Freiberg, Arie, 'Criminal Confiscation, Profit and Liberty 1' (1992) 25(1) *Australian & New Zealand Journal of Criminology* 44 50.
[695] See, eg, Smith, Lan, 'Civil Asset Recovery: The English Experience' in J P Rui and U Sieber (eds), *Non-conviction-based Confiscation in Europe: Possibilities and Limitations on Rules Enabling Confiscation without a Criminal Conviction* (Duncker & Humblot, 2015) 31.

In the jurisprudence of the European Court of Human Rights and in many nations around the world, the applicability of the presumption of innocence is dependent on the existence of a criminal charge.[696]

In *Phillips v The United Kingdom*,[697] the Court was asked to determine whether an extended confiscation model, in which the confiscation was not limited to property linked to the criminal offence for which a conviction has been secured, constitutes a violation of Article 6 (2), which guarantee the presumption of innocence in case of a criminal charge. The circumstances of the case are as follows. Mr Phillips was convicted for importation of drugs and sentenced to nine years. The financial investigation suggested that he may have benefitted from drug trafficking other than the offence for which the conviction had been secured. Pursuant to extended confiscation, in which all of the property that had passed through the hands of Mr Phillips over the preceding six years of criminal proceedings were presumed to be derived from other criminal offences committed by Mr Phillips, the judge found that Mr Phillips had acquired benefits in the amount of GBP 91,400. The Court found that there was no criminal charge involved and therefore no violation of Article 6 (2). In reaching this decision, the Court stated that 'The purpose of this procedure was not the conviction or acquittal of the applicant for any other drug-related offence.'[698] Moreover, the Court considered 'that this procedure was analogous to the determination by a court of the amount of a fine or the length of a period of imprisonment to be imposed on a properly convicted offender'.[699] The Court, therefore, treated the confiscation of the proceeds of crime after securing conviction part of the sentencing processes, which is unlikely to constitute a criminal charge.

In *M v Italy*,[700] the Court was asked to identify whether the Italian preventive confiscation measure constitutes a breach of Article 6 (2). The circumstances of the case are as follows. The applicant had been convicted of many criminal offences, including membership of a 'mafia'-

[696] See generally King, Colin, 'Civil Forfeiture and Article 6 of the ECHR: Due Process Implications for England & Wales and Ireland' (2014) 34(3) *Legal Studies* 371; Boucht, Johan, 'Civil Asset Forfeiture and the Presumption of Innocence under Art. 6(2) ECHR' in Rui, J P, and Sieber, U, (eds), *Non-conviction-based Confiscation in Europe: Possibilities and Limitations on Rules Enabling Confiscation without a Criminal Conviction* (2015) 152.
[697] *Phillips v The United Kingdom* (2001) Application No 41087/98.
[698] Ibid [34].
[699] Ibid.
[700] *M v Italy* (1991) Application No 12386/86.

type organisation. The preventive confiscation scheme allows for the confiscation of the proceeds of crime without a need to secure a conviction in the situation where there is sufficient circumstantial evidence such as the existence of disproportionate wealth and social dangerousness. The existence of disproportionate wealth shifts the burden of proving the lawful origin of the property to the person, who is required to demonstrate the lawful origin of the property. Based on circumstantial evidence, including the applicant's criminal record and the existence of a significant increase in wealth, the preventive confiscation measure was imposed on his property. In relation to whether the confiscation scheme constitutes a criminal charge, the Court decided that no criminal charge was involved. In reaching this decision, the Court noted that the purpose of the confiscation scheme is not to punish a specific criminal offence. It also noted that one of its main preconditions is to establish dangerousness to society based on suspicion of membership of a mafia-type organisation. The Court therefore accepted that the purpose was not to punish, but instead, to prevent the commission of further criminal activity.

To summarise, there are three main grounds that are often relied on to refute the existence of the criminal charge. The first is that there is no allegation of the commission of a specific criminal offence, but rather, the commission of a crime generally.[701] The second is that the purpose of the proceedings is not to punish the perpetrator of the criminal offence, but rather, to prevent the commission of further criminal activity.[702] The third is that there is no conviction or indictment of a criminal offence.[703] Therefore NCBC it is very difficult to engage the presumption of innocence.

This reasoning, however, seems unsatisfactory. As Smith stated:

> *there is at best fine distinction between an allegation that a person committed a crime and an allegation that property was obtained by a person as a result of his criminal*

[701] See *M v Italy* (1991) Application No 12386/86.
[702] Ibid.
[703] See *Air Canada v The United Kingdom* (1995) Application No 18465/61, in which one of the containers discharged from the Air Canada aircraft was filled with cannabis. The aircraft was seized pursuant to the *Customs and Excise Management Act 1979* on the basis that it was used in the commission of an offence contrary to customs law. The aircraft was released and returned to Air Canada on the payment of GBP 50,000. Air Canada argued that it was actually subjected to a fine, but the courts in the UK rejected that argument. The ECtHR found that no criminal charge was involved, primarily because these were in rem—not in personam—proceedings. See also *Gogitidze v Georgia* (2015) Application No 36862/5.

> *conduct. It is true that the former concerns liability and punishment of an individual, whereas the latter concerns the recovery of property. At their core, however, both approaches scrutinize the conduct of an individual and the key issue to be determined is whether or not that individual committed a criminal offence.*[704]

In McIntosh v Her Majesty's Advocate,[705] Lord Prosser, in finding that Art. 6(2) applied, stated that:

> *By asking the court to make a confiscation order, the prosecutor is asking it to reach the stage of saying that he has trafficked in drugs. If that is criminal, that seems to me to be closely analogous to an actual charge of an actual crime, in Scottish terms. There is of course no indictment or complaint, and no conviction. And the advocate depute pointed out a further differences, that a Scottish complaint or indictment would have to be specific, and would require evidence, whereas this particular allegation was inspecific and based upon no evidence. But the suggestion that there is less need for a presumption of innocence in the latter situation appears to me to be somewhat Kafkaesque and to portray, a vice as a virtue. With no notice of what he is supposed to have done, or any basis which there might be for treating him as having done it, the accused's need for the presumption of innocence is in my opinion all the greater.*

The question then becomes whether the presumption of innocence should be applicable to property-directed confiscation in Kuwait. According to the Kuwaiti Constitution, an accused person is innocent until proven guilty in a legal trial at which the necessary guarantees for the exercise of the right of defence are secured.[706] To determine whether or not the presumption of innocence should be applied in the situation of property-directed confiscation, the main question that should be answered is whether the subject of confiscation under property-directed confiscation can be fairly considered an accused. The law in Kuwait does not define the term 'accused person'; however, in the literature a number of definitions have been proposed. One important definition of an accused person is any person against whom an authority takes procedure based on suspicion of the commission of a criminal offence whether in particular or

[704] Smith, Lan, 'Civil Asset Recovery: The English Experience' in Rui & Sieber (ed), *Non-Conviction-Based Confiscation in Europe: Possibilities and Limitations on Rules Enabling Confiscation without a Criminal Conviction* (Duncker & Humblot, 2015) 52.
[705] *McIntosh v Her Majesty's Advocate* [2001] JC 78.
[706] *The Kuwaiti Constitution* section 34.

kind.[707] Another definition of the term accused person is any person against whom a criminal charge has been initiated.[708]

There are two main differences between the jurisprudence of the European Court of Human Rights and Kuwait. The first is that claiming that the person is not considered an accused because there is no allegation of the commission of a particular criminal offence may not prevent finding that the person is, in fact, an accused, and therefore, the presumption of innocence should be applied. The person can be considered an accused even though the allegation is based on the commission of a kind of crime without reference to a particular criminal offence. The second is that arguing that the aim of the confiscation of the proceeds of the crime is preventive does not necessarily preclude considering the proceedings as criminal and the person as an accused.[709]

As a result, property-directed confiscation that is imposed based on the finding that the person committed a criminal offence, whether in particular or in kind of crime, may result in the person being regarded as an accused. It follows that the presumption of innocence is involved, and therefore, lessening the standard of proof may not be possible. Moreover, unexplained wealth confiscation based on suspicion of the commission of a criminal offence is likely to engage the presumption of innocence. However, since the purpose of the proceedings is not to establish liability for the criminal conduct, but instead, the provenance of the property, the applicability of the presumption of innocence remains unsettled.

Even if property-directed confiscation based on findings that a particular person has committed criminal conduct cannot engage the presumption of innocence, the question remains whether property-directed confiscation proceedings may result in relaxing the standard of proof.

In relation to the standard of proof, the first thing to note is that the issue of the standard of proof has not been regulated, in either criminal or civil procedures, in the legislation. What is clear from the existence of the presumption of innocence in criminal matters is that criminal cases must be decided, in case of conviction, to a level of certainty and definiteness. One could

[707] Aleifan, Meshari, 'The Privilege Against Self-Incrimination in Kuwait Law' (2016) 40(1) *Journal of Law* 119 138 n 66.
[708] Bahnam, Ramsees, الإجراءات الجنائية تأصيلا و تحليلا [Criminal Procedures: Rooting and Analyzing] (Almaaref bel Eskandereiya) 175.
[709] Ibid 178.

argue that the mere mention that criminal cases are decided to the level of definiteness assumes that the standard of proof in civil matters is lower than that in criminal cases. This argument, however, does not necessarily hold. Although it is true that criminal cases are decided to the level of certainty and definiteness and this is not the case in civil cases, the issue is not concerned with the standard of proof, but rather, the approaches of proof adopted in criminal and civil matters. In other words, the theory of proof in criminal cases differs from that in civil cases.

In the doctrine of unrestricted proof or free proof, there is no specific method for proving the case;[710] In other words, there is no constraint on the kind of evidence required to prove the case. Therefore, neither the judge nor the party adhere to certain evidence to prove the case.[711] The parties can provide any evidence to support their claim.[712] The judge can make a decision based on any evidence he or she deems convincing.[713] Moreover, the judge has a positive role in gathering evidence in this theory of proof.[714] This doctrine is characterised by the fact that it makes the judicial truth largely identical to reality and allows the judge to reach justice, but it is taken in this doctrine that adversaries do not know in advance the means by which the judge might be persuaded.[715] This theory is applied in criminal cases in Kuwait.[716]

The second theory is called the restricted theory of proof, or the legal theory of proof.[717] In this theory of proof, the law determines the methods of proof that litigants must adhere to before the courts, and also restricts the judge, in the sense that he or she may not accept others to form his or her conviction.[718] In addition, the law determines the value of evidence, and this value is also restricted to the judge and to the litigants.[719] Accordingly, litigants can only prove their claim in the manner specified or authorised by law, and the judge can only reach convictions through the evidence established in the law, and can only give such evidence the force of law.[720]

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[710] See generally Abdulreda, A & Alnakkas, J, مصادر الإلتزام و الإثبات *[Sources of duty and proof]* (Dar Alkotob, 2010) 347–350.
[711] Ibid.
[712] Ibid.
[713] Ibid.
[714] Ibid.
[715] Ibid.
[716] Ibid.
[717] Ibid.
[718] Ibid.
[719] Ibid.
[720] Ibid.

The judge, under this theory, has a negative role; he or she cannot complete the evidence if it is incomplete.[721] The advantage of this doctrine is that it ensures the stability of transactions and leads to confidence in the litigants because they know in advance the evidence through which they can prove their claims and convince the judge of their rights.[722] The disadvantage of this approach is that it widely constrains the judge, which makes it likely that the legal truth is not compatible with the truth in reality, which may affect the outcome of justice.[723] Thus, the judge may rule in favour of one party because that is required by the rules of evidence, even though the judge in this ruling knows that this is not true in reality.[724] Therefore, to say that the criminal case is proved to a level of certainty and that no such standard exists in civil law is not related to the standard of the proof. It is mainly related to the approach adopted in the theory of truth, in which the civil law adopts the restricted approach, while the criminal law adopts the unrestricted approach.

Another argument in support of the claim that the standard of proof in civil matters is not relaxed compared with the standard of proof in criminal matters can be deduced from the rationale of 'party civil' in Kuwait. In principle, any civil claim should be instituted by the injured person in civil courts. Party civil represents an exception that allows the criminal court to review both the criminal case and the civil case at the request of the injured party. There are a number of conditions that permit party civil in Kuwait, but what matters for our purpose is the rationale and advantages behind party civil. One of the main rationales and benefits behind party civil is that the theory of free proof is applied in criminal cases.[725] This benefits the injured person, allowing claims to be proved more easily than those in civil cases. If the standard of proof in civil cases is lower than that in criminal cases, then the party civil does not constitute an advantage to the injured party.

[721] Ibid.
[722] Ibid.
[723] Ibid.
[724] Ibid.
[725] Alsammak, Ahmad & Nassrallah Fadhel, شرح قانون الاجراءات و المحاكمات الجزائية الكويتي *[Explanation of the Kuwaiti Code of Criminal Procedure and Trial]* (Kuwait University Law School, 2015) 431.

Conclusion

To conclude, it is not only the nature of property-directed confiscation that hinders its use in Kuwait to overcome the difficulties in proving the criminal origin of the property; the primary method through which the intended objectives of property-directed confiscation are pursued is also unattainable. As a result, property-directed confiscation should not be considered in Kuwait to deal with the difficulties in proving the criminal origin of the property.

Unexplained-wealth confiscation, as theoretically justified in Australia and the UK, may not be possible in Kuwait. This is because the general application of the unexplained-wealth confiscation to a number of offences renders the likelihood of finding the nature of unexplained wealth confiscation punitive. Therefore, the deviation from conventional norms for confiscating the proceeds of crime may not be justified.

CHAPTER 7 - The possibilities and limitations of confiscating unexplained wealth generated from public money offences in Kuwait

Introduction

Previous chapters have demonstrated that there are many obstacles that prevent using NCBC to overcome the difficulties arising from the linkage requirement in Kuwait. In general, the problems associated with using NCBC in Kuwait are fourfold. The first is the absence of theoretical justification for the claim that the state is adopting a non-punitive aim when taking proceeds of crime action. The second concerns the absence of a concrete ground of liability of the subject of NCBC without establishing *in rem* confiscation. The third problem relates to the application of the presumption of innocence in NCBC proceedings, especially where action is based on commission of a criminal offence. Finally, the reparative and preventive justifications for NCBC are not only weak in theory but also entail potential infringement of individuals' rights and liberties.

However, previous chapters have been concerned with theoretical justifications for NCBC that are not limited to a specific kind of offence. This chapter attempts to explore whether the unexplained wealth confiscation of proceeds generated from the commission of public money offences may overcome these problems in Kuwait and can provide for a reasonable balance between the interests of the state to overcome the problems associated with the linkage requirement and the need to secure individual's safeguards and interests. It will be argued that unexplained-wealth confiscation of proceeds generated from public money offence that is based on the harm principle may be possible in Kuwait and provides for limits that ensure protecting individuals interests.

This chapter begins by providing an overview of public money offences in Kuwait and the current legal tools that allow the deprivation of the proceeds generated from such offences. It then examines whether unexplained wealth proceedings can be theoretically and practically

justified. It concludes with evaluation of the effectiveness and legality of unexplained wealth confiscation as proposed.

Public money offences

Before proceeding to examine how unexplained-wealth confiscation could be used to recover proceeds generated from public money offences in Kuwait, it is necessary to provide a brief overview of the nature of these offences and the current legal instruments that allow for deprivation of proceeds of such offences from individuals.

In Kuwait, law No 1 of 1993 pertaining to the criminal protection of public money was introduced as a response to several outrageous instances of theft of public money during the Iraqi invasion of Kuwait.[726] For instance, in 1990 the Kuwait Investment Office lost $5 billion from its investments in Spain, $1.2 billion of which was suspected to be embezzled by members of the office.[727] This law was designed to provide greater protection of public money than that provided in the special part of the penal code.

Law No 1 of 1993 covers four offences: embezzlement of public money (ekhtlas),[728] misappropriation of public money (estelaa),[729] and two kinds of offences related to illegal profiting of public money.[730] The perpetrators of these criminal offence are, generally, public officials.[731]

The main difference between embezzlement and misappropriation of public money is that for the former, the money stolen must have been legally submitted to the public official for use in connection with their office.[732] In contrast, the misappropriation of public money does not entail the previous submission of funds to the public officials.[733] In this regard, the Court of Cassation stated that the embezzlement of public money has not occurred unless the embezzled

[726] Aloumi, Noura, 'The development of laws in Kuwait to combat corruption' in Colin King Katie Benson, Clive Walker (ed), *Assets, Crimes, and The State* (Routledge, 2020)
[727] Greenberg, Theodore S., *Stolen Asset Recovery: A Good Practices Guide for Non-Conviction Based Asset Forfeiture* (Washington : World Bank Publications, 2009) 163-166.
[728] Law No. 1 of 1993 section 9.
[729] Law No. 1 of 1993 section 10.
[730] Law No. 1 of 1993 section 11; Law No. 1 of 1993 section 12.
[731] Law No. 1 of 1993 sections 9-12.
[732] Law No. 1 of 1993 sections 9-10.
[733] Law No. 1 of 1993 sections 9-10.

money has been in the custody of the public employee because of his or her office with the intention of considering the money as his or her own.[734] In contrast, public money can be misappropriated regardless of how the public official is connected to the public money, and misappropriation can be committed by extracting public money through stealth, trickery, or force.[735]

The two kinds of illegal profiting offences differ in that the first is concerned with profiting from dealing with public money with the intent to harm public revenue while the other offence does not require the existence of an intention to harm public money.[736] Moreover, the nature of the office and the act required to be performed in connection with the offence differ among the two kinds of illegal activity.[737] In both offences, the liability does not require damage to public money as a result of the offence.[738] In fact, such an offence can occur even though there is a benefit to the public purse as a result of the commission of the offence.[739]

Restitution versus confiscation

The normal legal avenue used to deprive individuals of the proceeds generated from such offences is restitution (Alrd).[740] Restitution can have a procedural function and a substantive function. In the procedural sense of the term, restitution denotes the return of seized items to the person who was in possession of them when the court has not ruled for confiscation of those items.[741] Restitution in the substantive sense refers to any measure taken by the court to

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[734] Appeal No 171/ 94 cited in Althaferi, Fayez, الحماية الجنائية للأموال العامة من خلال القانون الكويتي رقم (1) لسنة 1993 دراسة تحليلية نقدية *[Criminal Protection of Public Funds through Kuwaiti Law No. (1) of 1993 A Critical Analytical Study]* (Academic Publication Council, 2006) 114-115,

(جريمة الاختلاس المنصوص عليها في المادة 44 من القانون 31 / 1970 بتعديل بعض أحكام قانون الجزاء لا تتحقق إلا إذا كان المال المختلس قد أدرج في عهدة الموظف العام ومن في حكمه أو سلم إليه تسليما ماديا أو أن يكون بين يديه أو تحت سيطرته بسبب وظيفته وأن تتجه نيته إلى اعتبار هذا المال ، مملوكا له بأي فعل يكشف عن ذلك) .

[735] Collection of legal rules decided by the Court of Cassation for the period from 1/1/1997 to 12/31/2001 in the Penal Articles, Section IV, Volume 7, July 2004, pp. 245-246

(متي جناية الاستيلاء المنصوص عليها في المادة 45 من القانون رقم 3 لسنة 1970 بتعديل بعض أحكام قانون الجزاء تتحقق أركانها إذ كانت الدولة أو إحدى الهيئات العامة تساهم في مالها بنصيب ولو لم يكن الموظف من العاملين بالجهة التي تم له الاستيلاء على مالها استولى الموظف العام أو المستخدم أو العامل بغير حق على مال للدولة أو لإحدى الهيئات أو المؤسسات العامة أو الشركات أو المنشآت ، وبصرف النظر عن الاختصاص الذي يخوله الاتصال بالمال موضوع الاستيلاء ، وذلك بانتزاعه منها خلسة أو حيلة أو عنوة) .

[736] Law No. 1 of 1993 sections 11-12.

[737] Law No. 1 of 1993 sections 11-12.

[738] AlSammak, Ahmad, 'The Crime of Profiting Under Kuwaiti Law' (1998) 22(2) *Journal of Law.*

[739] AlSammak, Ahmad, 'The Crime of Profiting Under Kuwaiti Law' (1998) 22(2) *Journal of Law.*

[740] Law No. 1 of 1993 section 16.

[741] Law No. 17 of 1960 section 95.

restore the *status quo ante*.[742] Examples of such measures include rebuilding a fence that a criminal has demolished and returning the proceeds of crime to the true owner of the property. Restitution, as stated by the Court of Cassation, does not aim to deter individuals from the commission of such offences or penalise offenders for the crime committed.[743] Rather, it aims to restore the *status quo ante*.[744]

Restitution in the substantive sense can be distinguished from confiscation in a number of respects. The first relates to the question of seizure. One of the main preconditions for confiscating the proceeds of crime is the requirement that the items be seized. In contrast, restitution in a substantive sense presupposes that the proceeds of crime have not been seized. If the proceeds of crime have been seized in their entirety, the judgment of restitution cannot be imposed.[745] The second difference can be seen in the deprivation system itself. Whereas, in principle, the confiscation of the proceeds of crime adheres to a property-based system, restitution can be imposed as a property-based system or a value-based system.[746] Therefore, the ramifications of adhering to a property-based system of confiscation are not applicable to restitution.

Third, restitution and confiscation can also be distinguished through the aims pursued in depriving the proceeds of crime. Confiscation of the proceeds of crime aims to penalise the offender in order to deter the commission of future criminal offences.[747] Restitution does not primarily aim at penalising criminals and achieving deterrence.[748] Instead, the purpose is to restore the *status quo ante* by rebalancing the financial positions to what they were before the

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[742] Alsammak, Ahmad & Nassrallah Fadhel, شرح قانون الاجراءات و المحاكمات الجزائية الكويتي *[Explanation of the Kuwaiti Code of Criminal Procedure and Trial]* (Kuwait University Law School, 2015) 412.

[743] Criminal appeal No. 19/1993 cited in Althaferi, Fayez, الحماية الجنائية للأموال العامة من خلال القانون الكويتي رقم (1) لسنة 1993 دراسة تحليلية نقدية *[Criminal Protection of Public Funds through Kuwaiti Law No. (1) of 1993 A Critical Analytical Study]* (Academic Publication Council, 2006) 129.

[744] Ibid.

[745] Suror, Ahmad Fatehi, الوسيط في قانون العقوبات- القسم الخاص *[Meditator in the Penal code – Special Section]* (Dar Alnahdha Alarabiya, 2016) 597.

[746]Althaferi, Fayez, الحماية الجنائية للأموال العامة من خلال القانون الكويتي رقم (1) لسنة 1993 دراسة تحليلية نقدية *[Criminal Protection of Public Funds through Kuwaiti Law No. (1) of 1993 A Critical Analytical Study]* (Academic Publication Council, 2006) 129.

[747] Bozbar, Mohammad, 'Criminal Liability of Morale Persons toward Money Laundering Crimes: A Founding Study of Article (35), Year 2002 Regarding Combating Money Laundering Operations' (2004) 28(3) *Journal of Law* 80.

[748] Criminal appeal No. 19 of 1993 (20-06-1994) cited in Althaferi, Fayez, الحماية الجنائية للأموال العامة من خلال القانون الكويتي رقم (1) لسنة 1993 دراسة تحليلية نقدية *[Criminal Protection of Public Funds through Kuwaiti Law No. (1) of 1993 A Critical Analytical Study]* (Academic Publication Council, 2006) 129.

commission of the criminal offence occurred.[749] Fourth, confiscation and restitution differ in terms of their legal nature. Whereas confiscation of the proceeds of crime is regarded as having an absolute penal character, restitution is regarded as being a civil obligation.[750] However, because restitution is regulated under the framework of additional punishment, securing a conviction is a necessary prerequisite without which restitution cannot take place, unless the law provides otherwise in specific provisions.

The fifth difference relates to the subject of deprivation. Whereas confiscation as punishment should, in principle, adhere to the principle of personal punishment, which requires confiscation to be imposed only on those who have participated in a criminal offence, restitution does not adhere to the principle of personal punishment, as it is not an absolute punishment. Therefore, if there is justification for depriving of their proceeds those who were not participants in the crime, there is no objection to this. For example, restitution applies not only to those who commit public money offences but also to any person who benefited from the proceeds generated from such offences.[751] The sixth aspect of difference lies in who acquires the proceeds of crime. In confiscation as punishment, the proceeds of crime are transferred to the state. In restitution, in a substantive sense, the proceeds of the crime are, in principle, vested to the person or entity who is harmed by the offence.[752]

It should be noted, however, that even though restitution is not considered punitive in nature, according to the Court of Cassation, the nature of restitution is contested among scholars. For example, Alkandari has a similar opinion to the Court of Cassation that the legal nature of restitution is a civil obligation aiming to restore the *status quo ante*.[753] Similarly, Suror argues that restitution is not punishment, even though it is legally organised within the framework of additional punishment.[754] However, he argues that restitution must be confined to restore the

[749] Ibid.
[750] AlKandari, Faisal, ' مظاهر الحماية الجنائية للأموال العامة (دراسة تحليلية و نقدية لقانون رقم 1 لسنة 1993 بشأن حماية الأموال العامة)' ['Criminal Protection of Public Funds (Analytical and Critical Study of Law No. 1 of 1993 Concerning Protection of Public Funds)'] (1994) 18(2) *Journal of Law* 271-291.
[751] Law No. 1 of 1993 sections 20.
[752] Hassan, Ali Fadhel, *[Confiscation Theory in the Comparative Criminal Law]* نظرية المصادرة في القانون الجنائي المقارن (Dar Alnahdha Alarabia, 1997) 85.
[753] AlKandari, Faisal, 'مظاهر الحماية الجنائية للأموال العامة (دراسة تحليلية و نقدية لقانون رقم 1 لسنة 1993 بشأن حماية الأموال العامة)' [Criminal Protection of Public Funds (Analytical and Critical Study of Law No. 1 of 1993 Concerning Protection of Public Funds)]' (1994) 18(2) *Journal of Law* 271
[754] Suror, Ahmad Fatehi, *[Meditator in the penal code - special section* الوسيط في قانون العقوبات- القسم الخاص (Dar Alnahdha Alarabiya, 2016) 596-597.

damage.[755] Otherwise, restitution is not applicable. For others, however, restitution entails remedial and punitive features.[756]

The central issue of disagreement can be demonstrated by considering whether the judgment of restitution rebalances the financial position of the concerned parties or not. If it is, then restitution can be fairly be considered to be a civil obligation. If not, then claiming that the legal nature of restitution is a civil obligation would be suspect.

There are two main issues that render the legal nature of restitution problematic. The first is concerned with whether the judgment of restitution is confined to restore the *status quo ante* of the subject of restitution or whether it can extend beyond the profit of the crime. The second main issue is concerned with the permissibility of the restitution without ascertaining the amount of the damage to the public money. If restitution can be imposed without regard to the amount of the damage that occurred to the public purse, then it may be suspect to regard the nature of restitution as a civil obligation.

While it is not contested that the restitution of proceeds generated from embezzlement and misappropriation of public money rebalances the financial position of the concerned parties, the issue is less clear in the case of illegal profiting offences. Some scholars argue that restitution cannot be applied except in the situation where the injured party seeks compensation for the damage that occurred.[757] Another argument is that restitution can be applied to the proceeds of crime generated from such offences regardless of the occurrence of damage.[758] In Kuwait, however, restitution can be applied with respect to the illegal profiting from public money regardless of the occurrence of the damage.[759]

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[755] Suror, Ahmad Fatehi, الوسيط في قانون العقوبات- القسم الخاص *[Meditator in the penal code - special section* (Dar Alnahdha Alarabiya, 2016) 596-597.
[756] See generally, Abo Lbda, Hamza, *Confiscation in the Palestinian Criminal Legislation: An Analytical Study* (Master Thesis, Alazhar University, 2015) 23-25.
[757] Suror, Ahmad Fatehi, الوسيط في قانون العقوبات- القسم الخاص *[Meditator in the penal code - special section* (Dar Alnahdha Alarabiya, 2016) 596-597.
[758] Alsammak, Ahmad, & Nassrallah, Fadhel, شرح قانون الاجراءات و المحاكمات الجزائية الكويتي *[Explanation of the Kuwaiti Code of Criminal Procedure and Trial]* (Kuwait University Law School, 2015) 412.
[759] Alsammak, Ahmad, & Nassrallah, Fadhel, شرح قانون الاجراءات و المحاكمات الجزائية الكويتي *[Explanation of the Kuwaiti Code of Criminal Procedure and Trial]* (Kuwait University Law School, 2015) 412.

The illegal profiting offences may involve different scenarios in relation to whether damage to public money occurred. One scenario concerns gaining a profit in return for awarding a contract to a certain company. In this situation, it is conjectural whether damage occurred because of the commission of the offence. Moreover, even if it can be established that there was damage as a result of the commission of such offences, it is not clear whether the responsibility for the damage should be attributed to the perpetrator of the illegal profiting offence or the company. In other words, the question is whether depriving the perpetrator of the profits of crime rectifies the damage or whether rectifying the damage should be on the company.

Another scenario is where the perpetrator of such an offence performs the contract himself. In this situation, the perpetrator is likely to incur costs in preforming the contract. Therefore, depriving the profits of crime without deducting the cost may not lead to restoring the position of the perpetrator to the position he had before the criminal offence was committed. Moreover, in this situation, the perpetrator may not lead to damage to the public purse where the contract was performed at the same quality with a lower price. In this situation, the commission of the offence may lead to an increase in the profits of the public money instead of damaging it.

The question is whether the deprivation of the proceeds of profiting offences can be regarded to aim at remedying the damage. It is submitted that this can be the case. It is well established that calculation of the damage occurred in this area is significantly difficult to ascertained.[760] In many nations, an approach to overcome such difficulty is by determining the loss incurred by reference to the gain acquired.[761] In other words, the loss incurred is at least equal to the gain acquired by the perpetrator of the offence.[762] Griffiths stated that "in the case of the bribe paid in relation to the office supply contract described above, that payment is effectively a tax paid by the victim company because the victim will seek to recoup the costs of its bribe. As a result, it is likely the cost of the bribe will be built into the payments that the company will ultimately make to the offender over the life of the contract".[763]

[760] See generally, Publishing, OECD, *Identification and Quantification of the Proceeds of Bribery,* Identification and Quantification of the Proceeds of Bribery (Paris : OECD Publishing, 2012).
[761] Ibid.
[762] Ibid.
[763] Griffiths, Kelly, 'Criminalising bribery in a corporate world' (2016) 27(3) *Current Issues in Criminal Justice* 251

In the Netherlands, Article 6:104 of the Dutch Civil Code of 1992 seems to provide a legislative basis for such damages:

> *If someone, who is liable towards another person on the basis of tort or default of complying with an obligation, has gained a profit because of this tort or non-performance, then the court may, upon the request of the injured person, estimate that damage in line with the amount of this profit or part of it.*[764]

> *The value of the bribe may be confiscated or disgorged in cases where the contract revenues or profits cannot be ascertained. For example, in the Contracts and Other Advantages and the Volume-Based Contract Cases, both companies paid several public officials travel and entertainment expenses. It was difficult to attribute the bribes paid directly to specific contacts. In the Contracts and Other Advantages Case, the company also paid bribes to obtain a contract that was ultimately not performed, and hence did not obtain actual revenues or profits from the contract. In both cases, an amount equal to the bribe was disgorged on the assumption that the benefit to the briber is equal to at least the bribe.*[765].

It should be noted, however, this in most civil law countries does not mean the acceptance of disgorgement damages in which the injured party is compensated by the assessment of the gain acquired not the loss incurred. Rather, it is only a means to assess the loss incurred. Therefore, even though the loss cannot be identified, the confiscation of the proceeds generated from such offence can be fairly be regarded as aiming at rectifying the damage occurred. However, without providing for legal avenue for discounting expenses, the aim of rectifying the damage would be suspect.

Having said that, there are a number of factors that diminish the proposition that restitution as applied in public money offence is a pure form of civil obligation. One of the factors is that the third party in such offences cannot claim ownership of the property and therefore prevent the imposition of restoration on him. This is unlike restitution in civil law where bona fide third

[764] Hondius, Ewoud & Janssen, André, 'Disgorgement of Profits: Gain-Based Remedies Throughout the World' in *Disgorgement of Profits* (Springer, 2015) 471 481.
[765] Publishing, OECD, *Identification and Quantification of the Proceeds of Bribery*, Identification and Quantification of the Proceeds of Bribery (Paris : OECD Publishing, 2012) 43.

party can claim ownership of the proceeds and therefore can prevent the application of restoration on him.[766]

Moreover, if restitution is considered as civil obligation, the question is why the law always requires a third party to significantly benefit from the commission of one of the public money offences in order to apply for compensation.[767] If it is purely a civil obligation, then the requirement of significant benefit may be considered as unnecessary condition for the application of restitution. On the other hand, if restoration is purely punishment, then the practice of public prosecution to deprive the person of the proceeds generated from such offences without criminal judgment should be questioned. This reinforces one of the main safeguards in connection with the imposition of criminal punishments, namely that it must be imposed by a court judgment done in accordance with laws of criminal procedure.

Unexplained-wealth confiscation as a civil obligation

The previous section showed that restitution of proceeds generated from public money offences is regarded as a civil obligation, not constituting a form of criminal punishment. However, there are a number of factors that diminish the claim that restitution from public money offences is a pure civil obligation. This section explores whether unexplained-wealth confiscation of proceeds generated from public money offences can be similarly regarded as a civil obligation, based on corrective justice.

Even though the deprivation of proceeds generated from public money offences aims to rectify the damage caused to the public purse, the argument that unexplained wealth confiscation of such proceeds is based on corrective justice is not necessarily true. In order to demonstrate that, we first need to consider the concept of what constitutes public money. In civil law, the notion of public money entails any property owned by the state and allocated for the public use.[768] The protection of public money within the civil law is that public money cannot be subject to

[766] Abdulreda, A & Alnakkas, J, مصادر الإلتزام و الإثبات *[Sources of duty and proof]* (Dar Alkotob, 2010)327.
[767] Law No. 1 of 1993 sections 22.
[768] Althaferi, Fayez, الحماية الجنائية للأموال العامة من خلال القانون الكويتي رقم (1) لسنة 1993 دراسة تحليلية نقدية *[Criminal Protection of Public Funds through Kuwaiti Law No. (1) of 1993 A Critical Analytical Study]* (Academic Publication Council, 2006) 35-40.

any legal transaction and cannot be owned through simple possession.[769] According to this view, the fact that property is public money means that the person holding it cannot acquire ownership of the property.[770] The title of the property is still vested to the state.[771] Even if the person transfers the ownership of the property to another person, this legal transaction is considered void, for such property cannot be transferred to individuals.[772]

According to the criminal law, however, the law pertaining to the protection of public money provides an expansive definition of public money beyond money wholly owned by the state. Article 2 of this law states that public money in the application of this law means money, which is owned or subject to law to manage one of the following sources, whatever the location of those funds inside or outside the country:[773]

1. The State
2. Public bodies and public institutions
3. Companies and establishments in which the entities mentioned in the previous two articles contribute no less than 25% of their share capital. The percentage of capital referred to shall be determined by the total shares of the State or any other body of public or corporate entities.

In other words, money can be considered public money and can engage the four offences of public money even though the state does not wholly own it.[774] The concept of public money can include the money of a private company as long as the state owns a share of not less than 25%.

Therefore, one important feature in the notion of public money in the criminal law is that the property not owned by the state, but property owned by private company that state acquire share of 25% or more is considered public money within the notion of public money offences. It is also not necessary that the property is allocated to the public good, although public money has a direct impact on all citizens. The result is that the notion of public money in civil law is

[769] Ibid; Ali, Jaber, حق الملكية في القانون الكويتي *[The right to property in Kuwaiti law]* (Kuwait University, 2012) 395-396.
[770] Ibid.
[771] Ibid.
[772] Ibid.
[773] Law No. 1 of 1993 sections 2.
[774] See generally, AlKandari, Faisal, 'مظاهر الحماية الجنائية للأموال العامة (دراسة تحليلية و نقدية لقانون رقم 1 لسنة 1993 بشأن حماية الأموال العامة) [Criminal Protection of Public Funds (Analytical and Critical Study of Law No. 1 of 1993 Concerning Protection of Public Funds)]' (1994) 18(2) *Journal of Law* 271.

not applicable. Therefore, the protection of public money within the civil law it necessary applicable. One of the pieces of evidence that supports this assertion is that the law pertaining to the protection of public money does not consider any transaction to public money as void.[775] It requires certain conditions to be fulfilled in order to nullify the transaction.[776]

As a result of the notion of public money in the criminal law, unexplained wealth confiscation can extend beyond property loss by the state. Unexplained wealth confiscation of property generated from public money offences can result in the state acquiring a profit beyond the loss suffered by the state. This is mainly because the property not owned by the state, but property owned by private company that state acquire share of 25% or more is considered public money within the notion of public money offences. This is also attributed to the difference between restitution and unexplained wealth confiscation in determining the entity that suffered damage as a result of the commission of the criminal offence. The deprivation of the proceeds generated from public money through restitution presupposes the entity from which the proceeds of generated is determined. In unexplained wealth confiscation, however, the institution from which the proceeds of crime generated may be ambiguous. In other words, the proceeds of crime deprived under unexplained wealth confiscation would likely be transferred to the state, not the entity or the institution. As a result, while it is true that restitution in this situation can conform with the notion of corrective justice, unexplained wealth confiscation lacks the quality needed to conform with corrective justice. Therefore, unexplained wealth confiscation cannot be based on corrective justice.

To summarise, the deprivation of the proceeds of crime generated from public money offences under unexplained wealth confiscation is unlikely to be considered an expression of corrective justice. Although the deprivation of such proceeds could repair the harm that occurred to the state, unexplained wealth confiscation of such property may not meet the requirements of corrective justice.

[775] Law No. 1 of 1993 section 28.
[776] Ibid.

The harm principle

Having demonstrated that unexplained-wealth confiscation of property generated from public money offences cannot be based on corrective justice, this section attempts to explore whether the harm principle can provide for a satisfactory basis for such confiscation. Specifically, it explores whether the unexplained-wealth confiscation of proceeds generated from public money offences can overcome the barriers to adopt NCBC in Kuwait.

The harm principle has a pivotal role to play in contemporary criminal law.[777] It is considered a fundamental principle that protects individual liberty from illegitimate state intervention into the life of citizens.[778] The genesis of the harm principle is mainly attributable to Mill, who stated in *On Liberty*, that "the only purpose for which power can be rightfully exercised over any member of a civilised community, against his will, is to prevent harm to others".[779] This principle continues to play a vital role in academic discourse, mainly to identify whether a particular course of conduct should be prohibited or not through criminalisation.[780] In other words, the main function of the harm principle is to exclude conduct from the criminalisation if it does not comply with the harm principle. The application of the harm principle, however, has not been confined to the area of criminalisation but has been extended to a number of different areas that involve the coercive intervention of the state into the life of individuals.[781] Since confiscation of the proceeds of crime entails coercive power of the state into individuals' lives,[782] the legitimacy of the confiscation of the proceeds of crime should be examined in light of the harm principle. This is especially the case because unexplained wealth confiscation does not fully fit any civil law theory of justice.

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[777] See, eg, Vogel, Joachim, 'The Legal Construction that Property Can Do Harm - Reflections on the Rationality and legitimacy of "Civil" Forfeiture' in Rui, J P, and Sieber, U, (eds), *Non-Conviction-Based Confiscation in Europe. Possibilities and Limitations on Rules Enabling Confiscation Without a Criminal Conviction* (Duncker & Humblot, 2015) 225-230.

[778] See, eg, Mill, John Stuart, *On liberty, utilitarianism, and other essays* (Oxford University Press, USA, 2015 12.

[779] Mill, John Stuart, *On liberty, utilitarianism, and other essays* (Oxford University Press, USA, 2015 13.

[780] See, eg, Ashworth, Andrew and Horder, Jeremy, *Principles of criminal law* (Oxford University Press, 2013) 32.

[781]Epstein, Richard, 'The Harm Principle - And How It Grew ' (1995) 45(4) *University of Toronto Law Journal;* Steel, Alex, 'The Harms and Wrongs of Stealing: The harm principle and dishonesty in theft' (2008) 31(3) *UNSW Law Journal.*

[782] See, eg, Holtug, Nils, 'The harm principle' (2002) 5(4) *Ethical theory and moral practice* 357 359.

Prior to examining whether the harm principle can provide for a satisfactory basis for unexplained wealth confiscation, some aspects of the harm principle should be outlined.

The first is that although the harm principle continues to be prominent in academic writings regarding the assessment of the legitimacy of state intervention in the lives of individuals, it is far from uncontroversial. In actuality, there is no one harm principle. Following Mill's original conception, a number of harm principles were proposed by academic scholars that could have a substantive impact on its general content.[783] For instance:

- Is the harm principle necessary for the criminalisation of conduct?
- Does the harm principle provide a reason to legitimise the intervention of the state in the lives of individuals, or does it merely eliminate a reason not to intervene?
- Is state intervention into the lives of individuals limited to preventing harm to others, or can it also apply to harming oneself?
- Should legitimate state intervention into the life of individuals be against the person who originated the harm, or can this be origin-neutral?

Because of these discrepancies, the precise content of the harm principle is not settled.

Secondly, the harm principle is a necessary condition for any legitimate coercive state intervention into the life of individuals.[784] However, it is not solely sufficient to any coercive intervention.[785] A number of principles and safeguards should be adhered to for the purpose of coercive intervention of the state into the life of individual. This includes procedural fairness and the rule of law.[786]

Thirdly, most versions of the harm principle are origin-centred.[787] According to the origin-centred, the person who is to be coerced is the person who causes the harm.[788] The person cannot be coerced to prevent the harmful agency of others or harm caused by natural events.[789] Other versions of the harm principles are origin-neutral in that the person can be coerced to

[783] Feinberg, J, *Harm To Others* (Oxford University Press, 1984); Raz, Joseph, 'Freedom and Autonomy' in *The Morality of Freedom* (Oxford University Press, 1988).
[784] Edwards, James, 'Harm principles' (2014) 20(4) *Legal theory* 253.
[785] Edwards, James, 'Harm principles' (2014) 20(4) *Legal theory* 253.
[786] Edwards, James, 'Harm principles' (2014) 20(4) *Legal theory* 253.
[787] See, eg, Holtug, Nils, 'The harm principle' (2002) 5(4) *Ethical theory and moral practice* 357 360.
[788] Ibid.
[789] Ibid.

prevent the harmful agency of others and harm caused by natural events.[790] In other words, the origin-neutral version permits the use of coercive power against an individual even if that individual has not caused harm to others as long as such a use of power prevents harm.

In the following sections, this chapter will focus on four main issues in order to determine whether the harm principle can provide for a satisfactory basis for unexplained-wealth confiscation generated from the commission of public money offences: the focus of the claim of harm, preventing harm, the origin of harm and harm analysis.

The focus of the claim of harm

In order to determine whether the harm principle can constitute a satisfactory basis for the unexplained wealth confiscation of proceeds generated from public money offences, it is necessary to determine the focus of the claim of the harm. The different versions of the harm principle are not consistent in relation to the focus of the claim of harm.[791] There are in general four kinds of focus of the claim of harm that should be distinguished: purposive, act-based, property-based, and instrumental.[792] Determining the focus of the claim of harm is important for the satisfaction of the harm principle and the protection of individual interests. However, the claims of harm are not mutually exclusive.[793] It is perfectly possible to endorse more than one of the claims of harm in order to satisfy the harm principle.[794] This section aims to determine what should be the paramount focus of the claim of harm.

The purposive claim of harm focuses on the justification behind the coercive measure. According to this claim, what matters for satisfying the harm principle is the rationale behind the coercive measure.[795] If the purpose of the coercive measure is to prevent harm, then the harm principle is satisfied.[796] If the coercive measure is not aimed at preventing harm, the harm principle is not satisfied.[797] Accordingly, in order to satisfy the harm principle according to this

[790] Ibid.
[791] Edwards, James, 'Harm principles' (2014) 20(4) *Legal theory* 253 263-266.
[792] Ibid.
[793] Holtug, Nils, 'The harm principle' (2002) 5(4) *Ethical theory and moral practice* 357 363 nn17 and nn18.
[794] Ibid.
[795] See generally, Holtug, Nils, 'The harm principle' (2002) 5(4) *Ethical theory and moral practice* 357 362-363; Edwards, James, 'Harm principles' (2014) 20(4) *Legal theory* 253 263-266.
[796] Ibid.
[797] Ibid.

focus, it is the aim of preventing harm that matters. Mill's harm principle is purposive. Mill focuses on the justification behind the coercive measure as the focus of the claim of harm.

The second claim of the focus of harm is act-centred.[798] According to this claim, what matters for the claim of harm is not the justification behind the measure, but rather the harmful consequence of an act.[799] In other words, it is outcome-based version rather than justification-based version of the focus of the claim of harm.[800] If the consequence of the act is harmful, the state has legitimate claim to intervene by coercive measure. If, on the other hand, the consequence of the act is not harmful, the harm principle is not satisfied. The act-centred focus of the claim of harm is significant in the situation of criminalisation. In criminalisation, one of the main claims of preventing harm is act-centred claim of harm.[801] Focusing on this claim will exclude from the criminalisation conduct that is not harmful.

The third possible claim of harm is harm stems from property. According to this claim, what matters for satisfying the harm principle is that the property is the origin of harm or risk of harm sought to be prevented. If the property sought to be confiscated constitute harm or risk of harm to others, then the harm principle is satisfied. If not, the harm principle is not satisfied.

The fourth claim of harm is instrumental.[802] According to this claim, the focus of the claim of harm is not on whether the property sought to be confiscated is harmful, it is whether the unexplained-wealth confiscation of proceeds generated from public money offences will (probably) prevent harm. The instrumental claim is more suited to assess the proportionality of the confiscation regime at large rather than focusing on the harm caused by the property or conduct. According to this focus of the claim of harm, even if the act is considered harmful, the criminalisation may not be legitimate as instrumentally the criminalisation would not prevent harm.[803] Similarly, the act criminalised may not be harmful, but the harm principle can be satisfied since the criminalisation would prevent harm to others.[804] In other words, the

[798] Ibid.
[799] Ibid.
[800] Ibid.
[801] See, eg, Ashworth, Andrew and Jeremy Horder, *Principles of criminal law* (Oxford University Press, 2013) 32.
[802] See generally, Edwards, James, 'Harm principles' (2014) 20(4) *Legal theory* 253 263-266.
[803] Ibid.
[804] Ibid.

instrumental focus of the claim of harm demands assessing the harm in question and dealing with competing harms.

How, then, does this apply to unexplained wealth confiscation of proceeds generated from public money offences? According to the purposive focus of the claim of harm, the aim of unexplained wealth confiscation of property generated from public money offence should be to prevent harm. Such unexplained wealth confiscation should not adhere to the purposive focus of harm as the paramount focus. Adhering to the purposive claim of the harm principle would in fact generate serious controversy in relation to the nature of confiscating the proceeds of crime. It has already shown that the confiscation of the proceeds of crime can pursue a number of aims and that may include deterrence. Therefore, accepting the purposive claim of the harm as the sole focus of the harm principle is implausible. It should not be the primary focus of the claim of harm.

The act-centred claim of the prevention of harm is more suited for criminalisation than the confiscation of the proceeds of crime. For the claim of harm is not centred on the act that generated the property, but instead, the harm from the proceeds that is generated by the offence. Moreover, unexplained wealth confiscation does not specify the conduct. Therefore, it is difficult to endorse the act-centred claim of harm in order to satisfy the harm principle in unexplained wealth confiscation.

However, a possible version of the act-centred claim in the context of confiscating the proceeds of crime would be as follows: the possession or retain of proceeds of crime would harm others. This view, in substance, requires the property that is in possession of the person to be harmful. The act-centred claim of harm, therefore, cannot solely be the focus of the claim of harm.
It is submitted that the focus of the claim of harm should lie mainly in the property in order theoretically to justify the requirement of NCBC.[805] Otherwise, the justifications of the requirements of confiscation would be debatable. That is, ignoring the person as wrongdoer for the purpose of the intervention of the state may be plausible if the main focus of the claim of harm originates from the property.

[805] See chapter Three.

The instrumental claim of harm should be a secondary focus of the claim of harm. This is mainly because unexplained wealth confiscation of property generated from public money entails a number of competing harms.

The first concerns the identification of the true owner of the property. Unexplained wealth confiscation can seize property beyond that owned by the state. It, therefore, can inflict harm on the true owner of the property. This stems from the notion of public money in the criminal law which entails property not wholly owned by the state.

Another competing harm is related to the issue of wrongful confiscation and the burden that the subject of unexplained wealth may unreasonably be required to bear.

Another competing harm is that the costs associated with confiscation should not exceed the benefits to be derived from confiscation of the proceeds of crime. Otherwise, the confiscation of the proceeds of crime can inflict harm to the subject of confiscation.

Feinberg provided a number of factors that can provide useful guidance on how to assess and compare harms in order to determine when the harm principle can be satisfied.[806] These include assessments of the magnitude of the harm, the probabilities of the harm, and the relative importance of the harm.[807]

The magnitude of the harm refers mainly to the amount of the harm that is sought to be prevented.[808] The harm principle requires the harm that is needed to be prevented constitutes a genuine harm not just inconvenience.[809] In other words, the harm principle cannot be invoked to prevent harm of a trivial extent.[810]

How probable should the harm be in order to allow for proceeds of crime to be confiscated using unexplained wealth procedures? Feinberg refers to the idea that the more probable the harm, the more justifiable is it for preventive coercion to take place. Feinberg combines the

[806] Feinberg, J, *Harm To Others* (Oxford University Press, 1984) 187-217.
[807] Ibid.
[808] Ibid 188-190.
[809] Ibid.
[810] See, eg, Zedner, Lucia, *Criminal Justice,* Clarendon Law Series (Oxford, 2004) 56.

need to examine the magnitude of the harm and the probability of the harm occurring. "The greater the probability of harm, the less grave the harm needs to be to justify coercion; the greater the gravity of the envisioned harm, the less probable it needs to be".[811]

In the situations of homicide, robbery and other conduct in which the harm is clearly apparent, the legislature can invoke the harm principle to justify criminalisation.[812] However, there are a number of cases where competing harms exist. In this situation, the legislature has to weigh the importance of removing the harm with the consequences of preventing it. Feinberg provides a formula to weigh these competing interests. The first factor is that "we should protect an interest that is certain to be harmed in preference to one whose liability to harm is only conjectural".[813] The second factor is "we should deem it more important to prevent the total thwarting of one interest than mere invasion to some small degree of another interest".[814] The third is in the situation where the setback of interest does not differ in degree. Here we should consider the vitality, the degree to which they are reinforced by other interests private and public and in their inherent moral quality.[815]

To summarise, in order to satisfy the harm principle, it is suggested that the primary focus of the claim of harm should be in property while endorsing the instrumental focus of the claim of harm as secondary focus.

Unexplained wealth confiscation and preventing harm

Having identified what should be the paramount focus of the claim of the harm, the next step to examine whether unexplained wealth confiscation of proceeds generated from public money offences can prevent harm.[816]

[811] Feinberg, J, *Harm To Others* (Oxford University Press, 1984) 191.
[812] Ibid 202.
[813] Ibid 204.
[814] Ibid.
[815] Ibid.
[816] The different versions of the harm principle are not consistent in relation to the object of harm. Some of the versions of the harm principle confine what is to be harmed to the rights. Other versions of the harm principle allow for interests to be harmed regardless of the violation of rights. See Holtug, Nils, 'The harm principle' (2002) 5(4) *Ethical theory and moral practice* 357 268.

The main issue that needs to be considered is the concept of harm. Feinberg defines the concept of harm as setbacks to interest.[817] According to Raz, the harm principle is satisfied in a situation where people's prospects are diminished. For Raz, "One harms another when one's action makes the other person worse off than he was, or is entitled to be".[818] For both Feinberg and Raz, the harm is not the impairment per se but comprises the consequences of the impairments on the person's well-being.[819]

In the following sections, I consider two main possibilities in relation to what is to be harmed. The first is ownership and the second is the public purse.

Property rights and the harm principle

Unexplained wealth confiscation of the proceeds generated from public money offences cannot satisfy the harm principle unless such confiscation can prevent harm. Since the previous section identified that the paramount focus of the claim of harm should lie at the property, the question is what is to be harmed that stems from the property in question.

One possible answer is the proprietary claim of harm. In other words, the state claims the proceeds generated from public money offence constitutes damage to its property. There are a number of reasons that prevent proprietary claim of harm to satisfy the harm principle. One of the main reasons is that the proceeds of crime may not be owned by the state. The notion of public money within the criminal law allows property owned by private company with the state owns only 25% share of the company to subject to public money offences. As a result, claiming that the whole of the proceeds of crime constitutes harm to its property may not be plausible

[817] Feinberg, J, *Harm To Others* (Oxford University Press, 1984) 31-50.
[818] Raz, Joseph, 'Freedom and Autonomy' in *The Morality of Freedom* (Oxford University Press, 1988) 414.
[819] Simester, Andrew P and Andrew Von Hirsch, 'Rethinking the offense principle' (2002) 8(3) *Legal theory* 269 281. The baseline that determines when the harm occurs can mainly take two different forms: comparative and normative. The comparative in turn can take two different dimensions. The first is in comparing the position of the harmed person prior to the event and the after the event. In other words, one harm another if he made other worse off than before the event. Accepting this baseline may be problematic. For instance, if a person already poisoned and went to a doctor that inject him with the same poison, the doctor does not harm A because the doctor does not render A worse off than before the event. Another baseline is counterfactual. According to this baseline, what matters for the existing of the harm is the position of A had the event not occurred. Another baseline is normative. According to which one harm another when the person made other worse off than what he is intitled to be. See, Edwards, James, 'Harm principles' (2014) 20(4) *Legal theory* 253 267-268.

since the property can be legally owned by a private company. The state may only own a share of the company.

More importantly, the main reason for the failure of proprietary claim of harm is that without establishing that the person has committed the criminal offence that generated the property or that the person is not bona fide in acquiring the proceeds of crime, then the Kuwaiti law recognises the ownership of the person holding it.[820] Therefore, it cannot be said that the state has proprietary claim since the law itself recognise the ownership of the property to the person holding it.[821] This is unlike the situation of the public money in civil law. If the concept of the public money is that of civil law, then the state has proprietary claim since such property cannot be owned by any person. As a result, it can be argued that the harm principle is not satisfied.

Harm to public money itself

Another possible harm is damage not to the ownership, but rather to the public purse itself. It is submitted that the harm to public money can meet the concept of harm since public money is integral to enable the state to fulfil its duty to offer public services to all citizens in the country. Therefore, the proceeds generated from public money offences can diminish people's prospects.

The main obstacles in relation to the damage to public money, however, is the origin of the harm. The harm principle requires mainly that the person who is to be coerced causes the harm (origin-centre). In in rem confiscation, confiscation of property is based on the description of the property as proceeds of crime without relevance to any person for the purpose of confiscation. In the case of unexplained wealth confiscation, the state may justify its action on the basis of prevention or reparation. In terms of prevention, the establishment of dangerousness may provide ground for confiscating the proceeds of crime. In terms of reparation, the justification of confiscation is that it restores the position of the confiscation subject to the position occupied prior to the commission of the criminal offence.

[820] Ali, Jaber, حق الملكية في القانون الكويتي *[The right to property in Kuwaiti law]* (Kuwait University, 2012) 390-398.
[821] Ibid.

Since unexplained wealth confiscation as proposed in this chapter treats the subject of unexplained wealth confiscation as merely bona fide third party, the problem of the ground of liability is compounded. What permits the confiscation of property belonging to a completely bona fide third party? This issue is not only applicable to unexplained wealth confiscation but also a third party who is subjected to restoration as a result of the commission of one of the public money offences.

It is submitted that what may allow for the deprivation of the proceeds of crime generated from public money offences is that there is a constitutional obligation that can provide a basis for the ground of liability to completely bona fide third party. The constitution of Kuwait stated that "Public property is inviolable and its protection is the duty of every citizen".[822] A similar provision exists in the law pertaining to the protection of public money.[823]

Raz wrote that one may harm another if he fails in his duty.[824] Because there is a duty to protect the public purse imposed by the constitution and the law pertaining to the protection of public money, the person causes (allow) harm to occur in the moment that the property is recognised as proceeds generated from public money offences and that the inaction of the person may allow harm to occur. In other words, once it is established that the disproportionate wealth constitutes proceeds generated from public money offences, the duty to protect the public money occur.

The legal nature of unexplained wealth confiscation

It should be noted that to invoke the harm principle as a basis for unexplained wealth confiscation does not necessarily preclude the classification of it as a punishment. Although punishment in modern criminal law is essentially retributive, the aim of preventing the occurrence of further criminality is one of the crucial purposes of inflicting punishment.[825] However, since the focus of unexplained wealth confiscation as proposed is on rectifing the damage to public money, it cannot be regarded as a punishment.

[822] The Constitution of Kuwait section 17.
[823] Law No. 1 of 1993 section 1.
[824] Raz, Joseph, 'Freedom and Autonomy' in *The Morality of Freedom* (Oxford University Press, 1988) 416.
[825] Suror, Ahmad Fatehi, الوسيط في قانون العقوبات - القسم العام *[The penal Code – The General Part]* (Dar alnahdha alarabia, 2015) 940.

Another possible classification of unexplained wealth confiscation is preventive. However, the concept of preventive justice as commonly understood is concerned with preventing further criminality from taking place.[826] Moreover, in a country such as Kuwait, the preventive nature cannot be invoked unless dangerousness has been established which is not present in the current unexplained wealth confiscation regime.

It was established above that unexplained wealth confiscation cannot be considered as compensatory. In compensation legislation, the state should be the injured party. However, the concept of public money may render the state merely the owner of a share of a company that own the property. In compensation legislation, the amount of confiscation should be determined according to the loss suffered by the plaintiff, and the concept of public money allows for confiscation of unexplained wealth beyond the loss to the state. Claiming that the proceeds of crime would be transferred to possible identified victims cannot offer a sound basis for claiming that such confiscation is compensatory.

It is submitted that since the focus of such unexplained wealth laws is on preventing the harm that occurred because of the damage to public money, the nature of unexplained wealth confiscation is reparative. However, it is not reparative in a sense that it aims at restoring the position of the subject of confiscation as it was before the commission of the criminal offence. But rather, it is reparative in a sense that it aims at restoring criminally protected interests as it was before the criminal offence. It can be said that it is more regarded as protection of public interests rather than prevention. Prevention normally try to eliminate the harm prior to its occurrence. It attempts to avert the harm before taking place. The role of protection, on the other hand, comes after the failure of prevention. Protection primarily aims at defending against and eliminates the threats or harm that has already occurred.

To summarise, the nature of unexplained wealth confiscation is reparative based on harm principle in the sense that it defends against and eliminates the threat that has already occurred. It does not aim at deal with the wrongdoing committed which differs from punishment. Instead, it focuses only on the harm that stems from the property with the aim to eliminate the harm that occurred as a result of the commission of the criminal offence.

[826] Ashworth, Andrew and Lucia Zedner, *Preventive justice* (OUP Oxford, 2014)20.

The elements of the proposed model

Property sought to be confiscated

The property liable for confiscation

Unexplained wealth confiscation, as proposed in this chapter, requires that property subject to unexplained wealth confiscation be derived from one of the public money offences. It does not allow for the confiscation of property generated from other criminal offences. There are a number of reasons for confining property being sought for confiscation to those properties derived from public money offences.

The first concerns the legal nature of unexplained wealth confiscation. It has been demonstrated in previous chapters that allowing the confiscation of crime proceeds that apply to (almost) all kinds of offences may increase the likelihood of finding the legal nature of confiscation as punishment. Limiting the confiscation of the proceeds to property generated from public money offences will increase the likelihood of finding the legal nature of confiscation as not a criminal punishment. This is mainly because the construction of the confiscation regime clearly indicates the aim of confiscation is not to punish or deter the perpetrator of the criminal offence. Instead, the aim is to eliminate the harm done to the public money.

The second main reason relates to the ground of liability to the subject of confiscation. It has been demonstrated in this chapter that without the existence of a constitutional obligation to protect the public money, the ground of liability to the subject of confiscation would be ambiguous. Since this constitutional obligation is limited to the protection of public money, permitting the confiscation of property beyond that derived from public money offences may undermine the permissibility of unexplained wealth confiscation. Therefore, one of the main reasons for confining unexplained wealth confiscation to the protection of public money is that there is no clear ground for liability to the person in Kuwait except in the situation of the protection of public money.

The third main reason is related to the issue of jurisdiction. In order to hold the person accountable for the proceeds of crime, the court must have jurisdiction in relation to the criminal offence that generated the property. The jurisdiction for the offences is primarily

governed by territorial jurisdiction in which the material element of the offence should be committed in Kuwait.[827]

Also, personal jurisdiction applies in certain circumstances.[828] Kuwaiti courts have jurisdictions with respect to offences committed abroad provided that the person who committed the offence is Kuwaiti national and that the requirement of double criminality is satisfied.[829] The problem with unexplained wealth confiscation is that there is no examination of the criminal conduct committed. Applying unexplained wealth confiscation to all offences may lead to confiscation of property generated from the commission of offence over which the Kuwaiti courts have no jurisdiction.

In relation to public money offences, however, jurisdiction differs. The law pertaining to the protection of public money provided for subject matter jurisdiction in which the Kuwaiti courts have jurisdiction over the commission of public money offences regardless of where the offence is committed and regardless of the nationality of the person who committed the criminal offence.[830] Therefore, limiting the offences that can be subject to unexplained wealth confiscation to those pertaining to the protection of public money can suit the design of unexplained wealth confiscation.

The confiscation system

The next issue that should be discussed in relation to the property sought to be confiscated is the confiscation system. Unexplained wealth confiscation, as proposed, requires the adoption of a property-based system of confiscation rather than a value-based system of confiscation. The main reason is that there should be a fair imputation of the harm to the subject of confiscation in order to satisfy the harm principle.[831] Since property-directed confiscation targets the actual proceeds of the crime, the fair imputation of harm is, in principle, satisfied

[827] See generally, Althaferi, Fayez, الحماية الجنائية للأموال العامة من خلال القانون الكويتي رقم (1) لسنة 1993 دراسة تحليلية نقدية *[Criminal Protection of Public Funds through Kuwaiti Law No. (1) of 1993 A Critical Analytical Study]* (Academic Publication Council, 2006) 23-32.
[828] Ibid.
[829] Ibid.
[830] Ibid.
[831] For a discussion on the fair imputation of harm, see Hirsch, Andrew, 'Extending the harm principle' in A & Smith simester, A (ed), *Harm and Culpability* (Oxford, 1996).

even if the subject of confiscation is completely bona fide. This is because once the property is found to be derived from the commission of public money offences, there will be a duty to protect this property. This is done by returning the property in question to the state. This is not the case, however, with the value-based system of confiscation. In the value-based system of confiscation, the subject of confiscation may be obliged to pay an amount equal to property consumed, even if he is completely bona fide. There is no fair imputation of harm to the subject of confiscation in relation to the proceeds consumed without his or her knowledge that the property is proceeds of crime.

Net profit

The next issue is whether the property liable for confiscation is limited to the net profit or extends to the gross benefit. In other words, the question is whether the confiscation of property can go beyond restoring the status quo of the confiscation subject or is limited to restoring the status quo ante. For instance, the perpetrator of the profiting offence can obtain a contract himself and incur costs in performing the contract. Unexplained wealth confiscation as proposed is limited to the net profit. The confiscation that can go beyond the net profit of crime can in principle constitute a punishment. However, it is not only because the confiscation of gross receipts can constitute a punishment that limits the confiscation to only the net profit, but also unexplained wealth confiscation as suggested in this chapter is mainly aimed at preventing the harm to the public purse. It does not aim to punish the person in question. The prevention of the harm is achieved by confiscating the amount of the damage to the public purse. Any profits that are generated from the commission of such offence may be considered as damage to public money which should be confiscated. Allowing confiscation beyond the profits necessarily means the confiscation is incompatible with the aim of rectifying the damage to the public purse. In addition, the confiscation of the crime's proceeds beyond the net profit can constitute harm to the subject of confiscation. Therefore, the harm principle may be undermined as a basis for unexplained wealth confiscation since there would be competing harms. Therefore, the subject of unexplained wealth confiscation should be provided with an opportunity to demonstrate any costs incurred as a result of confiscation.

The person liable for confiscation

This chapter proposes that unexplained wealth confiscation is, in principle, confined to the public officials described in the Nazaha (Kuwait Anti-corruption Authority) declaration system. Although the constitutional obligation to protect public money may provide grounds for liability to all persons in principle, there are a number of reasons for this limitation.

The first is related to the presumption of innocence. Although the presumption of innocence in criminal law does not apply, innocence is also assumed in civil law.[832] The main difference is that the presumption of innocence in criminal law is more protected in that even if what is presumed is rationale, it constitutes violation to the presumption innocence. The rules of proof in civil law may limit who can be subject to unexplained wealth confiscation. The rules of proof state that the onus of proof is on the person who makes a claim. In order to accept the presumption of innocence, the rationality test must be satisfied. One consequence of the rationality test is that not every person who possesses disproportionate wealth can be said to have acquired property generated from public money offences. Instead, the persons who can be rationally said to acquire the proceeds of crime are those who occupy a certain public office. In other words, in order to presume that the property has been generated from a public money offence, the nature of the occupation should permit the person to acquire the proceeds of such offences. Otherwise, the rationality test may not be satisfied. Since the innocence is applicable in criminal law and civil law, it is not rational to assume that the property is the proceeds of the crime unless the person has the ability to exploit public money.

Secondly, limiting individuals that could be subject to unexplained wealth confiscation to those subjected to the declaration system may provide a number of benefits. One benefit is that there will be an increase in the awareness of public officials about the possibilities of subjecting to unexplained wealth proceedings, which reduces the possibilities of wrongful confiscation that comes as a result of a lack of perceiving receipt. Moreover, since the declaration system requires the subject of the law to declare their wealth during the first sixty days from the time of issuing the law or the occupancy of public office, and every three years from the first declaration, and again when leaving the office, limiting unexplained wealth confiscation to

[832] See generally, Alsammak, Fadhel Nassrallah & Dr. Ahmad, شرح قانون الاجراءات و المحاكمات الجزائية الكويتي *[Explanation of the Kuwaiti Code of Criminal Procedure and Trial]* (Kuwait University -Law School, 2015) 569-585.

those under the declaration system may reduce the unnecessary burden to the subject of unexplained wealth confiscation. This is because no property should be questioned unless it was derived after the first declaration of wealth.

The question then become what if the person transfers the ownership of the property to a third party. In this situation, one solution is to include property in the confiscation order not only currently owned but also property over which the person has effective control. Another solution is to permit the confiscation from other than the public officials on condition of proof of a certain relationship between the person and the public official.

Evidentiary and proof procedures

As to the evidentiary and proof procedures, the proposed model supports the idea that some sanctions are not purely criminal nor purely civil.[833] The unexplained wealth confiscation proposed in this chapter is within this category since no civil law theories can recognise it nor is it a criminal punishment. Despite there being no intentional hard treatment nor censure, the involvement of the state in the proceedings should not be underestimated. Moreover, unexplained wealth confiscation entails a risk to individuals' rights and liberties. In examining the procedural safeguards afforded to the confiscation subject, the issue of whether the confiscation proceedings are criminal should not be the primary force behind the application of procedural safeguards. Instead, each procedural safeguard should be examined separately, including its justification, to examine whether the subject unexplained wealth proceedings should be afforded such safeguards based on the features of the confiscation in question.

It is recommended that some of the safeguards of criminal cases be included, such as the application of the theory of unrestricted proof as well as the permittance of the confiscation subject to prove the lawful derivation of the property or his inability to prove the lawful derivation of the property by all means.

[833] See, eg, Boucht, Johan, *The Limits of Asset Confiscation: On the Legitimacy of Extended Appropriation of Criminal Proceeds* (Hart Publishing, 2017) 131-139.

Justice

The first concerns the identification of the true owner of the property. Unexplained wealth confiscation can confiscate property beyond that owned by the state. It can inflict harm on the true owner of the property. This, however, does not suggest that unexplained wealth confiscation should be avoided – instead it should be managed. The state must offer legal avenues through which a victim company can claim the proceeds confiscated through unexplained wealth confiscation. Otherwise, the confiscation of the proceeds of crime would not prevent harm but it is in fact generate harm to the actual victim of the crime. Without offering a route to the true owner to redress, the confiscation of the proceeds of crime may not satisfy the assessment of the harm principle.

Unexplained wealth confiscation, as proposed, does not allow for the investigation and confiscation of individuals without a threshold that should be met. The requirement of a threshold is necessary for three main reasons. The first is that the rationality test may not be met unless the increase in wealth is significantly disproportionate compared with the legitimate earning capacity of the person. Secondly, the harm principle requires that the harm being addressed must be of sufficient magnitude. The third is that the profiting offence demands that the proceeds generated must be significant in order to assume that damage occurs to public money. Without this, the assumption that there would be damage to public money and that the unexplained wealth confiscation aims to protect the criminally protected interests from the damage may be questionable

Evaluating unexplained wealth confiscation

Unexplained wealth confiscation that is reparative based on the harm principle may have a number of advantages compared with unexplained wealth confiscation that is reparative based on unjust enrichment and preventive based on preventing further criminal activity from occurring. It also has some disadvantages.

Justifications of the proposed model

The first advantage of unexplained wealth confiscation as proposed is that the ambiguity of the nature of confiscating the proceeds of crime is diminished, as the confiscation in this situation has a clearly non-punitive aim. Such confiscation aims primarily to rectify the damage that occurred to the public purse. The intention to hurt the individual who committed the criminal

offence is dismissed. Unlike the reparative aim, that is based on unjust enrichment, and unlike the preventive nature of confiscation, the confiscation of the proceeds of crime has no general application or almost general application to all offences. The design of such unexplained wealth confiscation clearly excludes that the primary aim of confiscating the proceeds of crime as being to deter the commission of further criminal activity or to penalise the person as a result of committing the criminal offence. The concentration is not on the criminal conduct or the perpetrator of the criminal offence, but rather the focus is on the true harm inflicted on the public money, with the aim of eliminating such harm.

Secondly, despite the inherent risk of wrongful confiscation and the potential excessive burden placed on the subject of unexplained wealth confiscation, the reparative aim based on unjust enrichment is not able to provide for normative limits to ensure the protection of individuals' interests.[834] In fact, providing for limits may contradict the reparative nature that is based on unjust enrichment.[835] On the contrary, unexplained wealth confiscation that has a reparative nature based on the harm principle is better able to provide for normative limits to secure individual interests without undermining the non-punitive nature of confiscation. In other words, the reparative nature that is based on the harm principle allows for taking into account not only the interests of the state in overcoming the difficulties in proving the criminal origin of the property, but it also requires consideration of the interests of individuals. Given that unexplained wealth confiscation involves the possibility of negative impacts on the interests of individuals, the harm principle as a basis for the reparative nature would be more suited to protecting the interests of individuals than a basis for reparative nature that assumes achieving justice without consideration of possible significant injustice as an outcome of unexplained wealth confiscation.

Thirdly, unexplained wealth confiscation of property generated from public money offenses can be found to be more compatible with prospective proportionality than that which allows for confiscation from all offences. The means employed are proportional to the aim sought. On the contrary, permitting the general application of unexplained wealth confiscation to all offences is likely to be incompatible with prospective proportionality.[836]

[834] See chapter Four.
[835] Ibid.
[836] Ibid.

Fourth, the harm principle allows not only for consideration of the parties actually involved in unexplained wealth confiscation but also the actual victim of the crime. The harm principle requires the state to return money confiscated to the true victim of the crime. Otherwise, the harm principle cannot be invoked as a basis for confiscation. Therefore, the interests of the victim of the crime are protected from the initiation of civil claims against the perpetrator of the criminal offence who lacks sufficient financial resources to vindicate the damage that has occurred to the victim. It follows that the interests of the perpetrator of the criminal offence are also protected from the possibility of double deprivation of the proceeds of crime.

Fifth is the rationality of the presumption that the disproportionate wealth that cannot be justified is complied with more in unexplained wealth confiscation as proposed in this chapter than in unexplained wealth in the UK and Australia. First, there is the requirement of a fair warning to the possible confiscation subject that he or she might be the subject of unexplained wealth confiscation proceedings. This provides an opportunity for an individual to demonstrate the lawful origins of the disproportionate wealth by preserving the receipts from his or her property. Therefore, presuming that the property is proceeds of crime because of the lack of justification is more rationale in unexplained wealth confiscation as proposed than in Australia and the UK.

Comparison with illicit enrichment

Although unexplained wealth confiscation as proposed in this chapter has significant similarity to the illicit enrichment offence, unexplained wealth confiscation is more well-suited for dealing with the difficulties in proving the criminal origins of a property.

Shifting the burden of proof entails the significant risk of a wrongful outcome. In unexplained wealth confiscation, the risk of error is limited to the deprivation of legitimately acquired property. In the illicit enrichment offence, however, the risk of error is not confined to deprivation of property of lawful origin, but also includes the possibility of wrongful convictions and punishment. As a result, unexplained wealth confiscation may be considered as a less drastic means of overcoming the difficulties in proving the criminal origin of the property compared with the illicit enrichment offence.

Second, the illicit enrichment offence suffers from serious flaws in relation to the rationality test. On the contrary, unexplained wealth confiscation may be better able to satisfy the rationality test compared with illicit enrichment offence. The existence of disproportionate wealth does not necessarily suggest that the person committed the crime himself. Since the illegitimacy in unexplained wealth confiscation is not connected to the conduct of the person, but on the proceeds of crime, it is not a requirement for the rationality test to assume that the person committed the crime that generated the property by himself.

Third, unexplained wealth confiscation as proposed in this chapter is more suited to avoiding possible double deprivation of the proceeds of crime than that in illicit enrichment offence.

Fourth, since the illegitimacy is connected to the proceeds of crime, rather than the conduct, in unexplained wealth confiscation, unexplained wealth confiscation is more able to impose a requirement that there should be a significant increase in the wealth than in illicit enrichment offence, which concerns the conduct primarily, and therefore the requirements of the significant increase in the wealth can be avoided. This is mainly because the magnitude of the harm is confined to the provenance of the property in unexplained wealth confiscation. In contrast, the magnitude of the harm includes the criminal conduct and the property in illicit enrichment offence.

Fifth, unlike illicit enrichment offence, the shift to the burden of proof cannot set an example that may render the accused in the criminal law as guilty until proven otherwise. This is because the deviation from the presumption of innocence is justified because no criminal punishment is imposed in confiscation proceedings. In contrast, the deviation from presumption of innocence is justified by the argument of necessity which can apply to a wide range of criminal offences.

Sixth, the ability of the illicit enrichment offence to lead to the confiscation of the proceeds of the illicit enrichment offence from third party is always dependent on an exception to the principle of personal punishment. This renders the ability to deal with the difficulties in proving the criminal origin of the property to be always in danger of violating the constitution, which stated that the punishment must be personal. On the other hand, unexplained wealth confiscation is able to deal with property acquired by a bona fide third party without breaching the principle of personal punishment since the nature of such confiscation is not punishment.

Limitations of the proposed model

Although there are a number of advantages to the model proposed, there are a number of concerns arising from the adoption of such a solution. The first is that, although the solution provides a number of controls to protect individual interests, the shift of the burden of proof remains a risk to individuals' interests.

Secondly, and more importantly, as long as the harm is connected to property rights, the limits that ensure that individuals' interests are secured are easy to be manipulated—and therefore easy to be circumvented, for property rights are not pre-legal.[837] In other words, the property regime that recognises property rights is the creation of the state. As a result, the existence of the harm can be manipulated through the property regime, which is governed by the state. For instance, there is nothing to prevent the state from regarding the proceeds of any crime as property owned by the state, and therefore the existence of harm is available in all situations.

In less extreme situations, the concept of public money can be extended beyond that in the current conception of public money in criminal law. In fact, the concept of public money in criminal law is one example that demonstrates the ability of the state to manipulate property rights and, therefore, the concept of harm. Without a limitation to the property regime itself, the harm principle as a basis for confiscation may not provide adequate and certain limits that ensure the protection of individuals' interests.

Thirdly, adopting unexplained wealth confiscation as suggested may not lead to obviate the need for extended criminalisation to overcome the difficulties in proving the criminal origin of the property. This is because unexplained wealth confiscation as proposed is limited to public money offences. In contrast, the reparative nature, based on unjust enrichment, and the preventive nature, based on preventing the occurrence of further criminal activity, are both able to obviate the need to utilise extended criminalisation since they offer a solution to the overcome the difficulties in establishing the linkage requirement to all kinds of offences. This is especially the case in relation to the reparative nature based on unjust enrichment.

[837] See generally Simester, Andrew & Sullivan, G Robert, 'On the nature and rationale of property offences' in A and Green Stuart Duff (ed), *Defining Crimes Essays on the Special Part of the Criminal Law* (Oxford University Press, 2005)

Fourthly, the solution provided may be partly accepted because there is a duty imposed on persons to protect public money. Similar to the property regime, the state can replicate the duty to encompass proceeds generated from other offences. However, it must be noted that the assessment of the harm may exclude the proceeds of crime generated from other offences.

Conclusion

This chapter examined the possibilities and limitations of unexplained wealth confiscation of proceeds generated from public money offences. It showed that unexplained wealth confiscation as proposed may suit the legal circumstances in Kuwait. However, unexplained wealth confiscation as proposed is not a panacea. Although individuals' rights and liberties may be more protected than in extended criminalisation, the risk to individuals' rights and liberties are not eliminated.

CHAPTER 8 - What should be done in Kuwait to deal with the difficulties associated with the linkage requirement?

This thesis sought to guide to the legislature in determining what should be done in Kuwait to deal with the difficulties associated with confiscating proceeds of crime from individuals in Kuwait. In particular, the thesis sought to address the need for establishing a linkage requirement between criminality and the property sought to be confiscated in a manner that not only protects the interests of the state but also safeguards individuals' property rights and interests. In doing so, this research examined the possibilities and limitations relevant to overcoming the problem of establishing the linkage requirement through extended criminalisation and NCBC.

The main argument of the thesis

In this thesis, it has been argued that the practical difficulties in establishing the linkage requirement cannot properly resolve all the questions that arise with conviction-based confiscation. Instead, the linkage requirement problem can be better explained by examining the practical difficulties arising from the theoretical problem underlying the linkage requirement.[838] Conviction-based confiscation is wrongdoer-based sanction. It generates tensions between confiscating the proceeds of crime with the rationale of confiscating the proceeds of crime does not target the confiscation subject as a wrongdoer.[839]

Moreover, there are many features in confiscating the proceeds of crime that do not find difficulties in requiring the confiscation beyond the specific offence that generated the property. However, many obstacles prevent the deviation from the concept of crime as wrongdoing. One of the important limitations is the legal nature of confiscating the proceeds of crime.

[838] See chapter Three.
[839] Ibid.

The punitive nature of confiscation in Kuwait has given rise to the use of extended criminalisation. However, it has been argued that extended criminalisation should not be maintained nor further pursued in Kuwait. This is because the way in which the effectiveness is justified can have a significant negative impact on individuals' rights and interests. Therefore, it is argued that an alternative mechanism should be explored to overcome the linkage requirement in a more just and reasonable manner.

Although NCBC avoids many ramifications of using extended criminalisation to overcome the issues associated with the linkage requirement, it has been argued that there are many obstacles that prevent using NCBC in Kuwait.

In general, the problems of using NCBC in Kuwait are fourfold.

The first issue is the absence of theoretical justification of the claim of the state towards the proceeds of crime that is clearly pursuing a nonpunitive aim. This is mainly because the construction of NCBC in Australia and the UK is not able to justify the NCBC as based on civil law theory of unjust enrichment, predominantly preventive or concerned mainly with dealing with the harm of property.[840] This stems mainly from the fact that the confiscation of the proceeds of crime is not limited to a certain kind of offence. Instead, it has general applications to all kinds of offences.

The second issue is concerned with the absence of concrete ground of liability to the subject of NCBC. Property-based confiscation can offer a ground of liability to the subject of NCBC mainly because of the notion of *in rem* confiscation. However, in rem confiscation is a product of legal tradition in common law countries. Since Kuwait is a civil law country, it is very difficult to adopt in rem confiscation. Moreover, it has been argued that unexplained wealth confiscation cannot be considered as *in rem* confiscation. Instead, it is *in personam* confiscation. Therefore, accepting *in rem* confiscation in Kuwait will not resolve the issue of the ground of liability of the subject of unexplained wealth confiscation.

[840] See chapters Three, Five and Six.

The third issue is related to the possible application of the presumption of innocence in NCBC, especially wherein NCBC was based on findings that the confiscation subject had committed a criminal offence or there was suspicion of the commission of a criminal offence.[841] The inability to adopt *in rem* confiscation in Kuwait coupled with the fact that the preventive regime is considered criminal is likely to result in viewing the subject of NCBC proceedings as an accused. Therefore, the presumption of innocence may be applicable. If the presumption of innocence is applicable, the whole of the NCBC regime would be undermined.

Finally, the reparative and preventive justifications for NCBC are not only weak in theory but also may not be able to provide for normative limits that can ensure the protection of individuals' interests.[842]

As a result, it has been argued that NCBC, as theoretically justified in Australia and the UK, is not possible in Kuwait and lacks inherent limits for protecting individuals' rights and interests. Nevertheless, it has been demonstrated that the confiscation of unexplained wealth generated from public money offences might be possible in Kuwait if limitations are provided that offer more security for individuals' rights and interests than those provided theoretically in Australia and the UK. Having said that, the risks of undermining individuals' rights and interests are still present.[843] Therefore, while the confiscation of unexplained wealth for offences that relate to proceeds that are generated from public money is preferred to other legal mechanisms that allow the problem of the linkage requirement to be overcome, extended criminalisation and NCBC should not be the default route to overcome the difficulties in establishing the linkage requirement since they both entail serious risks to individuals' rights and interests.

Recommendations for dealing with the difficulties in meeting the linkage requirement

Resolving the problems of the linkage requirement should be divided into two phases. The first phase is concerned with matters that should be considered prior to invoking legal powers. The second phase is concerned with the use of extended criminalisation and NCBC.

[841] See chapters Five and Six.
[842] See chapter Four.
[843] See chapter Seven.

Phase one

First, consideration needs to be given to developing ways in which the confiscation regime can deviate from establishing criminal liability for a specific criminal offence while adhering to criminal norms in relation to the standard and burden of proof. It is important to consider the whole confiscation regime, including the investigative stage, identifying, freezing and enforcement, and international cooperation to obtain evidence. Unless these practical aspects of the implementation of a confiscation regime can be overcome, confiscation proceedings are unlikely to be taken and assets unable to be confiscated. Evidence for this came from the research undertaken on unexplained wealth in Australia.

One of the important issues that this research has not considered is the investigative phase. The investigative phase may play a crucial role in identifying whether there is a shortcoming in meeting the linkage requirement or not. It is necessary to increase the ability of the investigative phase, which could overcome the linkage requirement and secure individuals' safeguards.[844]

Moreover, one of the critical issues involved in effective confiscation is international cooperation. Extensive powers for confiscating the proceeds of crime are partly justified in order to deal with the practical difficulties involved in securing international cooperation in the investigative and enforcement phases. Attention and increased effort in this area could help to mitigate the need to use extended criminalisation and NCBC as a solution to the difficulties in dealing with the linkage requirement.

In addition to increasing international cooperation and the effectiveness of the investigative phase, it is recommended that an effective situational crime prevention strategy be used to combat corruption in Kuwait.[845] The confiscation of the proceeds of crime would never ensure the recovery of all proceeds of crime, nor would it ensure the safeguarding of individuals' rights and property interests. Implementing an effective situational crime-prevention strategy may help achieve confiscation of the proceeds of crime more efficiently without violating individuals' safeguards and undermining their interests.

[844] See the limitations of this thesis in chapter One.
[845] See generally, Clarke, Ronald, 'Situational Crime Prevention' (1995) 19 *The University of Chicago Press* 91.

The need for a legal response that involves extensive powers of confiscating the proceeds of crime should only be considered when the other avenues have been exhausted. It is important, however, to be careful when dealing with this area of law. Specifically, the presence of practical difficulties should not be the sole guide for introducing a more extensive power of confiscation. In this regard, the confiscation of the proceeds of crime can become the monster that ate the jurisprudence.[846] Therefore, one of the strong recommendations arising from the present research is to increase the effort to offer a sound theoretical basis for any resolution of the linkage requirement in connection with confiscation laws. Providing a solid theoretical basis not only increases the legitimacy of the legal avenue that allows for dealing with the problem of the legal basis of confiscation but also can prevent the diffusion of state powers to other areas.

As for the first phase, this research recommends that there should be extensive studies concerning the investigative power, international cooperation, and situational crime prevention, as well as their impact on overcoming any legal reforms adopted. More invasive legislation should be considered only when these measures fail to tackle the problem and when empirical data support the need for the legal regime proposed.

Phase two

As to the second phase, this research recommends the following.

The first recommendation is that practical difficulties should never be used to justify the extension of legal powers of confiscation. Otherwise, there would be a number of ramifications that may lead to the collapse of the protections offered by the criminal law.

The second recommendation is to avoid the use of extended criminalisation as a solution to difficulties in proving the criminal origin of a property. The use of extended criminalisation can set a negative precedent that could undermine the foundation of criminal law, not to mention the violation of individuals' rights and interests.

[846] Judge David Sentelle cited in Freiberg, Arie, 'Criminal Confiscation, Profit and Liberty 1' (1992) 25(1) *Australian & New Zealand Journal of Criminology* 44.

The third recommendation is that property-directed confiscation not be considered because the means through which the intended objective of property-directed confiscation should be reached may not be attainable in Kuwait. Similarly, unexplained wealth confiscation, theoretically justified in Australia and the UK, may not be possible in Kuwait.

The fourth recommendation is that unexplained wealth confiscation that is based on the harm principle may be possible in Kuwait and provide a more reasonable approach for dealing with the difficulties in establishing the linkage requirement. To make the implementation of unexplained wealth confiscation easier, NAZAHA is recommended to become responsible for unexplained wealth confiscation since they have the targeted persons and the declaration system that can support their efforts in combating corruption.

There are conflicting views about the likelihood that these recommendations could be implemented, especially regarding unexplained wealth confiscation. On the one hand, it could be argued that those in position of power to legislate are the same persons who might be negatively affected of such legislation. Therefore, it could be argued that they might place many barriers in place to prevent legislation of unexplained wealth confiscation from being introduced.

On the other hand, the criminalisation of illicit enrichment is, in fact, a form of unexplained wealth confiscation. Unexplained wealth confiscation as suggested in this research has similar attributes to illicit enrichment but with a much lesser scope than the illicit enrichment offence. Since illicit enrichment has already been introduced by the legislature in Kuwait, there is no reason not to introduce unexplained wealth confiscation of the proceeds generated from public money offences as well. This is especially the case, if this is supported by the civil pressure to incorporate unexplained wealth confiscation within the Kuwaiti legal system.

Recommendations for future research

In addition to the recommendations that address the thesis research question, further research is needed concerning NCBC.

The first is that many issues that have a substantive impact on the balance between effective confiscation laws and securing individual interests should be considered if NCBC is to be

adopted in Kuwait. These include the issues of the permissibility of the imposition of NCBC after the acquittal of the accused person, the retrospective of NCBC, the discretion of judges to make the confiscation order, and the relevance of confiscation to sentencing. These problematic issues have already arisen in Australia and the UK and need to be addressed prior to legislation being introduced in Kuwait.

Second, there is a need for more flexible criteria through which the applicability of criminal safeguards should be determined. In other words, confining criminal safeguards to criminal proceedings should not be the exclusive factor that determines the applicability of criminal safeguards. Instead, for the sanctions that do not fully fit criminal or civil proceedings, other factors should come into play when determining safeguards to protect the rights of individuals.

Third, there is a real need for a study that is devoted to examining the concept of crime, the nature of sanctions and the rationale for undertaking confiscation, and how underlying criminality is to be proved. This is especially the case where the sanction does not concern the perpetrator of the criminal offence. Further research is needed to consider the material existence of the offence, especially when the focus is on the result of the conduct rather than on the conduct per se.

Fourth, regardless of whether NCBC is to be adopted in Kuwait, the existence of NCBC can raise many issues that should be considered. For instance, the very existence of NCBC can increase the likelihood of doubling the deprivation of a crime's proceeds, especially when a value-based system of confiscation is in place. There is a question of what should be done if the person claims that the property to be confiscated has already been counted during an unexplained wealth confiscation that took place in another country. Moreover, the use of unexplained wealth confiscation can undermine the interests of other states when the proceeds to be confiscated are highly connected in terms of importance to the interests of another state. Therefore, the scope of the confiscation scheme and issues related to international cooperation should be taken into account to not undermine the interests of other states or individuals.

Finally, there is a need to address the problem of the linkage requirement beyond the confiscation of proceeds generated from public money offences. This research suggests that the need for extended confiscation, and its possibilities and limitations, should be examined

since they may offer a more balanced approach to dealing with the problem of the linkage requirement in areas other than the proceeds generated from public money offences.

Conclusion

This thesis has identified a range of difficulties in proving the criminal origin of property for confiscation proceedings. The findings provide important new insights into this area. Firstly, this study not only has identified the practical difficulties in proving the criminal origin of the property but also provided an explanation of the challenges to conviction-based confiscation. Secondly, this research has explained how individuals' rights and property interests can be infringed upon as a result of extended criminalisation. Thirdly, the study provides an analysis of the possibilities and limitations of adopting non-conviction-based confiscation in Kuwait and suggests a basis for overcoming difficulties of proving the criminal origin of a property, which ensures a reasonable balance between the need for effective confiscation and protecting individuals' rights and interests through the application of the law.

Unlike some other research in this area, the present work demonstrates that finding a more balanced approach is not confined to the issue of the civil-criminal law divide. Instead, a more reasonable balance can be achieved by finding and applying the right basis and underlying principles for legislative reform.

In closing, NCBC is not a panacea. It is a double-edged sword that can provide benefits and harmful consequences. Unless a concerted basis for legitimising it is in place with a reasonable balance that considers the interests of the state and its people, NCBC should be avoided.

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