SUMMARY

1. INTRODUCTION

The subject of the study is the confiscation of the proceeds from crime, which the author analyses combining the dogmatical, comparative and historical methods. The study considers the confiscation of the proceeds from crime as a sanction on the frontier of criminal law and rule of law. Thereby it wishes to contribute to clarifying such „eternal questions", as the concept of the criminal law and the power of the state to punish (ius puniendi).

The writer elaborates the relevant national (especially English, German and Hungarian) legal norms, including criminal statutes, administrative norms governing confiscation, rules of civil codes on unlawful enrichment and on the adjudication of illegal services in favour of the state, as well as related preparatory materials, Supreme Court directives and promulgated court rulings.

2. LEGAL-POLITICAL BACKGROUND

A permanent aim of the confiscation of the proceeds from crime is the prevention of further crimes and also repairing the damage or grievance caused to the injured party or to society. However, the sanction discussed in the study only rarely aims at retribution, especially when it does not only extend to the net income but also to the total income gained by criminal activity.

3. CONCEPTUAL ANALYSIS

An obvious starting point for determining the sanction discussed by the study is the notion of confiscation. This is a sanction, whereby through a judicial or administrative decision someone is finally deprived of property (or a sum of money) in such a way that the entitlement to the property or the sum of money passes to the state in its capacity under public law.

The author clearly separates the types of confiscation which are restricted to assets related to the crime (e.g. instruments and proceeds of crime) and those extending to the full property of the perpetrator. This separation is significant despite and (exactly) due to the fact that the legal political aim of the latter sanctions, futhermore one circumstance to be considered in determining the extent of the sanction is the criminal origin of the property. Only such sanctions can, however, be included in the scope of our study, whose extent is exclusively determined by proceeds from crime.

A certain part of national laws (e.g. the French, Swiss or Finnish law) uses the term confiscation for every instance of the deprivation of possessions related to crime. In other countries, (Germany, England, Austria, Hungary) other terminology is also used for various cases of the deprivation of possessions related to crime. To my view, in the Hungarian legal system there is no need for two different terms (confiscation 'elkobzás' and confiscation of property 'vagyonelkobzás') defining various cases of objects related to criminal activity. All

cases should be united within the scope of one sanction, since then those unnecessary repetitions and parallel features which are subject to criticism on the contemporary regulations of the two sanctions could be avoided.

4. SYSTEMATICAL ANALYSIS

The sancntion discussed in the study – compared to other cases of confiscation – cannot be formulated as a pure security measure, since its application in all cases postulates the statement in a judicial or administrative decision that crime has been committed (or has presumably been committed).

The confiscation of the proceeds from crime may take place not only within the system of criminal sanctions but also within private or administrative law. The latter sanctions are mainly applied by countries (e.g. Italy, England), where non-penal means of counter-crime legislation looks back on a considerable legal cultural history. With regards to proceeds from crime the private or administrative intervention has the advantage that not only the link between the property and the offence, but also the comission of the offence need not be proved beyond reasonable doubt, but only on the balance of probabilities.

Within the legal systems that apply different types of criminal law sanctions, confiscation of the proceeds from crime is normally not regulated among punishments but as a measure or other so called side-consequence (Nebenfolgen in Germany). Confiscation regulated as a measure or other sanction according to the system of criminal codes, however, might at least in certain cases possess a materially penal character.

5. CONDITIONS AND SCOPE OF APPLICATION

The legal-political approach dominating contemporary national regulations states that confiscation of the income originating from the commission of crime must be regulated in cases of all crimes. As opposed to this, the other theory, based on which the confiscation of the proceeds from crime should only be applied for certain crimes, cannot be sufficiently justified. Neither the type of the offences, nor the in abstracto lesser weight of the offence, nor the possibility of a claim under civil law originating from the crime are factors that could justify in my opinion the ab ovo exclusion of applying the sanction of confiscation.

A common tendency of the development of the national laws examined is that confiscation of the proceeds from crime is made possible even if the perpetrators of the criminal offence are excused (e.g. are under age), can no longer be subject to punishment (e.g. have died) or no penal proceeding can be issued against them (resides in an unknown place). While in civil law jurisdictions exceptional regulations within the system of criminal law make application of the sanction discussed in our study possible without the conviction of the perpetrator, in common law states in similar cases the concept of civil forfeiture is applied. The expiration of statutory limitation periods, however, in all legal systems, except in the inaproppriate Hungarian one, renders not only punishment of the perpetrator but also the confiscation of the proceeds from crime impossible.

A common feature of national penal laws is that the confiscation of the proceeds from crime encompasses all types of property, especially not only corporeal property, but also choses in action (e.g. bank accounts).

A basic question concerning the confiscation of the proceeds from crime is whether the regulation applies the so called 'net or gross principle'. In the former case the cost of making the profit (for instance the purchase price of narcotic drugs) could not be confiscated. According to the latter principle the perpetrator is deprived of assets that were invested in the criminal activity.

The national laws of most European states apply both property and value confiscation, as alternative methods for deprivation of proceeds from crime. Since both methods have their advantages and disadvantages, they ought to complement each other.

Individual national laws generally make the confiscation of proceeds possible, which was obtained by other natural or legal persons than the perpetrator. This mainly occurs if the benefit derived from the violation of administrative regulations is accrued by the legal person employing the perpetrator.

The necessity of confiscation cannot be excluded even if the income from crime is not in the property of the perpetrator. The confiscation of such property is justified if the owner (e.g. the purchaser of drugs) supplied the property (e.g. a horse in exchange for the property) knowing about the crime. On the contrary, however – the way foreign legal systems proceed contrary to the Hungarian Criminal Code – express provision should forbid the confiscation of property stripped from the injured party.

The regulations of individual states differ in allowing at all the confiscation of property from crime having been transferred on third persons. Exceptions to the regulations on the confiscation of transferred property are, however, the properties that the third person acquired in good faith and with recompensation. Regulations on confiscation of property from crime should, however, include at least one clause of equity, according to which the person having acquired the transferred income in good faith but free of charge can be exempted from the sanction.

National laws apply various ways to solve the conflict of interest between the efficient confiscation of proceeds from crime and satisfying the injured party's claim for damages. In international comparison Hungarian regulations constitute a middle course worth considering, according to which confiscation cannot be imposed for property, covering the damages claimed by the plaintiff in criminal proceedings. Otherwise the state undertakes liability for the damage debts of the perpetrator towards the injured party up to the value of the property confiscated. De lege ferenda, however, – following the English model – I find sufficient reasons for not applying the sanction of confiscation in Hungary either if the perpetrator has already paid the sum obtained from crime (including the fiscal incomes of the state) to the person damaged.

With regards to confiscating the income from crime in all the legal systems examined here it is considered important to create alleviated rules for evidence. Their effectual adoption,

however, – especially regarding the various legal cultural traditions – is highly diverse in Anglo-Saxon countries and in civil law jurisdictions. Based on alleviated rules for evidence confiscation can (must) also be imposed, even if the link between the property and the given criminal activity is not provable beyond reasonable doubt. The study gives a detailed analysis of the solutions that can be classified here ranging from limiting the facts to be proved, through lowering the standard of proof to shifting the burden of proof.

6. HUMAN RIGHTS BASED LIMITATIONS OF CONFISCATION

Considering the case law of forums administering justice on human rights issues the author analyses which ones of the regulatory solutions striving to confiscate proceeds from crime are in harmony (and which ones are not) with the safeguards guaranteed in constitutions and in international human rights agreements. The study lays the emphasis on those human rights, whose application is connected to criminal law and to the concept of punishment, but those human rights are also included that are protected irrespectively of the legal branch the regulation belongs to or of the category of the sanction.

The principle of culpability inferrable from the German constitution, is considered violated according to the practice of the Federal Constitutional Court of Germany if a sanction with penal character is applied in absence of guilt. The penal character, however, in line with general practice, should be examined in a material sense (i.e. independent of the legal classification), otherwise citizens would no longer have constitutional protection against legislative acts. The study, based on the decisions of the Federal Constitutional Court of Germany, gives a detailed analysis of the circumstances, according to which the penal character of a sanction, especially that of the confiscation can be determined. The author agrees with viewpoints expressed in legal literature, which state that the German type of confiscation when following the gross principle – contrary to the viewpoint of the Federal Constitutional Court of Germany – should be considered as having a penal character, thus its application in absence of guilt is unconstitutional.

As to the prohibition of retroactive punishment (nulla poena sine lege praevia), the author – contrary to the ruling the European Commission of Human Rights made on the Taylor case – considers it a retroactive punishment when the sanction also applies to proceeds that the perpetrator had obtained from crime committed before the regulation took effect (but not serving as a ground for the given conviction). On the other hand he examines the relevant factors regarding the penal character of the sanction analysing the rulings of the European Commission and Court of Human Rights made on the Welch case. The author – contrary to the European Court of Human Rights –considers only those types of detentions in default of payment as a factor justifying the penal nature of deprivation, which do not merely serving the enforcement of payment, but also exempting one from paying the sum.

The extent of well-definedness required of laws regulating confiscation can also depend on whether a sanction – independent of legal categorization – can be considered penal or not. In case of a positive response, the sanction has to comply with the nulla poena sine lege certa

principle, otherwise only the lower measure derived from the general principle of the rule of law is decisive. Since, however, the requirement of well-definedness can also be derived from the human rights limited by the sanction, the constitutional requirements of well-definedness for sanctions of a penal and non penal nature do not necessarily vary. The study, with respect to this connection – building upon the pertaining rulings of the German Constitutional Court – analyses the well-definedness of the so called property punishment (Vermögensstrafe) of a penal nature and that of the confiscation of a non-penal nature.

In the practice of the considered leading constitutional or human rights courts the presumption of innocence is no obstacle when the confiscation extends to the proceeds of crimes for which the perpetrator has not been convicted in the relevant criminal procedure. According to the European Court of Human Rights the reason for this is that the accused is not charged with the commission of those individual crimes, whose income is considered when determining the sanction, and the presumption of innocence does not extend to the period of imposing the punishment. On the other hand according to the German Constitutional Court the presumption of innocence cannot be applied, since imposing the extended confiscation does not prescribe determining guilt by the court, and does not imply a punishment or a legal consequence similar to a punishment. The study discusses those requirements in great detail, which arise from the principle of fair trial with respect to alleviated rules for evidence – based on the judgment of the European Court of Human Rights on the Phillips case.

The human rights protection of property does not only extend to corporeal property, but also choses in action (e.g. bank accounts). The author also analyses whether and how much those traditionally known views from German legal literature, according to which illegally acquired property is automatically excluded from the protective scope of the Constitution, are influenced the practice of the Federal Constitutional Court. The study also analyses those factors, which help in determining from a human rights aspect whether confiscation proportionally limits human right to property. In this respect, the author thinks– contrary to the sentence brought by the European Court of Human Rights on the Phillips case – that even though property is deprived in accordance with the procedural guarantees in paragraph 6 of the European Convention of Human Rights, still 'human right to property' could be violated.