

CONFISCATION AS CRIMINAL LAW (OR WHAT)? ON HOW THE ILL-ADVISED DISCUSSION ABOUT “THE” LEGAL “NATURE” OF CONFISCATION OBFUSCATES WHAT REALLY NEEDS TO BE DISCUSSED

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Abstract

Confiscation –especially of the proceeds of crime– has turned into a key instrument in international, European and German efforts to curb serious crime (e.g. organized, but also economic crime). Central to the controversies about the legitimacy of confiscation is its disputed legal nature: Is it criminal law (or what)? By drawing on a major 2017 reform of the German confiscation regime as a case study, this article illustrates that the discussions about the but punitive or but non-punitive (e.g. preventive) rationales of confiscation are ill-advised as they do not account for the normative openness of confiscation. These discussions – as they are prompted especially by constitutional criminal law and its doctrines – obfuscate the unsettling political questions that are foundational to modern developments. E.g. if a commonwealth can still and indeed must afford unrestrictable fundamental rights (like the presumption of innocence) in order to pre-empt the rise of an authoritarian regime, even if this means that serious crime goes widely unchecked and can hence possibly undermine the democratic state. This article will not answer such questions. But it will bring them to the fore so that we have a frank debate about the very policy, polity and politics framework of the administration of “criminal” (or what?) justice in the age of confiscation.

Key words: *Confiscation of the proceeds of crime; 2017 Reform of the German confiscation regime; Constitutional Criminal Law; Normative openness of confiscation.*

I. INTRODUCTION

“Crime must not pay!” – This international battle-cry fosters the introduction and intensification of confiscation (especially of the proceeds of crime) worldwide¹.

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¹ See how this policy was discussed in the U.S. already in the eighties, WEINER (1981), p. 225 et seq. For a more recent assessment of this worldwide established policy see MANES (2016), p. 143.

It also underlies the major confiscation reform in Germany in 2017,² and current legislative proposals at the EU level.³ The most controversial types confiscations (like extended and non-conviction based confiscations) challenge many of the foundational principles of criminal law and procedure, like the “guilt principle” (“*Schuldprinzip*” in German), the presumption of innocence, or the onus of the prosecution to establish facts beyond a reasonable doubt.⁴ Yet (criminal) policy makers (seem to) accept these “costs” (the infringement upon these foundational principles), because they consider confiscation an important and effective tool to curb serious (especially organized) crime.

My reflections will start from this premise, i.e. that confiscation is a functionally sound instrument against serious crime and criminals. Not because I find conclusive empirical data to that end,⁵ but because legislators and (criminal) policy makers enjoy the prerogative to make determinations on inconclusive factual premises⁶ (at least until this determination is arbitrary or proven wrong in fact). This starting point prompts a preliminary word of caution: Just as criminal law, confiscation is no readily available panacea against (serious) crime. Although I hence –for the sake of the argument alone– commence from the premise that confiscation is instrumental in bringing serious crime to justice, I neither promote it as the singular or a singularly effective means to do so nor do I say that the ends justify the means. Even if confiscation would be beneficial or even necessary in the fight against serious crime, its individual types and procedural compositions may very well be illegitimate. Necessity does not imply legitimacy⁷ (but note that the reverse holds true as well in that a functional logic of necessity does not necessarily imply its illegitimacy).

When looking to the German and European debates about the legitimacy of confiscation, its controversial legal “nature” –e.g. as a criminal sanction, an administrative measure or a civil law injunction– is at the heart of things (see *infra* at B I). In

2 See part A. I. of the report attached to the reform proposal of the German government, BR-Drucksache 418/16, 12 August 2016, available at <http://dipbt.bundestag.de/dip21/brd/2016/0418-16.pdf>, p. 46. In the scholarship MEYER (2017), p. 351; KÖHLER (2017), p. 498.

3 See § 1. of the Explanatory Memorandum to the recent proposal for a regulation on the mutual recognition of freezing and confiscation orders, COM/2016/0819 final - 2016/0412 (COD), of 21 December 2016; see also the Communication from the Commission to the European Parliament and the Council “Proceeds of organised crime: ensuring that “crime does not pay”” (COM/2008/0766 final).

4 See SALIGER (2017d), 1024 et seq.; SCHILLING and HÜBNER (2018) p. 54 et seq.; BOUCHT (2014), p. 221 et seq.; CASSELLA (2015), p. 24 et seq.

5 See BOUCHT (2017), p. 105, on the scarce and inconclusive empirical evidences in this area.

6 See, in the case law of constitutional courts, in specific reference to criminal sanctions, e.g. German Federal Constitutional Tribunal (BVerfG), Decision from 9.3.1994, BVerfGE 90, 145. See in general in the constitutional doctrine BICKENBACH (2014). In particular on the prerogative of the legislator in criminal matters cf. LAGODNY (1996), p. 173 et seq.

7 In fact, in the usual proportionality test used by the constitutional and supreme courts in order to assess the legitimacy of legal norms, the stage of the necessity test is not the final one. In the last step (proportionality *stricto sensu* or balancing) one can still consider illegitimate the norm, although one acknowledges that is appropriate and necessary to achieve the legitimate aim set forth by the legislator, cf., *ex multis*, BARAK (2012), p. 317 et seq.

my opinion, this obfuscates the true (indeed the truly political) questions that we need to ask ourselves. For example: Do we, as a commonwealth, consider the threat of organized crime greater than that of authoritarianism? Are we therefore prepared to justify restrictions of traditionally unrestrictable guarantees (like the presumption of innocence)? E.g. because we no longer deem the state (and its criminal justice system) as a jeopardy for the individual's freedoms and liberties, but as the guarantor for civil peace and order (see *infra* C)?

Although it would be tempting to answer these questions, I will not do so. Indeed, I will not pick sides. For I will “simply” promote –nothing more, but also nothing less– that we have a debate about the very policy, polity and politics framework of the administration of “criminal” (or what?) justice in the age of confiscation (see *infra* at B II). By not following the quest for the legal nature of confiscations, and by bringing the underlying political questions to the fore instead, I fall between the stools of those who promote confiscation either as a non-punitive or as but a punitive instrument.⁸ I do so, because confiscation operates on the indeterminacy of its many rationalities, its normative openness.⁹ This one needs to account for when reflecting on the legitimacy of confiscation (see *infra* B II 1).

Let me be very frank: I have but an analytical agenda in mind when offering my summary reflections upon how (not) to reflect upon the legitimacy of confiscation. I intend to disenchant the legal nature debate, and promote an open discussion about the political of confiscation. Hence, I want to highlight what really needs to be asked. I am thus *not* promoting a normative agenda, for example, I am neither saying nor implying that the slippery slope into authoritarianism is less risky than the risks of serious crime. My analysis is simply to show that we need to address such truly unsettling assessments in order to normatively come to terms with the realities of the law; after all, no good will come from not looking at the proverbial elephant in the room.

In order to reflect upon how (not) to upon on the legitimacy of confiscation, I will draw on the 2017 German confiscation reform as a case study. I do so because it addresses all that is currently (and in many instances: heatedly) debated in relation to confiscation on a national, European and international level (*infra* A). I will then analyse and criticize that these debates centre on the legal nature of confiscation (or its individual types) (*infra* B), before finally offering my own thoughts on how the legitimacy of confiscation should be discussed (*infra* C).

8 Of course the same scholars and courts may fall sometimes in the group supporting non-punitive nature of confiscation and other times in the one supporting a punitive nature in relation to the different kinds of confiscation (direct, value, extended, non-conviction-based), but, as will be discussed, in the focus of the investigation there is always the question of the nature of the measure at issue.

9 With normative openness I allude to the possibility of embracing the justificatory pluralism, the “fluidity” (see NIETZSCHE (2007), pp. 52 et seq.) of law, instead of eliminating it by bringing about normative closure on the fundamental questions. I have tried to explore this concept more in depth in Burchard (forthcoming) and in BURCHARD (2017).

2.1 The new German confiscation regime – A brief overview

On 13 April 2017, the Federal German Parliament (“Bundestag”) enacted a comprehensive reform – indeed a “reboot”¹⁰ – of confiscations in criminal matters in Germany, which went into force on 1 July 2017.¹¹ The reform was meant to implement EU law, namely Directive 2014/42/EU of 3 April 2014 on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union, but arguably went far beyond the directive’s minimum requirements.¹² To only give a brief overview:¹³

2.1.1 Aim(s) and “legal nature”

The new German confiscation regime is based on fundamental changes in comparison to the *status quo ante*. Where the *ancien régime* spoke of “*Verfall und Einziehung*”, the new one heeds international developments by condensing everything into “*Einziehung*” (as a translation of “confiscation”; note that the US term forfeiture is not prevalent in Europe). Further, where the former law was gravely impeded by the fact that asset recovery for victims took precedence over confiscation under Section 73(1) 2nd sentence of the German Criminal Code, which was hence labelled the “undertaker for confiscation” (“*Totengräber des Verfalls*”¹⁴), Germany has now moved the compensation of victims to the execution phase of a final confiscation orders. And finally, the *nouveau régime* has implemented new types of confiscations (notably so-called non-conviction based confiscations for assets of unclear provenance) and extended the reach of so-called extended confiscation (by allowing it irrespective of the underlying trigger crime). This is – or so it is hoped – to boost confiscation in German administration of criminal justice,¹⁵ but has sparked grave controversies about the legitimacy of the reform.¹⁶

The German legislator followed the international battle-cry “Crime must not pay!” by conceptualizing confiscation as a measure *sui generis* to redress illegally appropriated property.¹⁷ The general idea is that the confiscation of the proceeds

10 KOHLER (2017), p. 497 (“*Neustart*”).

11 BGBl. 2017 I, p. 872.

12 See SALIGER (2017d), p. 997; KÖLLNER and MÜCK (2017), p. 598; KORTE (2018), p. 1; SCHILLING and HÜBNER (2018), p. 52 et seq.; TRÜG (2017), p. 1915; RÖNNAU and BEGEMEIER (2016), p. 263; SCHILLING *et al.* (2017), p. 308.

13 As to overviews and deeper explorations in German cf. KÖHLER (2017), p. 497; KÖHLER and BURKHARD (2017), p. 665; TRÜG (2017), p. 1913. Also cf. the *travaux préparatoire*.

14 See EBERBACH (1987), p. 491; TRÖNDLE *et al.* (1985), margin no. 7.

15 KÖHLER (2017), p. 497.

16 See SALIGER (2017d), p. 995 et seq.; KÖLLNER and MÜCK (2017), p. 593 et seq.; SCHILLING and HÜBNER (2018), p. 49 et seq.; TRÜG (2017), p. 1913 et seq.; RÖNNAU and BEGEMEIER (2016), p. 260 et seq.; SCHILLING *et al.* (2017), p. 308.

17 See part A. II. 7 d) of the report attached to the reform proposal of the German government, BR-Drucksache 418/16, 12 august 2016, available at <http://dipbt.bundestag.de/dip21/brd/2016/0418-16.pdf>, p. 62.

of crime (“*Vermögensabschöpfung*”) neither equates to punishment nor results in punishment-like effects.¹⁸ Rather, it simply –or so the German legislator decreed– (re-)allocates property rights (“*vermögensordnende Rechtsnatur*”) and hence is similar to the private law concept of unjustified enrichment (“*ungerechtfertigte Bereicherung*”, Sect. 812 et seq. German Civil Code).¹⁹ As a consequence, the guarantees of criminal law and procedure –notably the guilt principle (“*Schuldgrundsatz*”) and the presumption of innocence– were deemed inapplicable;²⁰ and the statute of limitation for extended and non-conviction based confiscation measures was separated from those of the underlying offenses, and prolonged to thirty years minimum (cf. Sect. 76b German Penal Code). Nevertheless, the German *Bundestag* recognized that confiscation is related to the administration of criminal justice. It was hence delegated to criminal courts to administer confiscation orders of any type. In effect, the German legislator tasked criminal justice actors to administer measures (supposedly) akin to private law under the roof of the administration of criminal justice by means of a peculiar melange of civil and criminal procedure.

2.2 Substantive regulations

The substantive part of any confiscation regime can be mapped along three axes: objects, addressees, and types of confiscations.

2.1.1 Objects

As to *objects*, German criminal law continues the internationally accepted differentiation²¹ between the confiscation of contraband, instrumentalities, and proceeds of crime.²²

Let me only go into the details about the proceeds of crime. They are now defined as “something that was obtained through or for a crime” (Sect. 73 (1) German Penal Code), instead of the former wording “from a crime”. One obtains something “through” a criminal act if there is a causal link between the obtained and the crime.²³ This change was aimed at overruling prior jurisprudence of the German Supreme

18 See different passages, in relation to the different norms of the proposal, of part B. of the report attached to the reform proposal of the German government, BR-Drucksache 418/16, 12 august 2016, available at <http://dipbt.bundestag.de/dip21/brd/2016/0418-16.pdf>, pp. 71, 100, 104.

19 See part A. I. of the report attached to the reform proposal of the German government, BR-Drucksache 418/16, 12 august 2016, available at <http://dipbt.bundestag.de/dip21/brd/2016/0418-16.pdf>, p. 46.

20 See part A. II. 7 d) of the report attached to the reform proposal of the German government, BR-Drucksache 418/16, 12 august 2016, available at <http://dipbt.bundestag.de/dip21/brd/2016/0418-16.pdf>, p. 62.

21 On this foundational differentiation VOGEL (2015).

22 See Sect. 74b (1) German Penal Code for the confiscation of contraband, Sect. 74 for the confiscation of instrumentalities, and Sect. 73(1) for the confiscation of the proceeds of crime.

23 See part A. II. 5 a) of the report attached to the reform proposal of the German government, BR-Drucksache 418/16, 12 august 2016, available at <http://dipbt.bundestag.de/dip21/brd/2016/0418-16.pdf>, p. 58. See also in the scholarship KORTE (2018), p. 3; Schilling et al. (2017), p. 306; KOHLER (2017), p. 503.

Court (“*Bundesgerichtshof*”, BGH) that required²⁴ an immediate link. “That which was obtained”, in turn, encapsulates first order, but not second etc. order surrogates (Sect. 73(3) German Penal Code). So if a thief steals a watch that is worth 7.000 Euros, and then trades it for stocks worth 5.000 Euros, which he then sells for 4.000 Euros to acquire a car worth 3.000 Euros, it would have been possible to confiscate the watch (as the originally obtained proceed of crime) and the stocks (as a first order surrogate), but not the car (as it is a third order surrogate). Where the confiscation of physical proceeds of crime is impossible or where a court does not order the confiscation of a first order surrogate, it may also order the confiscation of a certain amount of money (see Sect. 73c German Penal Code); here, the confiscation of the original proceeds of crime (or their first order surrogates) turns into the confiscation of surrogate economic advantages (“*Wertersatzentziehung*”).²⁵

The exact calculation of this confiscation of surrogate economic advantages is an art of its own. Suffice it to highlight two key characteristics:

First, the new German confiscation law stills follows the so-called gross principle (“*Bruttoprinzip*”).²⁶ This basically means that one must neither deduct “costs” for a criminal enterprise nor must one take note of any possible loss of value.²⁷ So in the aforementioned example, our thief is precluded from arguing that she spent 1.000 Euros for acquiring lock-picks etc. for stealing the watch; similarly, she is precluded from arguing that the stocks that she traded the stolen watch for thereafter lost all value; as a consequence, one can confiscate 7.000 Euros worth in assets (that’s how much the stolen watch cost) by means of a “*Wertersatzentziehung*”. The gross principle finally also implies that an increase in value is taken into account. So if the price of the aforementioned stocks explodes and rises from the original 5.000 Euros to say 100.000 Euros at the time of the verdict, one may confiscate this amount of money. After all, crime must not pay! – or so the logic of the gross principle goes.

Secondly, I need to qualify what I just said about. One must not deduct that which “was invested for the commission or preparation of a crime” (Sect. 73d(1) (2nd sentence) German Penal Code). It is argued²⁸ that the very term “for” implies that only intentional investments into *Vorsatztaten* (which I do not translate, as “*Vorsatz*” and intent is not necessarily the same) must not be deducted. From this it is deduced that deductions can be administered with regard to *Fahrlässigkeit*

24 See BGH (2002) – 5 StR 138/01; and again BGH (2010) – 5 StR 224/09.

25 For a closer exploration see KÖHLER (2017), p. 499. See more in detail on the similar provision before the recent reform (Sect. 73a German Penal Code), ESER (2014c); SALIGER (2017c).

26 See for a more detailed analysis of this aspect of the new confiscation law RÖNNAU and BEGEMEIER (2017), p. 1 et seq.; SALIGER (2017d), p. 1010 et seq.; TRÜG (2017), p. 1914 et seq. More general on the evolution of the German legal framework on this aspect, due to different law reform and to a vast case law, ESER (2014b), margin no. 17 et seq.; SALIGER (2017b), margin no. 10 et seq. For some comparative hints on this topic with regard to Norway, Sweden, England and Wales, see BOUCHT (2017), pp. 41, 46-47, 60.

27 See KORTE (2018), p. 3 et seq.

28 See KÖHLER (2017), p. 507 et seq.; SALIGER (2017d), p. 1014; KORTE (2018), p. 4.

staten (which I do not translate, as “*Fahrlässigkeit*” and negligence/recklessness is not necessarily the same). So take an official producer of weapons of war who negligently violates embargo provisions, thus earning 600.000 Euros from selling cluster bombs; this producer may actually argue that he spent 100.000 Euros in shipping costs and 200.000 Euros for producing the bombs so that one can only confiscate the net gain of 300.000 Euros.²⁹

2.2.2 Addressees

A *second axis* maps confiscation measures along its individual addressees. Here, German law encapsulates confiscations against perpetrators and accessories (“*Täter und Teilnehmer*”)³⁰ as well as confiscations against third-parties.³¹ The requirements for third-party confiscations include what is internationally discussed under the name of innocent owner defences.³²

2.2.3 Types

Finally and most importantly, on *types of confiscation*. Here, one first needs to distinguish between provisional and final confiscation measure. In order to secure the enforceability of final measures, provisional ones can be implemented if it is likely that the requirements of a final confiscation order (of any type) will be met.³³ Final measures include ordinary, extended and different subtypes of non-conviction based confiscations.

All of these measures can be distinguished by (1) the procedural basis, (2) the respective link of the confiscated object to the trigger proceeding, and (3) the applicable evidentiary standard.

So a final ordinary confiscation order under Sect. 73 (1) German Penal Code is (1) conviction based; (2) there is a direct link between the confiscated object and the trigger proceeding; and (3) it has to be proven beyond a reasonable doubt that the confiscated object is a proceed of crime.

An extended confiscation order under Sect. 73a (1) German Penal Code is (1) conviction based; (2) the confiscated object is, however, not a proceed of the crime for which the addressee has been convicted; and (3) it has to be proven beyond a

29 For this and many other concrete examples for the calculation of the amount of the confiscation see KÖHLER (2017), p. 505 et seq.

30 See Sections 73, 73a, 73c, 74, 74c of the German Penal Code.

31 See Sections 73b, 74a of the German Penal Code.

32 As to the innocent owner defense, cf. in the U.S. context, in which it originated, LOOMBA (1989), p. 471 et seq.; HOUTZ (1997), p. 257 et seq. This defense is also referred to as “bona fide third parties”, so for instance in Art. 31 par. 9 of the United Nations Convention Against Corruption. – As to the German implementation of innocent owner defenses, cf. Section 73b of the German Penal Code, see on that KÖHLER and BURKHARD (2017), p. 665 et seq.

33 German law foresees provisional measures (“freezing orders”) in Sect. 111b et seq. and Sect. 111e et seq. German Code of Criminal Procedure as well as final ones in Sect. 73 et seq. German Penal Code.

reasonable doubt that the confiscated object is a proceed of crime, although the commission of the crime itself does not have to be proven beyond a reasonable doubt³⁴.

A non-conviction based confiscation order under Sect. 76a (4) German Penal Code is (1) not conviction based; (2) the confiscated object is linked to offenses that we only suspect have been committed; and (3) the degree of proof required for the issuance of a non-conviction based confiscation is still debated (see *infra* at and in note 48).

Three short remarks:

First, in going far beyond what is required by the pertinent EU legislation,³⁵ Sect. 73a German Penal Code now extends *extended confiscation of proceeds of crime* to each and every trigger offense, thus breaking with the traditional German approach to only allow for extended confiscation when certain enumerated crimes were committed³⁶. As a consequence, even where it is possible to convict for a minor trigger offense (say: shoplifting), German courts can now issue an extended confiscation order for the proceeds of other crimes, even if there is insufficient evidence to convict these other crimes. This signals that extended confiscation (and for that matter: also third-party confiscation) shares many similarities with non-conviction based confiscations;³⁷ after all, each of these confiscation measures allow for confiscating objects without convicting the addressee for having appropriated that very object illegally.

Secondly, many critics³⁸ deem Sect. 76a(4) German Penal Code –that is: non-conviction based confiscations on the basis of a mere suspicion that an enumerated offense was committed–, an affront against the foundational principles of German criminal law and procedure, indeed a violation of the ideals of enlightenment and the *liberaler Rechtsstaat*.³⁹ The German legislator,⁴⁰ in contrast, conceived non-conviction based confiscations under Sect. 76a German Penal Code as a stand-alone (“*selbständig*”), that is an objective *in rem*⁴¹ proceeding independent of a corresponding criminal *in personam* proceeding.

34 See on this the case-law of the German Supreme Court on the similar provision provided by the German Criminal Code before the reform (§ 73d I 1), BGH (1994) – 4 StR 516/94. See in the scholarship SALIGER (2017c), margin 8.

35 See *supra* footnote 16.

36 For the many critics on this decision of the German legislator see SALIGER (2017), p. 1015 et seq., who deems the new norm unconstitutional; KÖLLNER and MÜCK (2017), p. 598, for whom the constitutionality of the norm is dubious. For other critics cf. also TRÜG (2017), p. 1915; RÖNNAU and BEGEMEIER (2016), p. 260 et seq.

37 See SCHILLING and HÜBNER (2018) p. 50.

38 See SALIGER (2017), p. 1024 et seq.; SCHILLING and HÜBNER (2018), p. 54 et seq.; GEBAUER (2016), p. 104

39 SCHILLING and HÜBNER (2018), p. 54 et seq.

40 See part A. II. 7 d) of the report attached to the reform proposal of the German government, BR-Drucksache 418/16, 12 august 2016, available at <http://dipbt.bundestag.de/dip21/brd/2016/0418-16.pdf>, p. 62.

41 MEYER (2017), p. 344 et seq.; KÖHLER and BURKHARD (2017), p. 672.

Thirdly, if one looks closely into the list of offenses that allow for a non-conviction and mere suspicion based confiscation under Sect. 76a(4) German Penal Code, this list not only encapsulates classic terrorism and organized crime offenses but also a serious cases of organized tax evasion as well as cases of ordinary money laundering. In this respect, Sect. 76a(4) German Penal Code goes beyond the terrorism and organized crime context, and enters into the realm of (serious) white collar crime.⁴²

2.3 Procedural regulations

The substantive law of confiscations is complemented by procedural regulations, namely those pertaining to the investigation (or rather: “preparatory”⁴³), the decision-making (especially at trial), and the execution phase of a confiscation order.⁴⁴ What is important to note here is that the more confiscation can take place outside an ordinary criminal proceeding against a defendant, e.g. by means of a stand-alone *in rem* proceeding or by means of third-party confiscation, the more one needs to autonomize the confiscation proceeding as such.

The new German confiscation regime takes due account of this by regulating that ordinary or extended conviction-based confiscations against perpetrators or accessories are part of the normal sanctioning process; this also means that these confiscation types can be ordered by means of a “*Strafbefehl*” (that is a written penalty order, cf. Sect. 432 German Code of Criminal Procedure). On the other hand, although the *in rem* proceedings under Sect. 76a German Penal Code are also delegated to criminal courts, these *in rem proceedings* are governed by separate procedural rules⁴⁵ – albeit the latter are somewhat sparse, confusing, and also incomplete.⁴⁶

For example, what is conspicuously missing is an open guideline as to whether state authorities (the police, prosecutors etc.) may initiate “normal” non-conviction based confiscation proceedings under Sect. 76a(1) and (2) German Penal Code, if the statute of limitation for the underlying crime has expired. Imagine this scenario: Our aforementioned watch was stolen 15 years ago, and today turns up in the possession of a well-known thief. Now, one cannot confiscate the watch under Sect. 76a(4) German Penal Code, as there is no indication of one of the enumerated crimes. One could, however, confiscate it under Sect. 76a(1) and (2) German Penal Code, if a court could be convinced beyond a reasonable doubt that the thief stole this watch. The question, then, is whether one may actually start investigations (e.g. by means of an interrogation) into how our thief got into

42 KÖLLNER and MÜCK (2017), p. 598; SCHILLING and HÜBNER (2018), 51; TRÜG (2017), p. 1916.

43 See Sect. 421(3) German Code of Criminal Procedure.

44 See, for Germany, Sect. 421 et seq. German Code of Criminal Procedure.

45 See Sect. 436 German Code of Criminal Procedure.

46 See, especially for the relationship between the criminal justice system and the insolvency procedure, KÖLLNER and MÜCK (2017), p. 599.

the possession of the watch. First comments⁴⁷ on this question suggest that no such investigations may be initiated, because there is no rule like Sect. 414(1) German Code of Criminal Procedure that would activate investigatory powers in a stand-alone, that is non-conviction based confiscation proceeding. If this was to hold water, it would seriously cripple this normal non-conviction based confiscations proceedings, and would fly into the face of its allegedly being “different” from the criminal *in personam* proceeding.

Another particularity, now of the “extraordinary” non-conviction based confiscation proceeding under Sect. 76a(4) German Penal Code, is Sect. 437 German Code of Criminal Procedure. It allows a court to hand down a confiscation order if it is convinced (but by what standard: beyond a reasonable doubt or merely by a balance of probabilities?)⁴⁸ that the confiscated object is a proceed of crime; it can base its decision, inter alia, on the gross disproportion between the monetary value of the object and the usual income of the person concerned, circumstances of how the object was found and secured, and the general personal and economic affairs of the addressee of the person affected by the confiscation order. Evidently, Sect. 437 German Code of Criminal Procedure is inspired by common-sense criminalistics. But the open question is: Do they not lead us toward some kind of “*Täter- and Kontextstrafrecht*” (perpetrator and context sensitive criminal law)?

A few last words on the execution phase of a final confiscation order. This is indeed a crucial one,⁴⁹ especially under the new German confiscation regime. First, it is only (with very few exceptions) in the execution phase that victims are introduced, and that they can move to have damages compensated.⁵⁰ Secondly, it is only during execution phase that the (in-)solvency of the addressee of a confiscation order becomes an issue;⁵¹ courts etc. are thus not burdened (as was the case under the *ancien régime*)⁵² with this question in prior stages of the proceedings. And thirdly, the execution of a final confiscation order allows for new investigations into the assets of its addressee. Under the new German law, criminal justice actors may thus e.g. (of course under certain procedural requirements) search the premises of the addressee (to secure assets) or seek the addressee by means of an arrest warrant.⁵³

47 KÖHLER and BURKHARD (2017), p. 672 et seq.

48 On this (open) dispute cf. e.g. MEYER (2017), p. 348 et seq.; cf. also SALIGER (2017), p. 1027 et seq.

49 TRÜG (2017), p. 1918.

50 Sect. 459h et seq. German Code of Criminal Procedure.

51 See Sect. 111i of the German Criminal Procedure Code.

52 See on the shortcomings of the previous regulation MEYER (2015), p. 247 et seq.; KORTE (2018), p. 1 et seq.

53 See Sect. 459g (3) German Code of Criminal Procedure. See on this KÖHLER and BURKHARD (2017), p. 670.

2.4 Excursus: International cooperation

A modern confiscation regime not only requires substantive and procedural regulations, but also those pertaining to international cooperation – to produce evidence that is kept abroad, to secure national confiscation proceedings by provisionally freezing assets in another jurisdiction, or to enforce final confiscations orders beyond one’s own borders. It is self-evident that –at least in Europe– international cooperation becomes all the more important with globalization and Europeanization allowing for a free-flow of criminals and criminal assets across borders.

The German confiscation reform did, however, not address these issues, mostly because international cooperation in criminal matters (with other EU as well as non-EU member states) is now in the firm hands of the EU. So we are currently waiting for a regulation on the mutual recognition of freezing and confiscation orders, for which the EU Commission has submitted a proposal on 21 December 2016⁵⁴ and which should be adopted soon considered that the European Council and the European Parliament agreed recently upon the final version of the text.⁵⁵

Until this regulation will be in place, Germany will be working with older EU instruments as well as international treaties to cooperate internationally in the matters of (criminal) confiscations.

2.5 Constitutional criminal law

To make things even more complicated –but also more interesting– I am afraid that the German confiscation reform cannot be analysed or evaluated in isolation. While (the lack of) empirical data, comparative experiences and of course obligations under international law proper play an important role, what is arguably the most important development is the turn to constitutional criminal law (“*Strafverfassungsrecht*”) in today’s discussions in Germany and Europe.⁵⁶

Indeed, the debate about the legitimacy of the German confiscation reform, especially about non-conviction based confiscations and their procedural counterparts, has mostly turned into either a defence of, or an attack against its constitutionality. The (in-)famous German *Dogmatik* (both of criminal law and procedure) only plays a real role to the extent that individual doctrines are “upgraded” to (supposed) constitutional status. This comes as no surprise, in my opinion, as we now experiencing a thorough constitutionalization of all parts of criminal justice in Germany.⁵⁷ Constitutional law is the supreme law of the land, which overrides both: ordinary criminal law principles, rationales etc. as well as doctrines as they are developed in

54 COM(2016) 819 final.

55 See 2016/0412 (COD) of 18 June 2018.

56 See e.g. SALIGER (2017), p. 1015 et seq.; KÖLLNER and MÜCK (2017), p. 598; SCHILLING and HÜBNER (2018), p. 49 et seq.

57 See BURCHARD (2016), S. 27 et seq.; JAHN (2016), p. 63 et seq.; KASPAR (2014); APPEL (1998); STÄCHELIN (1998); LAGODNY (1996); TIEDEMANN (1991) and the edited book BRUNHÖBER *et. al.* (eds.) (2013).

criminal law theory/scholarship.

Note, however, that in Europe constitutional (criminal) law can no longer be conceptualized in purely national terms. The European Charter of Human Rights (ECHR) as well as EU law (especially the EU Charter of Fundamental Rights, EU-CFR) also establish superior norms that the German confiscation regime needs to comply with. Therefore, the German discussion focuses on whether the new German confiscations regime complies with the German constitution (“*Grundgesetz*”), the ECHR and EU law;⁵⁸ and of course whether it complies with the jurisprudence of the respective superior courts, the German Federal Constitutional Court (“*Bundesverfassungsgericht*”), the European Court of Human Rights (ECtHR), and the European Court of Justice (ECJ). Since a review of this jurisprudence would require an article of its own, I will leave it at that, i.e. determining that the constitutional debate is now supreme in German and European reflections upon confiscations in criminal contexts.

III. CRIMINAL LAW OR WHAT? – ON THE SO CALLED LEGAL NATURE OF CONFISCATION, AND ITS PITFALLS

The German confiscation reform has seen mixed responses in academia and amongst the pertinent stakeholders. The ferocities of these responses indicate that we are amidst –to exaggerate but a little– a “*Kulturkampf*”, or a struggle between different ways of thinking the criminal law:

On the one hand, there are those who subscribe to its extraordinariness, and the inviolability of its traditional guarantees. They criticize, for example, that extended confiscation represents “a relapse into confiscation as practiced by the authoritarian state, which subordinates the liberal core of criminal law to preventive interests”⁵⁹; or that a non-conviction based confiscation under Sect. 76a(4) German Penal Code is a “*corpus alienum*” in German criminal procedure.⁶⁰

On the other side are the functionalists, who seek to sharpen an –or so they say– otherwise blunt sword in the fight against crime in general and organized and economic crime in particular. Listen to what *Frank Meyer* had to offer:

It is essential that we underline the criminal economic dimension as well as the symbolic significance of confiscation. These we must not only allow into our general consciousness, but also into that of academics and judicial actors. It is especially in academia that we rest comfortably

58 This is also true for the international scholarship on this topic. See e.g. NELSON (2016), p. 2487 et seq.; SIMONATO (2017), p. 369 et seq.; PANZAVOLTA (2017), p. 33 et seq.; BOUCHT (2014), p. 221 et seq.

59 SALIGER (2017b), margin no. 1 (“*Rückfall in die obrigkeitstaatliche Vermögenskonfiskation [...], der freiheitliche Kernbereiche des rechtsstaatlichen Strafrechts einer Orientierung an generalpräventiven Interessenlagen unterordnet*”). This passage was related to the old (substantively limited) provision on extended confiscation, and hence holds water even more for the new (substantively unlimited) provision on extended confiscation.

60 SCHILLING and HÜBNER (2018), p. 49.

in the comfort of the rule of law; we congratulate ourselves for our referencing Beccaria; and we caution against the return of an authoritarian state; but by doing all of this, we simply refrain from making constructive contributions to overcoming the realities of modern crime.⁶¹

This struggle eventually is one for interpretative supremacy, namely over what confiscation “is”, over its very “legal nature” (*“Rechtsnatur”*): Is it criminal law (or private law, or administrative law) or what? Indeed, both sides join in considering that putting a unitary classificatory label on confiscation (in general or at least on individual confiscation types) is integral for solving its conundrums.

I disagree. Or rather and a little more cautiously: I posit that everything (albeit not by everyone) has been said on the supposed legal nature of confiscation, and that reflections on this very legal nature necessarily lead to a Gordian knot, which we cannot untie by labelling confiscation as either a criminal, or private, or administrative etc. law measure. The upcoming section will therefore analyze (*infra* I.) and criticize (*infra* II.) the predominant –pun intended– “labelling approach”.

3.1 Analysis

If one looks to the German and European debate on confiscation, its very legal nature enjoys top priority in almost every contribution – be it in legislative reasoning,⁶² foundational court decisions,⁶³ or academic writings⁶⁴. At a first glance, proponents truly seem to be after a legal “nature” of things, that is after the inherent and innate features, characteristics and qualities of confiscation. At second glance, this quest for the legal nature of confiscation is facilitated by the role that labels play in constitutional criminal law thinking. At heart, however, the very act of labelling follows (un-)limitative functions, in that it either limits or unlimits state authority (i.e. it either restricts the powers of the state, or indeed expands these powers by empowering the state to intervene into the rights of its citizens etc.). To only give some details on these three analytical steps.

61 MEYER (2017), p. 354; my translation of “*Es ist unerlässlich, kriminalökonomische Dimension und symbolische Bedeutung der Vermögensentziehung zu unterstreichen und nicht nur ins allgemeine Bewusstsein, sondern auch in dasjenige der Wissenschaft und Justizakteure zu bringen. Wir ruhen uns vor allem in der Wissenschaft wohl in unserer rechtsstaatlichen Behaglichkeit aus, klopfen uns für Beccaria-Allusionen anerkennend auf die Schulter, warnen vor der Rückkehr des Obrigkeitsstaates und verzichten bei alledem schlichtweg auf konstruktive Beiträge zur Bewältigung der modernen Verbrechenswirklichkeit.*”

62 See part A. II. 7 d) of the report attached to the reform proposal of the German government, BR-Drucksache 418/16, 12 august 2016, available at <http://dipbt.bundestag.de/dip21/brd/2016/0418-16.pdf>, p. 62.

63 See e.g., among the decisions of national (constitutional) courts, the German constitutional court (BVerfG), 14.01.2004, 2 BvR 564/95; the Swiss Federal Administrative Tribunal (SchwBVerwG), 24.09.2013, C-2528/2011; the Italian Constitutional Court, 26.03.2015, n. 49. See also of course the case law of the European Court for Human Rights cited *infra* at footnotes 66 and 67.

64 See SALIGER (2017), p. 1000, for whom „the central question of any asset recovery by the State is to clear in which area of the law the adopted measure should be anchored“. See also MEYER (2017), p. 350 et seq.; KING (2012), p. 337 et seq.; NELSON (2016), p. 2487 et seq.; SIMONATO (2017), p. 369 et seq.; PANZAVOLTA (2017), p. 33 et seq.

3.1.1 The quest for the “legal nature”

The legal nature of confiscation features prominently on both of the aisle:

Remember, for example, how the Federal German Parliament justified its 2017 confiscation reform, namely by classifying it a measure to reallocate property rights in a private law style.⁶⁵ This takes up how the German Federal Constitutional Court confirmed the constitutionality of the old regime of extended confiscation in 2004, inter alia by the qualification: “Extended confiscation does not pursue repressive-retributive, but preventive-allocative rationales so that it is no measure akin to punishment.”⁶⁶ This is strikingly similar to how the ECtHR justifies the compatibility of non-conviction based confiscations with the ECHR. As it reiterated in 2015, it is “well-established case-law that the forfeiture of property ordered as a result of civil proceedings in rem, without involving determination of a criminal charge, is not of a punitive but of a preventive and/or compensatory nature.”⁶⁷ If these *in rem* proceedings take place in a civil, administrative or criminal framework, is hence irrelevant for the ECtHR; what matters is that this kind of confiscation is not, or so Strasbourg tells us, of a punitive nature.⁶⁸ In (German) academia, *Frank Meyer* may serve as a paradigmatic and staunch supporter of this perspective. He claims, for example, that the “legal nature of a confiscation measure is essential for the legitimacy of whatever *in rem* proceeding.”⁶⁹ As a consequence, “civil procedural evidentiary standards would correspond well to the foundational concept and legal nature of non-conviction based confiscations, although it might be even more appropriate to treat them like an administrative proceeding, since the state encounters the affected citizen not in a horizontal, but in its sovereign capacity.”⁷⁰

These classifications of course rest on preconceptions. A non-punitive or non-retributive concept of confiscation for example presupposes a corresponding concept of criminal punishment, as does a punitive or retributive concept of confiscation.

65 See supra in and around footnote 17.

66 BVerfGE 110 (2004) 1 (“*Der erweiterte Verfall [...] verfolgt nicht repressiv-vergeltende, sondern präventiv-ordnende Ziele und ist daher keine [...] strafähnliche Maßnahme.*”).

67 *Gogitidze and Others v. Georgia* (2015), para. 126. The decision was later confirmed in the similar case ECtHR, *Devadze y Otros v. Georgia* (2016).

68 See, along with the recent cases arising from Georgia, the previous case law of the ECtHR, cf. the cases arising from the *UK vs Butler* (2002); *Webb* (2004); *Walsh* (2006) – and the many cases arising from Italy - *M* (1991), *Teresi* (1992), *Raimondo* (1994), *Ruga* (1995), *Autorino* (1998), *Prisco* (1999), *Arcuri* (2001), *Riela and Others* (2001), *Bocellari and Rizza* (2007), *Bongiorno and Others* (2010), *Pozzi* (2011) -. On the case law of the ECtHR in this area, see BOUCHT (2014), p. 221 et seq.; SIMONATO (2017), p. 373 et seq.; ESSER (2015), p. 91 et seq.

69 Meyer (2015), p. 261 (“*Die Frage, welche Rechtsnatur einer Abschöpfungsmaßnahme zukommt, ist elementar für die Zulässigkeit jedweden in rem-Verfahrens.*”).

70 Meyer (2017), p. 349 (“*Obgleich ein zivilverfahrensrechtlicher Standard Legitimationskonzept und Rechtsnatur der non-conviction-based confiscation entspräche, wäre es sachgerechter, das Einziehungsverfahren wie ein Verwaltungsverfahren zu behandeln, da es sich nicht um ein echtes Privatrechtsverhältnis handelt, sondern der Staat dem einziehungs-betroffenen Bürger hoheitlich gegenübertritt.*”).

Enter those who have a different idea of punishment in mind, and thus label confiscation (at least of the proceeds of crime) as punishment or at least as a measure akin to punishment (“*strafähnlich*”). As candidly stated by *Saliger*:

One should agree with the German Constitutional Court in that not every de facto infliction of an evil transforms a sanction into a measure akin to punishment. However, in evaluating whether a sanction represents punishment, the effect on the sanctionee must not be conjured away with the consideration that the sanction is not intended to infringe upon her legal sphere, since it rather intends primarily to restore the desired assignation of property rights in the interest of positive general prevention. This consideration resembles a slap in the face, which is handed out in response to the violation of norm, on the grounds that one should not take this personal, since it simply states that ‘one must not do so’. The pain of being smacked in the face, of course, remains the same, and the sanctionee will rightly and justifiably raise the question if she deserved it. Since both, an ordinary confiscation order under the gross principle, and even more so an extended confiscation order, can destroy the [economic] existence of the sanctionee, intersubjective justice (which must not be overridden by an higher order of justice that serves a higher whole) commands a query into responsibility and desert in light of the guilt principle.⁷¹

These statements exemplify a pattern: Whether confiscation results in a criminal sanction, is deemed the “key question.”⁷² And the very act of labelling the legal nature of confiscation is premised on foundational preconceptions, e.g. on crime and punishment, security and prevention, private law and the deprivation of illicit assets etc.⁷³

71 SALIGER (2017a), margin no. 5. My translation of: “*Dem BVerfG ist darin zuzustimmen, dass nicht bereits jede faktische Übelszufügung einer Maßnahme strafähnlichen Charakter verleiht. Indes kann die Wirkung einer Maßnahme für den Betroffenen bei der Beurteilung, ob sie sich als Strafe darstellt, nicht dadurch überspielt werden, dass er dahingehend beschieden wird, sie solle ihn eigentlich gar nicht individuell in seiner Rechtssphäre treffen, sondern vorrangig die gewünschte Vermögensordnung im Interesse der positiven Generalprävention wieder herstellen. Dies gleicht einer Ohrfeige, die als Reaktion auf einen Normverstoß mit der Begründung erteilt wird, dass sie nicht ‚persönlich‘ genommen werden solle, sondern nur der Verdeutlichung gelte, ‚dass es so nicht geht‘. Der Schmerz bleibt aber für den Betroffenen und er wird zu Recht die Frage aufwerfen dürfen, ob er die Ohrfeige auch gerechterweise verdient hat. Da die Anordnung des Verfalls nach dem Bruttoprinzip (das beim Verfall gegen den Drittbegünstigten auch ein Unternehmen sein kann, das ruiniös betroffen wird), und erst recht der Erweiterte Verfall existenzvernichtende Folgen für den Betroffenen haben kann, ist es ein Gebot der intersubjektiven Gerechtigkeit (das nicht unter Verweis auf eine höhere ordnende Gerechtigkeit im Dienste des Ganzen überspielt werden kann), hier mit dem Schuldgrundsatz nach Verantwortung und Verdienst zu fragen.*”

72 SIMONATO (2017), p. 369.

73 This pattern also holds true for classificatory projects that focus on proxies in order to ascertain the right label, e.g. on objects or procedure, so that they bring nothing substantially new to the table. See e.g. VOGEL (2016), p. 224. According to Vogel, the confiscation of *contraband* is a “natural candidate for ‘police’ or ‘administrative’ forfeiture” as it is a “classical task of [the] police and (e.g., customs) administration [...] to counter threats to public safety and health.” (Ibid., p. 235). For the *confiscation of proceeds* the “unjust enrichment rationale is compelling only when limited to the profit of the crime”, while it operates “as a punitive fine” under the “gross principle”. (Ibid., p. 238). And looking to instrumentalities, it is clear to Vogel that their confiscation results in “an ‘extra’ punishment for wrongdoers.” (Ibid., p. 242).

3.1.2 Classificatory labels in constitutional (criminal) law

Leaving a possible relapse to naturalism or formalism aside, one reason for why the quest for the legal nature of confiscation features so prominently in the debate is the structure of constitutional (criminal) law. Constitutional (criminal) law is today determinative of said debate (see also supra A V). And in practice, it operates on and with labels, which in turn trigger certain constitutional tests, while quashing others. For example, the presumption of innocence under Article 6(2) ECHR only applies if someone is “charged with a criminal offense”. Likewise, under the German constitution, the “guilt principle” (as derived from Article 1(1), 2(1), and 20(3) German Constitution) “only” requires that there be a “just relationship” between the state’s invasion into the fundamental freedoms of its citizens on the one hand and the severity of the criminal act as well as the fault of the culprit on the other, if that measure represents punishment or a similar sanction.⁷⁴

In this respect, constitutional (criminal) law’s labels are yet again but an expression of foundational preconceptions as they manifest themselves in positive constitutional law or jurisprudence. For example, when the German Federal Constitutional Court denied confiscation its punitive dimension, this was due to the Court’s holding a very limited, finality-based and somewhat archaic concept of punishment that does not look to effects and rather defines punishment as retribution and ethical reprimand.⁷⁵

If a confiscation measure does not bear the label “criminal sanction”, this only activates the ordinary protection of property rights (e.g. in Art. 14 Grundgesetz). E.g. in that “no one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law (Article 1(1) Protocol 1 to the ECHR). Once we are in these realms, political expediency – which in turn facilitates procedural and substantive hybridizations⁷⁶ (remember that in Germany it is now criminal courts that administer stand-alone in rem confiscations, which are supposedly akin to civil law measures) – becomes prevalent. For the ordinary constitutional protection of property rights not only demarcates the unconstitutional (without), but also leaves considerable political leeway (within). Hence, it would probably be excessive and hence unconstitutional to confiscate – to alter the facts of a notorious US case⁷⁷ – a yacht as an instrumentality of a drug crime because someone smoked a joint on it. But it would not seem an excessive infringement of property rights if one were to confiscate this very yacht if was used, with the knowledge of the owner, for smuggling drugs across state borders.

74 BVerfGE 110 (2004), 1 (13) (“Der Grundsatz ‘Keine Strafe ohne Schuld’ [...] gebietet, dass Strafen oder strafähnliche Sanktionen in einem gerechten Verhältnis zur Schwere der Tat und zum Verschulden des Täters stehen”).

75 BVerfGE 110 (2004), 1 (13) (“Mit der Strafe wird ein rechtswidriges sozial-ethisches Fehlverhalten vergolten.”).

76 See generally HENDRY and KING (2017), p. 733.

77 *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974).

This suggests that the constitutional label “non-criminal” unlimits (i.e. expands) state authority (or more concretely: it limits the limits of state authority by deactivating special constitutional guarantees of criminal law and criminal procedure).⁷⁸

The case law of the ECtHR on confiscation is telling in this respect. Since the ECHR has dozens of Party States, the ECtHR is confronted with diverse types and typologies of confiscation regimes (also within the same state). To account for them, the quest for the legal nature(s) of confiscation features prominently in the jurisprudence of the Court. Indeed, the ECtHR has developed a peculiar set of criteria (known as *Engel* criteria)⁷⁹ to ascertain the legal nature of any given sanction regardless of its formal classification at the national level. These criteria include *inter alia* the national classification, the nature of the violated norm, the severity of the sanction, the aim of the sanction, and the proceeding through which the sanctions is applied.⁸⁰ In applying these criteria to confiscation, the ECtHR arrived at different classifications of individual confiscation measures depending on their respective kind and nature.⁸¹ On the one hand, in many cases the ECtHR has rejected the national classification as a non-criminal measure.⁸² This especially holds true where the confiscation measure at issue is issued by a criminal court in the context of a criminal proceeding. On the other hand, as already noted,⁸³ the Court did not challenge the non-criminal classification of other types of confiscation (like the UK civil forfeiture or the Italian *misure di prevenzione* – preventive measures), in which the confiscation is not strictly bound to a particular offence committed by the person, but related to the

78 Although this is likely the rule, there are notable exceptions so that constitutional criminal law’s reliance on labels is a neutral phenomenon. In Germany, for example, the very introduction of (supposed) non-criminal elements into the administration of criminal justice, namely the delegation of non-conviction based confiscations under Sect. 76a(4) German Penal Code to ordinary criminal courts, is now being questioned in light of the division of legislative competences. Germany is a federal state, where the federal legislator only enjoys enumerated legislative powers, *inter alia* for “criminal law” (Article 74(1) Grundgesetz). So, if one holds – as first comments suggest – and upon taking the very classifications of the German Bundestag seriously (see TEMMING (2018), margin no. 3 and 3.1.) – that non-conviction based confiscations are private law at heart, it would appear that the German Bundestag was not competent under its criminal law jurisdiction to legislate on this particular type of confiscation. Frankly, I consider this line of reasoning seriously flawed, as it confuses criminal law theory (Is confiscation “criminal” in nature?) with constitutional criminal law theory (Can confiscation be introduced into the administration of criminal justice, e.g. for pragmatic reasons and hence under a theory of implied powers?). The critique also overlooks that the legislative power of the German Bundestag extends to civil law and court organization, too (Article 74(1) Grundgesetz). But this shall be of no concern here. Suffice it to underline the importance of labels in constitutional (criminal) law.

79 See *Engel and others v The Netherlands* (1976).

80 For the progressive evolution of the *Engel* criteria see *inter alia* *Öztürk v. Germany* (1984); *Sergey Zolotukhin v. Russia* (2009); *Del Rio Prada v. Spain* (2013).

81 See on this case law of the ECtHR SIMONATO (2017), p. 365 et seq. and PANZAVOLTA (2017), p. 33 et seq.

82 See for instance *Welch v. U.K.* (1995); *Geerings v. The Netherlands* (2007); *Sud Fondi SRL and Others v. Italy* (2007); *Parapomiaris v. Greece* (2008); *Varvara v. Italy* (2013). This line of case law was later confirmed by the Grand Chamber of the ECtHR, *G.I.E.M. S.R.L. and Others v. Italy* (2018), paragraph 210 et seq.

83 See *supra* in the footnotes 67 and 68.

assets themselves or to the general dangerousness of the person possessing them. As a consequence, confiscation measures were either reviewed under Article 6(2) (3) and 7 ECHR (i.e. as criminal measure that has to comply with the “criminal” guarantees of the Convention), while others were “only” checked in light of Articles 6(1) ECHR and Article 1 (1) Protocol 1 ECHR (as a civil measure that has to comply inter alia with the due protection of property rights).

As an example, the Court stressed in one case that

[certain] civil proceedings in rem [...], which do not stem from a criminal conviction or sentencing proceedings and thus do not qualify as a penalty but rather represent a measure of control of the use of property within the meaning of Article 1 of Protocol N. 1, cannot amount to “the 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.⁸⁴

With regard to other confiscations regimes, however, the Court started its analysis from the premise that

as to the nature and purpose of the confiscation measure, the Grand Chamber confirms [...] that the confiscation of the applicants’ property for unlawful site development was punitive in nature and purpose and was therefore a “penalty” within the meaning of Article 7 of the Convention.⁸⁵

Put differently, the “correct” classification of any given confiscation measure is the starting point for the ECtHR. It predetermines the constitutional tests (i.e. the human rights tests) that this measure has to meet in order to comply with the requirements of the ECHR.

3.1.3 Classificatory labels as (un-)limitative strategies

While constitutional (criminal) law’s reliance on labels may be neutral, their strategic use is not.

On the one hand, all in all it is safe to posit that those who strategically cast confiscation (in general or individual types) in a punitive or retributive light, do so in order to limit its substantive reach and procedural clout⁸⁶: e.g. by activating the “guilt principle” or the presumption of innocence in order to restrict extended confiscation or to undermine non-conviction based and third-party confiscations under the auspices of the administration of criminal justice. In many instances, this is driven by a slippery slope argument: If one were to open criminal law and procedure for pre-

84 *Gogitidze and Others v. Georgia* (2015), para. 121.

85 *G.I.E.M. S.R.L. and Others v. Italy* (2018), paragraph 222.

86 See, apart from the German scholarship already cited, TAIFA (1994), p. 95 et seq.; GRAY (2012), p. 32 et seq.; MAZZACUVA (2017), p. 194 et seq.; ALESSANDRI (1989), 50; MOCCIA (1997), p. 76 et seq.; PADOVANI (2014), pp. 250, 321, 342 et seq.; MAIELLO (2012), p. 54.; CERESA-GASTALDO (2015), p. 8.

ventive or deprivatory rationales in specific cases, they threaten to contaminate the criminal justice system as whole and thus undermine its very normative legitimacy and social acceptance.⁸⁷

On the other hand, it is also safe to assume that the opposite holds true, too. Where confiscation is teleologically labelled as being akin to private or administrative law, this is usually to increase a legislator's regulatory possibilities: namely by deactivating specific guarantees associated with criminal law and procedure, and by triggering the ordinary protection of property rights, which in turn introduces political expediency and leeway to the state's fight against serious crime⁸⁸. As an example, remember Sect. 437 German Code of Criminal Procedure with its strange guidelines for determining whether assets have a shady and possibly illicit provenance. During the deliberation and consultation process of the German confiscation reform, this provision (or rather its precursor) was meant to introduce the idea of *prima facie* proof to the German Code of Criminal Procedure. Only upon harsh criticism by many stakeholders (including the German Bar Association),⁸⁹ was this term –*prima facie* proof– struck from the records. Nevertheless, the provision is clearly meant to guide courts. And it is meant to implement legally what the then ruling parties had agreed upon politically in their coalition agreement, that is to come up with a “constitutionally valid reversal of the burden of proof” in the context of non-conviction based confiscation of assets of uncertain provenance.⁹⁰ It comes as no surprise, then, that the German Bundestag had to classify Sect. 76a(4) German Penal Code proceedings as mere objective in rem proceedings, which allegedly only seeks to reallocate property rights. For this classification allows to put the burden of proof on the proprietor of “shady” assets.

The use of labels and the divination of legal natures is of course not restricted to legislators and courts. Suffice it to give two examples from academia. *Frank Meyer* was ready to admit that “with regard to confiscation, Germany is lagging behind for decades, because one has turned a blind eye to the risk and dimension of organized crime and because one has largely ignored the societal impact of confiscation of criminal assets.”⁹¹ It comes as no surprise, then, that he staunchly supports the introduction of non-conviction based confiscations of assets of uncertain provenance on

87 SCHILLING and HÜBNER (2018), p. 51.

88 See, apart from the German scholarship already cited, Nelson (2016), p. 2492 et seq.; VIGANÒ (2018), p. 885 et seq.

89 See for instance the advisory opinion given by the German Bar Board (BRAK), p. 6 et seq. or by the German Bar Association (DAV), p. 17. All these papers are available at https://www.bmjv.de/SharedDocs/Gesetzgebungsverfahren/DE/Reform_strafrechtlichen_Vermögensabschoepfung.html.

90 See the coalition agreement between CDU, CSU and SPD for the 18. Legislative Term at p. 145, available at https://www.bundesregierung.de/Content/DE/_Anlagen/2013/2013-12-17-koalitionsvertrag.pdf?__blob=publicationFile.

91 MEYER, (2017), p. 354 (“*Deutschland [hinkt] bei der Abschöpfung der Entwicklung Jahrzehnte hinter[...], weil man bislang Risiko und Ausmaß von OK ausgeblendet und die gesamtgesellschaftliche Bedeutung der Vermögensabschöpfung weitestgehend ignoriert hat.*”)

the ground that they are of a civil or administrative law nature. After all, one must “not bring a knife to a gun fight” (his words, not mine).⁹² *Joachim Vogel*, one the other hand, went for the contrary assessment. The proceeds of crime – or so he wrote – “are not harmful in themselves” as it is “by no means uncommon that profits from crime are laundered and invested in per se legal property or companies”.⁹³ Since he did not believe that laundered proceeds of crime can do any significant harm,⁹⁴ *Vogel* did not consider the fight against organized crime so important as to lower the traditional *acquis* of criminal law and procedure. It comes as no surprise, then, that *Vogel* labelled the confiscation of the proceeds of crime a punitive measure.⁹⁵

3.2 Critique

If my analysis holds water, the question whether confiscations amount to a criminal sanction is *not* key to their many conundrums. Rather, the legislative, adjudicative and academic quest for the correct legal nature of confiscation – criminal law or what? – is both driven by policy considerations and foundational preconceptions as well as facilitated and hedged by constitutional (criminal) law’s reliance on classificatory labels. The quest for the legal nature of confiscation appears to be a charade. Of course, this charade is prompted, in many instances, by the law itself, especially by constitutional criminal law and its foundational labels. Therefore, it of course also makes good sense that legislators, judges, practitioners and academics make use of these labels in their argumentation. However, or so I would like to suggest, we would be well advised not to absolutize this approach. Let me give three reasons:

3.2.1 Normative openness (confiscation of the proceeds of crime)

First, the quest for classificatory labels simplifies that which is highly complex. Indeed, it seeks to cast as unitary that which is ambivalent⁹⁶ and polyvalent, namely the many rationalities of confiscation. The best example is the confiscation of the *proceeds of crime*, for which the following objectives carry some weight:⁹⁷

- restoring the proprietary status quo ante;
- communicatively establishing and/or perpetuating the societal norm and belief that “Crime must not pay!”, that is – in German penal terminology – positive general prevention;
- preventing future harm by removing (possibly) illicit assets from circulation, even more so if – and contrary to what my maestro *Joachim*

92 MEYER (2017), p. 343.

93 VOGEL (2015), p. 235.

94 This, too, is an empirically questionable call.

95 VOGEL (2015), p. 238.

96 As rightly highlighted by ESER (2014a), margin no. 12.

97 Cf. BOUCHT (2017), p. 95 et seq. with further references.

Vogel believed – these assets are laundered and invested into the white economy, because the state has to inhibit the criminal infiltration of public (economic, social, cultural, political etc.) realms; note that this is not “prevention” in a penal sense, but rather prevention as a safety measure against concrete dangers, that is –in German legal terminology– prevention in the sense of “police law”;

- supporting victims in regaining their lost assets;

- deterring potential perpetrators or accessories, who are led to fear that they may lose “everything”; that is –in German penal terminology– negative general prevention;

- and inflicting extra-punishment – and possibly an extraordinarily hurtful one – on (potential) wrongdoers, especially on the “experienced” ones, who do not consider fines or imprisonment, but the loss of their financial status particularly upsetting.

To reduce these rationales to an either-or-logic (criminal law or private law or administrative law etc.) would not account for the complex rationalities of the confiscation of the proceeds of crime. This holds true on a general level, i.e. when a legislator frames this confiscation measure abstractly, as well as on a case-by-case, i.e. when a criminal justice organ administers a confiscation order. In both scenarios, it hardly seems possible to make a unitary call on “the” (one and only) legal nature of a confiscation of the proceeds of crime.⁹⁸

The type of confiscation is characterized by its normative malleability and indeterminacy and its justificatory over-determination. Indeed, I posit this measure “plays” with and operates on its diverse rationales, e.g. in that it appeals to different sentiments in the population at large (one citizen may consider it a rightfully harsh punishment, while another may understand it as a restorative instrument), or in that it affects different addressees differently (a hardened career criminal might not be deterred by imprisonment, but perhaps by the forfeiture of her assets etc.). The confiscation of the proceeds of crime is, in effect, and for good or bad, a highly adaptive and flexible, possibly a reactive and learning tool. It cannot be tamed, again for good or bad, by stringent and unitary labels. To the contrary, they would obfuscate its true “nature”, namely its normative openness, and would hence conceal that which needs to be addressed: Whether we want and need such an instrument in our toolbox to curb crime, be it in general or for particularly serious forms of it.

To complicate things, the debate about the legal nature of confiscation introduces other foundational preconceptions –e.g. on punishment, prevention and proprietary orders– to the table. Yet these preconceptions –just think about the debates on the “(legal) nature” of punishment– are all but fixed and decided, too. Indeed, they are normatively open as well. So in effect, a true exploration of the “legal na-

⁹⁸ The latter is disputed by ESER (2014a), margin no. 12, who charges the judge with deciding, on a case-by-case basis, the character of an individually administered sanction.

ture” of confiscation would need to go into “everything”, *inter alia* the “legal nature” of criminal law and the administration of criminal justice, its relationship to other branches of law, the connection between the legal and the political or between the social and the normative etc.

This is –unsurprisingly– rarely done. Taking the normative openness of confiscation and its underlying preconceptions to heart, it is safe to assume that determinations about “the” legal “nature” of confiscation will likely result in “legal fictions”.⁹⁹

3.2.2 The legal fiction of the but non-punitive

Let me first argue against the legal fiction that confiscation is non-punitive in nature. Take the account of the German 2017 reform that the (ordinary as well extended) confiscation of the proceeds of crime is but an (re-)allocation of property rights. This begs the question: Why would the state want, and be allowed, to (re-)allocate property rights? The answer is simple and complex all the same: because of the aforementioned rationales (restoration, communication, prevention, retribution, victim support etc.). The (re-)allocation of property rights thus has no real justificatory potential in and of itself. What is more, in its over-simplification, it overshoots the target. Extending extended confiscation to whatever trigger offense, and not foreseeing any other qualifications, grants criminal justice actors the proverbial sledgehammer to crack a nut¹⁰⁰ (e.g. in that small-time thieves, who have no known organized crime connection, may now be targeted with extended confiscation orders under German law).

Or take the German narrative that non-conviction based confiscations are conducted in an objective *in rem* proceeding, which can and must be separated from the criminal *in personam* proceeding. This begs the questions: Why does this objective *in rem* proceeding have an individual addressee? And why is it limited by the constitutional protection of property rights? Again, the answer is rather simple: It is of course an *in personam* proceeding, but one shuns this label in order to artificially suppress any resemblance with a criminal trial. In this respect, it is high time to hold dear internationally what *Stefan Cassella* has noted for the US debate on civil forfeiture: The classification as civil, rather than criminal, is but a doctrinal sleight of hand (my words), and “is viewed simply as a procedural device for resolving all objection to the forfeiture of property at one time in a single proceeding.”¹⁰¹ To hold otherwise is nothing but dire formalism (“*schlechte Begriffsjurisprudenz*”).

Finally, take the German fiction that even though the proceeds of crime are calculated by means of the gross principle, their confiscation has no punitive nature. This certainly does no longer hold true once one looks beyond a finality-based test (in the precariously limited version of the German Federal Constitutional Court of punishment as retribution and ethical reprimand), i.e. if one takes due account of the punitive effects and the punitive procedural frames of confiscatory measures (just

99 As VOGEL (2015), p. 228 labelled the civil forfeitures under US law.

100 RÖNNAU and BEGEMEIER (2016), p. 260 et seq.

101 CASSELLA (2013), p. 837.

consider that the criminal statutes of limitation do not apply, Sect. 76b German Penal Code). Yet even if one were to subscribe to this finality-based concept of punishment, Sect. 73d(1) German Penal Code introduces a strong element of personal fault to the equation in that “*Vorsatztaten*” are treated differently than “*Fahrlässigkeitstaten*”. Enter retribution and ethical reprimand, and thus the key characteristics of a finality-based concept of punishment, to the confiscation of the proceeds of crime in Germany.

3.2.3 The legal fiction of the but punitive

This may draw water to the mill of those who classify confiscations as punitive measures. Nevertheless, this narrative over-simplifies matters, too. Especially if one calls for the full and unwavering applicability of corresponding guarantees like the “guilt principle” or the presumption of innocence. Somewhat paradoxically, it is the absoluteness of these guarantees, i.e. their lack of flexibility and adaptability, indeed their unrestrictability, that provoke that they are conjured away by means of the legal fiction of the non-punitive nature of confiscations. Or to use the terminology of German constitutional doctrine: Because the fundamental rights and freedoms associated with criminal law and procedure do not foresee any (realistic) chance of justifying proportionate incursions into their guarantees (“*keine Rechtfertigungsmöglichkeit von Eingriffen in den Schutzbereich*”), these very guarantees are curtailed and limited in the first place (“*der Schutzbereich wird eng gehalten*”).

So the critics of confiscation need to ask themselves: Don’t we, as a society, have to be more flexible? Again, take extended confiscation. This measure might be a sledgehammer, and it might be “too much” in some instances. However, in other instances, one may require this blunt tool to crack the shell of serious (for example of organized or corporate) criminal structures. This indeed could (!) be an idea behind Sect. 73a German Penal Code. If criminal structures divulge minor convictable offenses, they shall trigger the possibility to issue an extended confiscation order to confiscate as much as possible.

Further, the move to keep criminal law and the administration of criminal justice clean of supposedly “alien” (e.g. deprivatory or preventive) rationalities, is hardly convincing per se. Indeed, good pragmatic considerations may militate for this intake, like drawing on the special expertise, authority and integrity of criminal justice actors. Or are these actors, by their very profession, disallowed from restoring the lawful proprietary order, or from impeding possible corruptions of public realms by removing illicit assets from circulation? I think not. What is really at stake, then, is not preserving the immaculacy of the criminal justice system, but justifying substantive invasions into the fundamental rights and freedoms of citizens independently of how these invasions are organized and labelled (e.g. as private, police, or criminal law). Outsourcing the precarious to other substantive or organizational branches of law (maybe even some kind of “*Feindstrafrecht*”), as some would have it, is not a solution (e.g. for keeping the ordinary “*Bürgerstrafrecht*” clean and tidy).¹⁰²

¹⁰² The reference is to the well-known elaboration of JAKOBS (1985), p. 783 et seq.; GÜNTHER(2004), p. 88 et seq.

Finally, what may come as the most painful realization of all is this: The fundamental opposition to the inclusion of “alien” (e.g. non-liberal, security-related, preventive or deprivatory) rationalities into the administration of criminal justice has (for good or bad) effectively failed as a containment strategy. At least in Germany, and all the more so in Europe, we observe an ever increasing influx of such “alien” rationalities into the criminal justice system. It is becoming but a building block of an overarching security architecture, where the pre-emption, prevention and repression of risks and crime coincide.¹⁰³ The essential question, then, is whether one wants to criticize these developments from without, or play along and constructively discuss these developments from within so as to forestall excesses.

IV. NOW WHAT?

My de(con)structions lead us to the desolation of post-naturalistic and post-formalistic legal thinking: Once the false certainties of legal natures and constitutional labels are dispersed, because a “criminal law or what?” does not tell us much about the legitimacy of confiscation in general or its controversial types in particular, how is one to constructively reflect on the objects, reach and addressees as well as on the procedural and organizational shape of confiscation measures? Or to say it more casually: Now what? By means of an outlook, I would like to pitch some very tentative thoughts on this matter.

In order to assess the legitimacy of confiscation, one needs to establish a normative framework. With traditional (doctrinal or constitutional) concepts faltering, I posit that we need to have an open political and also painful debate about foundational values and principles. If you wish: We need to approach constitutional criminal justice, and its possible securitisation, with a formative agenda in order to openly discuss the very policy, polity and politics framework of our normative order. This may sound somewhat aloof. So let me raise two of the questions that come to mind.

4.1 Unrestrictable rights?

Can we, as a commonwealth, still afford that the administration of criminal justice operates with unrestrictable guarantees? Is their unrestrictability “better” – e.g. in order to pre-empt the rise of an authoritarian regime – than an effective administration of criminal sanctions – even if this means that organized crime goes widely unchecked and can hence possibly undermine the democratic state? Or is it necessary – and if so: how – to strike a balance, by restricting the guarantees of criminal law and procedure, but only under strict conditions and by putting checks & balances in place?

Taking these question to Sect. 76a(4) German Penal Code, i.e. to extraordinary non-conviction based confiscations of assets of uncertain provenance, the following observation is at place: It would seem that the German Bundestag laid, for good

¹⁰³ See on these developments e.g. FARMER (2014), p. 399 et seq. On all the different aspects involved see also SULLIVAN and DENNIS (eds.) (2012).

or bad, and with the help of a civil law legal fiction, the unrestrictability of the traditional principles of criminal law and procedure to rest. But it did so only with regard to particularly dangerous forms of criminal enterprises (with the exception of extend confiscation, which in theory is applicable to any criminal enterprise). And by entrusting non-conviction based confiscations to the organs of criminal justice, the German *Bundestag* recruited those who always should have a “doubting conscience”, as they wield the criminal law and thus the (at least under traditional paradigms) *ultima ratio* of state authority on a daily basis: public prosecutors and judges. The German polity is thus – for good or bad – changing. The German Bundestag, as the prime legislative organ of the German welfare state, does no longer consider the slippery slope into authoritarianism more troublesome than the perils of terrorism, organized crime and (certain forms of) economic crime. This, in my opinion, is how Sect. 76a(4) German Penal Code, and non-conviction and suspicion based confiscations of assets of unclear provenance, should be discussed. Namely as a transformation of the German polity, where that which was formerly qualified as a state of emergency (where the polity is in jeopardy, which in turn warrants the suspension of certain liberal ideas of the rule of law) de facto turns into that which is normal (with the follow-up question being, of course, if this factual normality is a normative aberration or the new normative normality).

4.2 Equality of citizens?

But this is only part of the story. For not only do we have to assume the macro-perspective of constitutional ordering, but also the micro-perspective of how to approach and indeed shape the individual person as the possible addressee of a confiscation order. So again, can we still afford to treat all persons alike, and indeed as citizens with the unwavering right to remain silent and to be presumed innocent and law-abiding? Or do we have to lay these adamant principles to rest, be it in general or in particular cases? Indeed, do we have to follow-up on the particularization of society at large by differentiating burdens-of-proof and burdens-to-come-forward between different classes of addressees? Not only to encumber those, who are particularly dangerous (e.g. because they are “known” associates of organized crime), but also to relieve those, who are not (e.g. because they are “simple” thieves)?

Applying these questions to both Sect. 73a German Penal Code (extended confiscation) and Sect. 437 German Code of Criminal Procedure (guidelines for applying extraordinary non-conviction based confiscations under Sect. 76a(4) German Penal Code), these answers come to mind: It would seem at first glance that, generally speaking, the traditional citizen –whom we counterfactually cast as law-abiding until proven otherwise– has been replaced by the potential career-criminal or the potentially dangerous person, who has the “civic” duty to suggest that she is indeed not dangerous. And since dangerousness is premised on prognostic evaluations, false positives (non-dangerous persons that are considered dangerous) become normalized and a risk worth taking. This would explain (note: not justify!) why every criminal conviction now empowers criminal justice actors to look into the proprietary status of the convicted, and confiscate assets that result from crimes that are not brought to justice. My observation would also explain (again: not justify!) why

in a terrorism or organized crime context, the possible addressee of a confiscation order effectively has to account for the origins of his or her assets; and if he or she fails to do so in a convincing manner, this gives rise to a confiscation order under Sect. 76a(4) German Penal Code. In effect, this introduces the offense of unexplainable wealth¹⁰⁴ to the German criminal justice system.

At second glance, things might be more subtle, but no less “worrisome” than just indicated. For in practice, the status and class etc. of the addressee play an important role in the determination, if an asset certainly (Sect. 73a German Penal Code) or likely (Sect. 76a(4) German Penal Code) results from a criminal enterprise. After all, it seems far more reasonable to believe that the offspring of a rich family owns several Ferraris than someone who officially lives of social security. The transformation of the law-abiding citizen into a potentially dangerous person therefore facilitates that, among other factors, class and status openly (re-)enter the administration of criminal justice. Again, this is how extended and non-conviction based confiscations should be discussed.

4.3 Outlook

Debates about the legal nature of confiscation and its correct label –criminal law or what?– are but smokescreens that barely scratch the surface of the tremendous underlying transformations that the administration of criminal justice is –for good or bad– experiencing at the moment. We need to look, or so I suggest, into these underlying transformations of constitutional ordering (inter alia: positive law seems to consider the slippery-slope into state authoritarianism less worrisome than the subversion of civil peace and public order by crime cartels; and positive law has already de facto undermined the unwavering equality of citizens by recasting certain classes of individuals as more dangerous than others). Once we make these transformations transparent, they beg for normative justifications or refutations. This I have not touched upon in this paper. To put it bluntly: I have not argued in favour of taking the slippery-slope into authoritarianism lightly. I have also not argued in favour of putting to rest the equality of citizens, who we have to (counter-factually, but as a matter of principle) consider non-dangerous until proven otherwise. To the contrary, by having disenchanted the legal nature debate as charade, I have merely put (disconcerting) questions on the table, which need to be addressed as such.

104 See e.g. BOLES (2014), p. 835 et seq.

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