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CONFISCATION ORDERS: PROCEDURES AGAINST DRUG TRAFFICKING OFFENCES

BY

WALEED KHALAF BIN-SALAMA

A DOCTORAL THESIS

SUBMITTED IN PARTIAL FULFILMENT OF THE REQUIREMENTS FOR THE AWARD DOCTOR OF PHILOSOPHY OF LOUGHBOROUGH UNIVERSITY

SUPERVISOR: PROFESSOR PHILIP BEAN

DEPARTMENT OF SOCIAL SCIENCES

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In The Name Of Allah, The Most Beneficent
The Most Merciful

"O You Who Believe! Stand out firmly for justice, as witness to Allah, even though it be against yourselves, or your parents, or your kin, be he rich or poor, Allah is a better protector to both than you. So follow not the lusts of your hearts, lest you may avoid justice, and if you distort your witness or refuse to give it, verily, Allah is ever well-Acquainted with what you do"

(Glorious Quran, Suraht Al-Nisa, 135)
DEDICATION

"All the praises and thanks be to Almighty Allah, the lord of the alamin, the most beneficent, the most merciful"

To my parents, brothers and sisters

To my wife and children: Abdulla, Abdulrahman, Moneera, Dhari and Sohaila

For their unending prayers, patience, perseverance and moral support.
ACKNOWLEDGEMENT

"In The Name of Allah, The Most Benevolent, The Most Merciful"

First and foremost, all the praise be to Allah Almighty for his mercy in giving me the strength to complete this research.

To express with sincerity the debts of gratitude one owes in the clinched context of formal acknowledgements is, perhaps, one of the most difficult tasks set by this thesis. Yet I am grateful for the opportunity to express openly the gratitude to the many individuals who have contributed in this thesis.

To the Ministry of Interior for granting me the scholarship and study leave to pursue my Ph.D. and in particular, to the Police Academy and the Training and Scholarships Department, my gratitude.

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To the following friends without their help and support this thesis would not have been possible.

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ABSTRACT

CONFISCATION ORDER: PROCEDURES AGAINST DRUG TRAFFICKING OFFENCES

'Taking the profit out of crime' has been considered as one of the effective countermeasures to drug traffickers in the last decade. A growing interest in various approaches taken to secure the confiscation of the proceeds of drug trafficking offences in order to combat drug trafficking more effectively has resulted in the development of different national and international perspectives. Despite the acknowledgement of the United Nations of the provisions and proceedings for confiscation in late 1980s, some countries have adopted enforcement provisions and powers which are extraordinary wide, considered as either draconian and trespassing with the rights of citizens. At the other end some regard them as weak, inefficient, and lacking effective strength.

Unlike many developed countries, Britain has a specific confiscation system for drug trafficking offences (DTA 1994). Some of the provisions of the British confiscation proceedings have been seen as invading individual freedoms and rights. Therefore, the thesis is devoted to examining the British concept and values of confiscation order, highlighting the principles and critiques accompanying its various provisions' development at different stages of the British political, juridical and law enforcement systems.

The thesis advances and assesses the similarities and dissimilarities among different systems of confiscation beyond the borders of English and Wales. The aim is to determine the definitions, limitations, credibility and legality of principles, application and practices of confiscation laws perceived by different systems. The American, the Kuwaiti and the Egyptian systems are also chosen as relevant points of variability with respect to the British system.

It is within this framework, that the British confiscation system is scrutinised. There is an attempt to expose the strains existing in the system and also finding the best way forward. The current oscillation between either reparation or punishment which seems to occur regularly is
believed to be a critical stake and a crucial problem for producing a better understanding of the implications of confiscation orders.

Interviews conducted in England and Wales, United States (Washington DC), Kuwait and Egypt have provided a background to confiscation enforcement, revealing the extent of powers, restrictions and difficulties in implementing the order in line with its current principles.
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# ABBREVIATIONS

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<th>Full Form</th>
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<tr>
<td>ACPO</td>
<td>Association of Chief Police Officers</td>
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<tr>
<td>AFO</td>
<td>Asset Forfeiture Office</td>
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<td>CATS</td>
<td>Consolidated Asset Tracking System</td>
</tr>
<tr>
<td>CCE</td>
<td>Continuing Criminal Enterprise</td>
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<td>CCB</td>
<td>Central Confiscation Branch</td>
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<tr>
<td>CI</td>
<td>Chief Inspector</td>
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<td>CJA 1988</td>
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<td>CJA 1993</td>
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<td>Drug Enforcement Administration</td>
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<td>United States Attorney Office</td>
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<td>United States Marshal Service</td>
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INTRODUCTION

In this thesis there are two main aims. The first is to determine the manner in which the British confiscation system provided under the Drug Trafficking Act 1994 (hereafter DTA) developed and the second is to determine how the system operates by law enforcement agencies. The study is approached through the sociology of law by examining not just how law is constructed but how it is operates. That is how it is conditioned, developed, conceptualised, perceived and implemented. Certain important questions exist within the British confiscation proceedings. Questions about the nature of the system as punitive or reparative, or as a way of redressing the wrongdoing of drug traffickers are cases in point. There is also the problem of the enforcement of confiscation order. Who does it? How are decisions made in accordance with the order? These questions will be examined throughout, and in particular in chapters 3 and 4.

BACKGROUND

Every legal system would accept as axiomatic that an offender should not be able to enjoy the profits of his criminal activities. In earlier centuries the theory of confiscation in Britain for example, was based upon English law which contained penalties of general forfeiture of estate and blood. There were several forms of crime-based confiscation systems existing at that level of common law. The prime law was attainder, a mechanism whereby a capital felon lost the use of his land and he and his heirs lost their rights of inheritance and title. Attainder and other common law forms of confiscation were eventually abolished by statute, mainly by reason of the 'stark injustice' they could and did inflict upon defendants and their relatives (Fisse, 1989). Scott (1996) indicated that the unpopularity of these laws, which were sometimes used against political prisoners and dissenters, caused the virtual disappearance of criminal asset forfeiture legislation for more than two centuries.

In early 1970s, asset-confiscation law was resurrected in the United States, and as described by Hyde (1995), was to be the main weapon in the fight
against drug trafficking offences. Fears of a 'frankenstein monster's resurrection' boiled to the surface in various legal, political and public circles. The history of past injustices involved in forfeiture laws loomed over the debates which were about introducing new property or asset-confiscation laws. Interestingly, no sooner had drug trafficking became an issue of public alarm, than there was an emergence of powers to trace, seize and confiscate assets of crime that contributed to these fears. A more active form of government intervention was required for executing the 'war on drugs' strategy. The full flowering of civil asset forfeiture in America has become a tool in the war to banish the so-called "controlled dangerous substances" which has been made illegal by Acts of Congress or state legislatures.

Since 1980's, the 'war on drugs' witnessed an upshot in penal measures and a synchronisation among various American legal, political and governmental institutions as a weapon in the arsenal of the drug war. Today, these exist over 100 different federal forfeiture statutes, addressing a wide range of matters both criminal and civil. The direction, extent and speed that this war on drugs has taken have signalled a cautious responses from those who were considered that this war would produce a series of frontal attacks on the basic American constitutional guarantees- including due process, the presumption of innocence, and the right to own and enjoy private property. In light of the development of such a strategy, the war on drugs has been able to keep question about a granted constitutional rights in the background because it has given the impression that there has to be 'something done'.

Apparently, the pressures to have 'something done' have not been restricted to the American national scene. Drug trafficking has come to be an international phenomena where trafficking has cut across national systems and borders. These developments have prompted an increase of 'ebbs and tides' relations among the nations to draw out efficient measures and to abolish the 'open possibilities' which the drug trafficking networks are already exploiting and investing.

It is important to mention at this stage that the key circumstances which conditioned the content of the international developments among the nations against drug trafficking largely a response to the American system
and needs. These pressures are not considered in this thesis as a simple cause and effect. They are rather a matter of relations of forces which assumably impose themselves on various historical, circumstantial, and allocative aspects. Within such a perspective, the various critiques made by different writers, for example, Oppenheimer, G (1993, p 194-225), and Dorn, N et al (1992, 63-77), are clear indications of the influence that the United States has had not only on international conferences and agencies but also on national policies in an attempt to police cross-national drug trafficking, and dealing with offshore money—an important adjunct to its internal policy of narcotics prohibition and enforced drug abstinence. In retrospect, it seems as if the United States has aimed to impose its narcotics policy as standard, if not universal on all countries as a solution to its 'international loophole'.

The most significant representation of such a momentum to take curb offenders of drug trafficking across the borders was the United Nations Conventions against Illicit Drugs and Psychotropic substances signed in Vienna in December 1988. This was an agreement heralding the collective responsibility of all the countries which have to apply a co-ordinated action within the framework of international co-operation. Accordingly, the participating States are expected to commit themselves to a wide range of measures against drug trafficking.

Actually, there was preceding local legislation to take action against the illicit proceeds at the European stage. In the early 1980's, influenced by the American concept of 'taking the profit out of crime', several European countries (Italy, France and others) deployed asset confiscation as the most effective strategy against drug trafficking and organised crime.

It is no coincidence to realise that these aggregate developments at the international level have not kept Britain away from their influences. There are various indications, which the thesis will illustrate, that the legislators and the members of the British Parliament were swept by an acknowledgement of the international measurements that should be taken against drug trafficking.

Key aspects of the American forfeiture concept have received the approval and admiration of two committees: the Hodgson committee (1984) and the
Home Affairs Committee (1995), who then recommended asset tracing, seizing and confiscating powers for the government. Accordingly, the British government rushed into the drafting of an integrative confiscation system that included certain recommended measures and provisions that were thought to be competent enough to deal with drug trafficking problems at both national and international levels.

In 1986, Parliament enacted a new confiscation system which covered the loopholes of the existing forfeiture law and enabled law enforcement agencies to deal with new international developments in fighting organised drug trafficking offences. The reach and scope of the provisions of the British confiscation system provided first under the Drug Trafficking Offences Act 1986, as will be seen later in this thesis, were described as 'striking', 'extraordinary wide' and 'draconian'.

Mr. Corbett (MP), for example, commented on the powers provided under this Act by saying:

The powers proposed by this amendment are in terms of civil liberties, quite draconian' (2/7/1986, HC, col. 1137).

Lord Lane C.J. at p. 167 in Dickens' case (1990) indicated:

'It is plain that the object of the Act is to ensure, so far as possible, that the convicted drug trafficker is parted from the proceeds of any drug trafficking which he has carried out. The provisions are intentionally draconian (1990, 2 W. L. R. 1384).

DS Porazinski from Gwent Constabulary and DS Michael Gagg from South Yorkshire Police asserted that the application of the confiscation proceedings has, in general, a very powerful and draconian consequences (pers. communication, 1995).

These attitudes fuelled expectations regarding the efficiency and comprehensibility of confiscation legislation. Their application produced a variety of responses. Many case-laws, for example: 'Peters, re' case in 1988, 'R. v Dickens' case in 1990, 'Re O' case (1991), 'Comisky' case in 1991, 'Ilsemann' case in 1991, 'Saunders' case in 1991, 'Redbourne' case in 1993, and 'Simons' case in 1993 have exposed defects which put a halt to the execution of certain provisions, as well as raising a degree of scepticism
around some of the main principles of the confiscation system (e.g. the nature and purposes of confiscation and its status in the sentence).

In this respect, D. A. Thomas (1993) says:

"the Drug Trafficking Offences Act 1986 in its original form cannot be considered to be a particularly successful piece of legislation. It was burden by many difficult technicalities and unnecessary complications, and failed to prove an adequate procedural structure for decision-making" (p. 93).

The Lord Chief Justice Lane said of the DTOA;

"The grounds of appeal advanced . . . raise a number of points under the Act which we understand have caused trouble to courts up and down the country and it may be of assistance if we try to deal with the structure and import of the Act in general before turning to the specific points which arise in this appeal" (R v Dickens. ([1990] 2 WLR 1384).

The above responses, along with others suggested that the confiscation system would not escape fierce doctrinal and political debates which would raise doubts about its usefulness, its ability to preserve rights, and conversely its beneficial effects proportional to any sacrifices.

The subsequent amendments which were consolidated in the DTA 1994 and which dealt with certain provisions of the original Act (the DTOA 1986) did not manage to resolve these concerns. There was a very severe problem that accompanied the exigencies of the confiscation amendments. Nine judges at the Strasbourg Court (the European Court of Human Rights) ruled unanimously in 1995 that a British court acted unlawfully in trying to confiscate £59,000 of Peter Welch's drug profits after he was convicted of a plot to smuggle £4 million of cannabis. Accordingly, although the confiscation order has not been enforced because of Welch's plea to Strasbourg, Britain was ordered to pay him nearly £14,000 in costs for penalising him under a law which had not come into force when his crimes were committed (The Times, Feb. 10, 1995).

This is perhaps one of the stark events which reveal the critical consequence of a confiscation system which exists within the current climate of confusion concerning its nature and purposes. Ben Emmerson,
the barrister representing the convicted drug trafficker in this case, summarised the situation by saying:

'Despite warnings before the legislation was introduced that it would breach the convention, the Home Office has buried its head in the sand and built an entire legislative framework that these confiscation orders are not criminal penalties. It was that myth that the court exposed' (Ibid.).

Since that case, the need for clear explanations about the actual nature of confiscation, not only the nature of the 'confiscation order' but the nature of the confiscation system itself provided under the DTA 1994, and the social justifications underpinning it, were never scrutinised in depth. The punitive or reparative feature of the system are not clear when set within the government's determination to underpin asset-confiscation as being merely reparative with no punitive element. Ironically, this determination repeats the same problem that has faced the American system. The American government attempted to bypass this problem of 'double jeopardy' by introducing a new classification system by classifying forfeiture as an administrative remedy rather than as punishment. In doing so, it was thought that it had removed all confusion by providing a more suitable framework altogether.

The problematic situation in which the confiscation system has found itself have not been accompanied by serious socio-legal research. The absence of such research has been a serious defect. This thesis will show that this absence has caused many problems to persist so that easy and transparent answers are given to complex problems under the burden of appearing to 'do something'.

AN OVERVIEW OF THE THESIS (THE MAIN FOCUS)

Given the problematic developments, relations, cases and contexts accompanying the confiscation system, this thesis will examine a number of aspects that have contributed to the various dilemmas currently facing the British confiscation system. This means that the main focus of this thesis is the British system. However, an examination of the American, the Kuwaiti and the Egyptian confiscation systems will also be considered to assist with any subsequent analysis. Inevitably the American system has
had a great impact on the British one, so it is necessary to understand how that system operates too.

With regard to the Kuwaiti system, the choice was more pragmatic; that is, it reflects the researcher's national concerns. As it happens, this approach is consistent with a critical perspective in the sociology of law. Confiscation system can help determine the limits of the former in relation to the latter. In other words, the aim is to create a critical understanding of one's own position in order to understand the other. This helps to establishes a greater awareness of the differences between the two.

The Egyptian confiscation system was chosen because it helped determine the Kuwaiti system. So, the same principle applies for selecting the American laws as a necessary element in studying British confiscation as with the Egyptian and the Kuwaiti systems. In both these cases, it was crucial to examine the effects of the former on the latter in order to understand the form in which these legal systems would emerge.

AIMS OF THE THESIS:

As said above there are two main aims. First to determine the manner in which the British confiscation system developed, and second to determine how it operates under the DTA 1994. These aims can be broken down into other aims, and further subdivided into subaims where necessary.

For main aim I, i.e. to determine the manner in which the British system developed there are the following aims:

(1) To determine the historical and background under which the British confiscation system emerged.

(2) To determine the philosophical justification of the confiscation system.

(3) To determine the distinctive elements of the British confiscation legislation with particular reference to the DTA 1994, and the strategies of enforcement and organisation.
(4) To determine the link between the American system and the development of the British confiscation system.

(5) To examine the Kuwaiti and the Egyptian asset confiscation systems and locate any convergences and discrepancies with the British system.

For main aim II i.e. to determine how the British confiscation system operates, there are the following aims:

(1) to determine the perceptions of the police financial investigators about the nature of the confiscation system provided under the DTA 1994;

(2) to determine the perceptions of the police financial investigators about the main principles and features of the confiscation legislation;

(3) to determine whether or not the chosen enforcement strategies are consistent with the directions, conditions and demands of the main provisions of the system;

(4) to determine the major defects and problems which may prevent the system from being enforced and those which could prevent the involved practitioners from achieving the full potential of the powers and provisions against illegal proceeds and profits. This also include the nature and extent of cooperation of other law enforcement agencies;

(5) to determine whether the confiscation system is efficient and useful or not; and

(6) to determine the level of resources, funding and support dedicated by government and local forces for the system.

In regard to the main objectives of the research, it is an attempt to provide an insight into the advantages and the disadvantages of a unique asset-confiscation system. The uniqueness of the British confiscation system
lies, actually, in the adoption of a so called 'value-based system'. This is a system where the definition and application of confiscation is different from others. For the British confiscation order is an order to a convicted drug trafficker to pay a sum of money, in cash, not a deprivation of certain illegal proceeds which is the most common and traditional kind of procedure.

As said above the objective is also to determine how the British system of confiscation corresponds with the Kuwaiti constitutional and criminal systems and in particular, to see how it would fit into Kuwait and other international asset-confiscation systems.

THESIS DESIGN

This thesis will include six chapters excluding the introduction and the conclusion. The first four chapters deal with the historical and philosophical context, review of relevant literature, the extent of powers, the structure of the law enforcement organisation concerning the British confiscation system and the perceptions of the British police practitioners regarding the confiscation system provided under the DTA 1994. The remaining two chapters will include an examination of the American, the Kuwaiti and the Egyptian confiscation systems as a necessary step for knowing the conditions surrounding the adoption of asset-confiscation powers and as an outside sphere to examine and judge the British confiscation system.

Chapter one examines the British concept of confiscation through its historical background and context. It will also emphasise contemporary political concerns over confiscation legislation in the British system. It then concludes with an examination of some of the problems related to the theory of confiscation.

Chapter two offers a detailed description of existing literature drawn from legal manuals, law articles, professional accounts and academic works on the subject of confiscation procedures. It explores the manner in which a single, inflexible perspective on confiscation theory has been developed. It begins to examine the possible lines of criticism of such a restrictive framework.
Chapter three include two sections. The first section contain an examination of the distinctive elements of the British confiscation legislation provided under the consolidated DTA 1994 and clarify the features and extent of the main amended powers and provisions under the consolidated DTA 1994. This section also includes an examination of certain relevant provisions in the confiscation proceedings which have raised fundamental questions about civil liberties and of the erosion of individual rights. It draws on various positions, to reveal the limitations and the extent of the potential powers of the system and shows some of the weaknesses embedded in the legislation. The criticism unfolds in such a way so bring forth the importance of an in-depth analysis regarding the confiscation problem. The second section focuses on the operational side of the confiscation provisions. It includes a review of law enforcement organisation involved in the execution of the confiscation system. The discussion also highlights the strategies of the government, the Association of the Chief Police Officers (ACPO), and some of the local police forces in approaching the confiscation legislation.

The purpose of chapter four is to present the views and perceptions of the police financial investigators and other relevant practitioners in England and Wales in regard to the text of the law and the applications, policies and strategies of enforcement adopted by the police forces. It embraces the data collected using the questionnaire and the follow-up interviews with senior police officers, and prosecutors. At the end of the chapter, the most important findings are summarised.

Chapter five provides comparative accounts of definitions, extent of powers and applications of different confiscation systems. It attempts to develop a broader understanding of the British treatment approach from different perspectives in different countries. This chapter embraces two functions; the first section highlights, in brief, the usefulness of comparative studies in general, and how they can serve to determine the definitions, limitations, credibility and legitimacy of the confiscation laws perceived by different systems. The second provides a comparison with the American system in terms of principles, applications and practices.

Chapter six deals with the Kuwaiti and the Egyptian confiscation laws as they have developed over recent decades. It begins by examining the
Kuwaiti criminal confiscation system and recent relevant developments, and provides a description of the Egyptian sequestration system. The study also shows how the two systems look at the nature and theory of confiscation. Unlike the British and the American perspectives, the Egyptian and the Kuwaiti systems have classified confiscations according to certain applications; that is to say the applications show whether confiscation is a pre-cautionary procedure or one of pure punishment.

The conclusion hopes to establish a clear picture of the actual reality of the British confiscation system by examining its explicit and implicit philosophy and its distinctive principles. It is hoped that the present research may contribute to a better understanding of the British confiscation system. The conclusion will also include a determination of legal and policy implications, suggestions for future research and the propriety of its main principles and distinctive provisions with the Kuwaiti constitutional and legal system.
CHAPTER ONE

THE BRITISH CONCEPT OF CONFISCATION
(HISTORY AND PHILOSOPHY)

1.1. INTRODUCTION

This chapter examines the British concept of confiscation in the light of main aim I which is to determine the manner in which the British system developed. This chapter also looks at the historical and philosophical background under which the legislation emerged. These are examined through a variety of provisions and the philosophical justification of the confiscation system is also determined. The analysis is confined to confiscation proceedings defined under the Drug Trafficking Offences Act 1986. The subsequent amendments to the Act which were consolidated by the DTA 1994 are also taken into account to determine the mode in which the confiscation process has established its widespread legitimacy. In the course of setting out the historical conditions of the confiscation system, close attention will be paid to those features that show the difficulties accompanying such confiscation proceedings. For example, an attempt is made to locate the social philosophy underpinning confiscation legislation in order to determine the consistency and credibility of any subsequent argument and critique.

The argument in the chapter is set out in two sections. The first section considers the historical background, by means of the documents that have contributed to the development of confiscation. In particular conditions relating to its political and legal currency are examined. There is also an attempt to trace the lines and links between the existing laws regarding drug trafficking prior to the introduction of confiscation law, and the developing political debate surrounding confiscation especially that which defines and subordinates the profits of crime to the state's right of action.

The second section discusses the social philosophy of confiscation paying attention to that which provides the means of establishing a legitimating definition and an application of the confiscation system. There will be an
overview of the various philosophical positions that constitute the frameworks of justification, signalling the intentions and scope of usage.

1.2. AIM 1: THE HISTORICAL BACKGROUND AND CONTEXT

The current confiscation order introduced by the DTOA 1986 has little meaning unless the particular circumstances and developments surrounding its enactment, are put into focus. Bazell (1989) indicates that 'confiscation as a term and a concept was used for the first time in the British Criminal Justice System under the DTOA 1986' (p. 349). However, this concept exists alongside earlier provisions for forfeiture of crime-related property. Actually, forfeiture is the only term which has been used and survived since the Forfeiture Act 1870\(^1\) which abolished deodand, escheat, attainder, corruption of the blood as a consequence of felony or treason, and also the obsolete punishment of forfeiture of property (Liverpool, 1983, p. 21). Bugueroux (1996) pointed out that 'early English law contained penalties of general forfeiture of estate and blood. As a result of abuses in the use of those laws, they were abolished until recent times\(^2\).

There is no intention to draw upon the circumstances surrounding the development of forfeiture and the rationale or the causes behind the enactment of the Forfeiture Act 1870. However, what is important is to mention the nature of the powers of state, the ownership, the rights and obligations, and the functions which have all played a part in providing the content of the Forfeiture Act 1870. The dominance of monarchy, the existence of an absolutist ownership, the underdeveloped status of the public rights, and the confinement of forfeiture function in between

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\(^1\)The term 'forfeiture' is an ancient one going back in the British system hundreds of years. Feldman (1991) indicated that it has its origins in the feudal arrangements of Anglo-Norman law (p. 25). In feudal time when a person was convicted of a felony all his property was forfeited and his family were deprived of all rights of inheritance over the property. The Medieval law also had the concept of 'deodand' under which the court had the power to order the taking of any object. By the nineteenth century, forfeiture and deodand had become anachronistic. Deodand was abolished in 1846, and forfeiture as a consequence of felony or treason was abolished by the forfeiture Act 1870 (see in this regard Zander, 1989, Chatterjee, 1983).

\(^2\)This passage is quoted from an article found on the internet information service (http://www.ssc.msu.edu/cj/cp/forfeitu.html): Forfeiture: A potent and potentially dangerous new tool.
punishment and a guarantor of obedience (loyalty and allegiance)... etc., have all attributed to a process of development in conditions and functions that would require a different form of forfeiture\textsuperscript{3}.

In securing a better means of depriving offenders of the fruits of crime, the functions of the powers of forfeiture available to courts since the Forfeiture Act 1870 and until the enactment date of the Drug Trafficking Offences Act 1986, were the only options available for courts in England and Wales\textsuperscript{4}. The continuation of forfeiture as a procedure, confined to offences which breach the common law, reflects a system that differs from what has made the later confiscation order functional. It seems that the application of the concept has moved towards a means of particularising the power in which forfeiture is used. There are many conditions and developments which have played a major part in making the necessary changes to the way forfeiture has developed.

The Hodgson Committee of 1984 in their report 'Profits of Crime and Their Recovery' attributed the origin of the concept of confiscation to the government White Paper of 1959 'Penal Practice in a Changing Society; Aspects of Future Development', and also to two subsequent reports by the Advisory Council on the Penal System (p. 8). The government White Paper suggested that personal reparation would have to be considered in the context of a fundamental re-examination of penal philosophy and practice (paragraph. 25-7). The two reports of the Advisory Council were presented to the Home Secretary in 1970. The first report 'Non-Custodial And Semi-Custodial Penalties' recommended that the courts should be given a general power to order forfeiture of property if this appeared desirable for the prevention of crime (p. 50, para 148). The second report 'Reparation by the offender' furthered the impetus towards securing a better means of depriving offenders of the fruits of their crime and considered how the principle of personal reparation might be given a more prominent place in the penal system (p. v & 59).

\textsuperscript{3}More detailed information concerning this issue is found in W. S. Holdsworth, A History of English Law, (London, Methuen, 1925), vol. VII.

\textsuperscript{4}There are various statutes under which forfeiture of particular property results or, as mentioned by the Advisory Council on the Penal System (1970), may result, from the conviction of an offender (e.g. The Prevention of Crime Act 1953; The Dangerous Drugs Act 1965; Firearms Act 1968 ... etc.).
Chapter One

The Committee pointed out that the government had adopted the recommendation provided by the first report of the Advisory Council that post-conviction forfeiture powers should be generalised. This recommendation is currently contained in section 43 of the Powers of Criminal Courts Act (PCCA 1973) which provides that:

(1) Where a person is convicted of an offence punishable on indictment with imprisonment for a term of two years or more and the court by or before which he is convicted is satisfied that any property which was in his possession or under his control at the time of his apprehension:
   (a) has been used for the purpose of committing, or facilitating the commission of, any offence; or
   (b) was intended by him to be used for that purpose;

(2) Facilitating the commission of an offence shall be taken... to include the taking of any steps after it has been committed for the purpose of disposing of any property to which it relates or of avoiding apprehension or detention and references... to an offence punishable with imprisonment shall be construed without regard to any prohibition or restriction imposed by any enactment on the imprisonment of young offenders;

(3) An order under this section shall operate to deprive the offender of his rights, if any, in the property to which it relates, and the property shall (if not already in their possession) be taken into the possession of the police.

Accordingly, a trafficker's working capital can be forfeited on the grounds that he or she intended to use it for the purposes of committing further criminal acts. However, this still leaves the defendant the freedom to enjoy the profits of his criminal enterprise (Talbot, 1991). Section 11 of the Courts Act 1971, effectively imposes a time-limit within which the forfeiture power under section 43 can be exercised (Chatterjee, 1983). In R. v. Menocal, for example, the Courts Act imposes a time-limit of twenty-eight days on the power of a court to vary a sentence after it has been pronounced, but the order was in this case made more than twenty-eight days after conviction. The House of Lords had no hesitation in holding that there was no jurisdiction to make the order. Liverpool (1983) suggested, on this particular case, that this decision of the House of Lords clearly strengthens the submission that confiscation orders could be used to supplement forfeiture orders where the court was unable to make up its mind at the time of conviction whether or not to order forfeiture (p. 30).

An order for forfeiture was made in respect of a sum of money which was found with the defendant. As the accused admitted, the sum of money she possessed was for the purpose of being handed over for the payment of illegally imported drugs (R. versus Menocal, in The All England Law Reports, 1979 (London, Butterworths), vol. II, p. 510).
Lovell White Durrant\(^6\) in their report 'Money Laundering in England and Wales' (1994), pointed out that the power of forfeiture under section 43 is confined only to the 'instrumentalities' of crime, that is the physical instruments actually involved in the preparation of crime, and did not provide for the forfeiture of financial proceeds of an offence (p. 3).

In following the development of the law of forfeiture in relation to drug-related offences in particular, Chatterji (1983) asserted that it was unknown to Common Law. He pointed out that 'despite the fact that the concept of forfeiture was known in early English law, forfeiture in relation to drug-related offences cannot be based on the early experiences, because it is a primarily statute-based law' (p. 7).

Alongside the above mentioned statute-based Act (PCCA 1973), specific powers to order forfeiture of goods and gains connected with drug offences are contained in more than one statute. The most important statutes in this regard are: (a) Police (Property) Act 1897; (b) Theft Act 1968; (c) Misuse of Drugs Act 1971; and (d) Criminal Justice Act 1972\(^7\). Section 27 (1) of the Misuse of Drugs Act (MDA 1971), in particular, had played a major role in making the confiscation concept functional. It allowed a much wider power of forfeiture. It provided that:

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\text{The court by or before which a person is convicted of an offence under this Act may order anything shown to the satisfaction of the court to relate to the offence to be forfeited.}
\]

Under this Act, the power of the British courts to order forfeiture of matters relating to an offence was discretionary. They could order the forfeiture of anything shown 'to relate to the offence'. This means that forfeiture was not limited to that which was found in the possession of the convicted person. This particular subsection gave the court the authority to forfeit a house or money or any other property which might have been used in relation to the offence. One can also find that the function of this wider power of forfeiture was indistinguishable from the general power of forfeiture in section 43 of the 1973 Act; there was

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\(^6\)Lovell White Durrant is one of the largest law firms in Europe. It serves business clients in the UK and overseas from its base in the city of London.

\(^7\)The application of section 23 of the Criminal Justice Act 1972 which empowers the courts to deprive a person of property used or intended for use for the purpose of crime (in general), has been restricted by the Police (Property) Act 1897 (section 23 (3) (a) and (b) of the latter Act).
however a loophole in this Act (the MDA 1971). The forfeiture power provided under this Act could not be used against defendants convicted of conspiracy to commit certain offences.

The judicial pronouncement in *R. v. Cutlibertson* (1980) was the most important decision in the development of forfeiture and confiscation law. This was one of those drug trafficking cases known as the 'Operation Julie' case\(^8\) which attracted a great deal of public attention and gained some notoriety in 1980 (Nicol, 1987). Those convicted at the trial had over a number of years manufactured and sold LSD\(^9\). The offenders were sentenced to long terms of imprisonment. In addition, the judge made an order, confirmed by the Court of Appeal, for the forfeiture of certain assets in their hands, exercising a power given by section 27(1) of the Misuse of Drugs Act 1971. Huge profits had been made, and the prosecution was able to trace some £750,000 of those profits to the assets of the offenders\(^10\). The power given to the court under the Act was to 'order anything shown to the satisfaction of the Court to relate to the offence to be forfeited'. A further appeal was made to the House of Lords against the orders for forfeiture, and the Lords 'with considerable regret' found itself compelled to allow the appeals.

Among the reasons given, the Lords held that Parliament had never intended orders of forfeiture to 'serve as a means of stripping the drug traffickers of the total profits of their unlawful enterprises'. The power could only be used where it was 'possible to identify something tangible that can fairly be said to relate to any such transaction such as the drugs involved, the apparatus for making them, the vehicles used for transporting them or the cash ready to be or having just been handed over for them'. The House of Lords also held that an English court has no jurisdiction to make an order for the transfer of property situated abroad; and that no order could be made under section 27(1) of the Misuse of Drugs Act 1971 because the defendants were charged not with offences

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\(^8\)After one of the policewoman involved in the investigation. The case *R. v Cuthberson* [1981] was tried in the Crown Court at Bristol.

\(^9\)LSD is a hallucinogenic drug lysergic acid.

\(^10\)These assets included cash, cars, deposits of money and securities at bank accounts in Switzerland and France, rights and interests in a Post Office savings account, a debt due to one of the gang, paintings and electrical equipment.
under this Act, but with conspiracy to commit them\textsuperscript{11} (Hodgson' report, 1984).

The apparent inability of the Court to deprive an offender of the profits of his offending seems to be one of the main factors which caused substantial public concern (Ibid.). The decision of the House of Lords in Cuthbertson's case was greeted by a chorus of disapproval from the press, and calls for the gap to be closed (Burton, 1989). The Times, for example, declared that '... the decision will understandably result in feelings of outrage' (The Times, 13th June, 1980), particularly when it was realised that there were many other criminal activities where huge profits were made and the Court's powers were similarly restricted.

It seems that the decision of the House of Lords troubled the Howard League for Penal Reform\textsuperscript{12}. The League believed that an examination of the law with a view to its reform in regard to forfeiture powers would involve complex issues which deserved review in the context of the whole armoury of the court's powers to make monetary and proprietary orders. Therefore, under its auspices, considered by some to be an independent body, a Committee was formed chaired by Derek Hodgson to examine the law relating to the forfeiture of property associated with crime, in the light of the House of Lords' judgement in \textit{R. v. Cuthbertson and others} (Nicol, 1989).

The Committee produced its report in 1984, \textit{`Profits of Crime and Their Recovery'}. It recommended, \textit{inter alia}, that powers be vested in Criminal Courts to confiscate the benefit accruing to a defendant as a direct consequence of committing an offence of which he is convicted. The committee explained that the general application of such a power in respect of all offences would be wasteful in relation to minor contraventions and, in some cases, possibly unjust; it might result in a substantial and unacceptable increase in penalties; a list of offences in respect of which confiscation was appropriate would be wholly impracticable; limiting confiscation to 'serious crime', defined perhaps as offences carrying a possible prison sentence, would exclude many profitable regulatory offences (the terms of reference of the Committee


\textsuperscript{12}A research and pressure group for reform of sentencing and penal policy.
went beyond drug cases alone). An upper limit could be safely left to the discretion of the judge (pp. 150-156).

The terms of reference of Hodgson’s Committee required it to consider wider issues than simply the profits of drug trafficking. It was concerned with all types of criminal activities, and also with restitution of goods to their rightful owner and with compensation to victims. The report presented a sufficient examination of the historical developments in English law regarding forfeiture and the powers of the civil courts which are analogous to the powers of the criminal courts. It is worth mentioning that this report was the only available study to determine the situation and problems of confiscating the proceeds of wrongdoing during the period prior to the enactment of the Drug Trafficking Offences Act 1986. It is also considered to be one of the few sources which looked at the theory and application of a confiscation scheme.

The Hodgson committee also mentioned that, excluding crimes of violence where imprisonment may be the only way in which society can be protected, there are three broad categories of illegal conduct from which substantial gains can be made. These are 'victim' crimes, the paradigms of which are fraud and theft; 'non-victim' crimes, which refer to drug and pornography rackets, unlawful gaming, the transportation of illegal immigrants and the corruption of officials; and the third category are those regulatory offences that involve less obvious criminality.

The report asserted that, with one exception, no serious attempts were made to redress the harm done and the profit made by the second and third categories of offending. The exceptions are procedures adopted by the Inland Revenue and Customs and Excise which provide, in effect, for the confiscation of the gains of offenders guilty of offences of immediately recognisable criminality. The Committee clarified that when there is no identifiable victim who can be compensated, the criminal law provides no direct means of confiscating the proceeds of crime, although sometimes a fine can be calculated so as to achieve the same result. The problem with fines is that instead of forfeiting the proceeds in specie, the trial judge could have imposed a fine equivalent to their value, that is to say there is no upper limit on the amount of a fine which a Crown Court judge can impose. Non-payment of a fine, however, can, at most, lead to
imprisonment. For defendants receiving long sentences concurrently with a fine, this sanction then becomes a wholly ineffective incentive to pay. Moreover, given the growing sophistication of drug trafficking networks, and of the financial systems, it was not difficult for the proceeds of drug trafficking to be moved rapidly from the jurisdiction in which the trafficker was being prosecuted, making even with the levying of heavy fines a system which was effectively counter-productive.

In relation to civil powers, Talbot & Hinton (1991) added 'that in cases where there is a victim, there are some remedies in civil courts that have the effect of confiscating the proceeds of wrongdoing, such as account of profits from using another's intellectual property, account of profits from abuse of trust, waiver of tort, and exemplary damages. All these remedies have the effect and the impact of confiscating the proceeds of wrongdoing.'

In this respect, the Hodgson Committee did not think that the problem of confiscating the proceeds of crime should be solved by expanding these civil remedies, which in fact reflect penal sanctions and as such are thought by some to sit uncomfortably in the civil law system. It found that this concept of quasi-criminal forfeiture is 'troubling' for it could too easily be used 'as a way of penalising criminal conduct without the safeguards of the ordinary criminal process'. The committee, therefore, believed that their experience was useful in several respects in considering the nature and extent of the powers that might be given to the criminal courts. The report concluded by recommending that criminal courts should have the power to order the confiscation of proceeds of an offence of which the defendant has been convicted or asked to be taken into consideration (p. 151). The Committee also distinguished between 'forfeiture' and 'confiscation' by providing the following definitions: (1984):

'Forfeiture is the power of the Court to take property that is immediately connected with an offence'.

and

'Confiscation is the depriving of an offender of the proceeds or the profits of crime' (p. 5).
1.2.1. Social and Political Concerns

Parallel to these legal developments and consequences, there were others of equal significance. During the early 1980s, the issue of illegal drug use gave rise to social and political concerns that had been dormant since the 1960s (Goodsir, in Bean, 1993, p. 131). This was most likely due to the assumption underlying the British drug policies in the 1960s and 1970s, which were rooted in a medical model of response to drug problems. This principle was implicit in the Rolleston Report of 1926 and was explicitly stated by the two Brain Committees of 1961 and 1965. Goodsir asserted that illegal drugs and the management of drug problems became a matter of general interest. The fear of the consequences of rising levels of illegal use, and later, with evidence of strong links between injecting drugs using sharing needles and HIV infection, there were serious concerns which led to changes in drug policy (p. 132).

Feldman (1988) says that in 1985, a wave of public concern about drug addiction swept across the country. Young people saw pop stars suffering and dying from sniffing, smoking and injecting drugs. Consequently, the then Home Secretary, Leon Brittan, committed the government to take urgent steps to combat the problem (p. 4). Moreover, there were numerous political discourses aimed at shifting drug policies towards the supply side. On the other hand, a consensus emerged among politicians and judiciary during the early 1980s that drugs sentencing had become too soft. Goodsir (1993) attributed that to the feeling that a comprehensive 'crackdown' on drug suppliers was necessary. Goodsir exemplifies this by saying that in 1983, Lord Lane, C. J. asserted that;

'Anything which courts of this country can do by way of deterrent sentences on those found guilty of crimes involving Class A drugs should be done.' (Goodsir, 1993, p. 138)

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13 The Ministry of Health set up a Departmental Committee under the chairmanship of Sir Humphrey Rolleston. This Committee accepted a disease model of addiction, regarding it as a medical problem rather than as a vice to be dealt with entirely by their criminal law (D'Orban, 1986, p. 221).

14 The first Brain Report of 1961 recommended that addiction should be regarded as 'an expression of mental disorder rather than a form of criminal behaviour'. It did not recommended any change in the law (Ibid., p. 222). The second Brain report of 1965 recommended that a system of compulsory notification should be introduced. Special treatment centres should be established and that the right to prescribe heroin and cocaine to addicts should be limited to doctors working at those centres. It is worth mentioning here that the recommendations of the later report were implemented in the Dangerous Drugs Act 1967.
The then Home Office Secretary Leon Brittan in a speech to the London Diplomatic association in 1983, expressing the government's concern about drug abuse stated;

'Drug abuse is a disease from which no country and no section of modern society seems immune. Stamping it out will be slow and painful. It requires co-operation between Governments, law enforcement agencies, professionals, schools and families. The rewards are great if we succeed and the price of ultimate failure is unthinkable' (Home Office, 1985, p.3)

Mr. Greg Knight (MP), in 1986 said that it is not often that there is such consensus in the House and he hoped that all Members would agree with the Prime Minister, Margaret Thatcher, who on 9 August the previous year (1985), addressed her remarks to drug traffickers by saying;

'We are after you. The pursuit will be relentless. The effort will get greater and greater until we have beaten you. The penalty will be long prison sentences. The penalty will be confiscation of everything you have ever gotten from drug smuggling'. (Hansard's Parliamentary Debates 21/1/86, Col. 273)

In addition to that, the Home Affairs Committee has used even stronger language in their Interim Report on the Misuse of Hard Drugs (Home Affairs Committee, 1985). The Committee described the prospect of South American cocaine exporters targeting the British market as 'the most serious peacetime threat to our national well-being' (p. iii).

Feldman (1991) asserted that Britain's legislation to deprive offenders of the proceeds of crime was a response to the increase in the quantity of drugs being trafficked inside and outside the country (p. 25). The actual extent of illegal drug use and the quantity of illegal drugs in England and Wales was unknown. Different statistics provided a series of indicators and evidence which may provide an explanation for the new trends in policies and strategies. In 1978, the quantity of cannabis (herbal, plants, resin and liquid) seized, for example, was 15,163.3 kilograms. In 1985, the quantity has sharply risen to 68,630.6 kg. The number of persons found guilty, cautioned or dealt with by compounding for drugs offences by police force and other authorities (HM Customs and Excise and British Transport Police) has also risen from 13,684 in 1978 to 26,958 in 1985 (near 100% increase). The number of seizures of controlled drugs by police or other organisations show a marked increase, from 13,454 seizures in 1978
to 30,466 in 1985 (more than 100% increase) (Home Office Statistical Bulletin, 1989, Sept., Table 1.1).

Table (1.1) Seizures of controlled drugs

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<tr>
<td></td>
<td>13,454</td>
<td>16,056</td>
<td>17,617</td>
<td>19,428</td>
<td>21,636</td>
<td>26,216</td>
<td>28,466</td>
<td>30,466</td>
<td>30,478</td>
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<td>1987</td>
<td>38,235</td>
<td>52,131</td>
<td>60,859</td>
<td>69,807</td>
<td>72,065</td>
<td>87,485</td>
<td>107,629</td>
<td>114,539</td>
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Table (1.2) Persons found guilty, cautioned or dealt with by compounding from 1978 to 1995 (this shows the continuous increase in the number of cases even after the enactment of the recommended confiscation system).

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<tr>
<td>Possession</td>
<td>11,771</td>
<td>12,153</td>
<td>14,030</td>
<td>14,850</td>
<td>17,425</td>
<td>20,286</td>
<td>21,399</td>
<td>22,569</td>
<td>20,052</td>
</tr>
<tr>
<td>Trafficking</td>
<td>1,934</td>
<td>2,059</td>
<td>2,496</td>
<td>2,865</td>
<td>2,907</td>
<td>3,403</td>
<td>4,315</td>
<td>5,244</td>
<td>4,679</td>
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<tr>
<td>Total</td>
<td>13,604</td>
<td>14,339</td>
<td>17,158</td>
<td>17,921</td>
<td>20,356</td>
<td>23,442</td>
<td>25,240</td>
<td>26,958</td>
<td>23,905</td>
</tr>
<tr>
<td>Possession</td>
<td>22,017</td>
<td>26,372</td>
<td>33,207</td>
<td>39,350</td>
<td>42,575</td>
<td>43,492</td>
<td>60,482</td>
<td>76,127</td>
<td>82,796</td>
</tr>
<tr>
<td>Trafficking</td>
<td>5,077</td>
<td>5,019</td>
<td>6,108</td>
<td>6,680</td>
<td>6,329</td>
<td>6,678</td>
<td>9,170</td>
<td>9,906</td>
<td>15,852</td>
</tr>
<tr>
<td>Total</td>
<td>26,278</td>
<td>30,515</td>
<td>39,415</td>
<td>44,922</td>
<td>47,616</td>
<td>48,927</td>
<td>68,480</td>
<td>85,693</td>
<td>93,631</td>
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Source: Home Office Statistical Bulletin, 1989, Sept. Table 1.1)

Figure (1.1) A graphical chart of the rise in unlawful possession and trafficking cases from 1978 - 1995. Source: Home Office Statistical Bulletin, 1989, Sept. Table 1.1)

Stimson (1987) pointed out that the drugs problem has become a politicised issue, attracting a political consensus which persisted until
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quite recently (p. 275). Drug trafficking offences, in particular, were described as the fastest growing area of international crime. Virtually, they have been at the forefront of stimulating developments in terms of legislation and the organisation of law enforcement (Dorn 1994, p. ix). Several cross-party Parliamentary Committees (e.g. Social Services Committee 1984-5; Home affairs Select Committee 1985) were in agreement, warning of the dangers facing Britain from heroin and cocaine trafficking (South, 1995, p. 30).

The search for new ways of containment and treatment was the main concern of the public and politicians. Therefore, 'taking the profits out of crime', the subject of this research, is one of the legislative developments that has accompanied the growth of drug trafficking offences. It has become an important rhetorical motif in the English-speaking developed world for the past decade (Levi & Ososky, 1995), and has recently become live in many other countries largely in the context of the huge profits made through drugs.

The Parliamentary Under Secretary of State at the Home Office, and Chairman of the Interdepartmental Ministerial Group on Drug Misuse, then Mr. David Mellor, invited the Home Affairs Committee, who had been concerned for many years about the misuse of drugs, to make recommendations as a matter of urgency to help the government decide on early legislation to meet the approaching threat of increased drug trafficking. The Home Affairs Committee in their interim report stated four basic objectives for dealing with the growing threat of international drug trafficking;

(1) Stopping as far as possible the importation of drugs by;
   (a) physical interception of supplies;
   (b) prosecution and punishment; and
   (c) elimination of drug crops.

(2) Attacking the profits of the traffickers.

(3) Stopping the disposal of drug profits through the 'laundering' of money; and

(4) Reducing the long term demand by education.

On the basis of its conclusions, the committee stated that it shares the American's belief that the ruthlessness of big drug dealers must be met by equally ruthless penalties once they are caught, tried and convicted. These penalties must be of such a character that no major drug dealer will risk
taking on the United Kingdom market because of the penalties that will be imposed. It recommended, therefore, to give the courts draconian powers in both civil and criminal law to strip drug dealers of all the assets acquired from their dealings in drugs, in accordance with American practice. Drug dealers must be made to lose everything; their homes, their money and all that they possess which can be attributed to their profits from selling drugs (House of Commons, Home Affairs Committee, session 1984-85).

The Government responded by introducing such powers in several Acts. The first was in the Drug Trafficking Offences Act 1986 which was considered to be an important precedent for further statutes (Home Affairs Committee, Seventh Report, session 1988-89). Powers to trace, freeze and confiscate the proceeds of drug trafficking in Scotland are contained in the Criminal Justice Act (Scotland) 1987. Powers to recover the proceeds of other serious profitable crimes are contained in Part VI of the Criminal Justice Act 1988, while the prevention of Terrorism (Temporary Provisions) Act 1989 enabled the confiscation of terrorist related funds. It is quite obvious that confiscation provisions which are contained in all these specific Acts are based upon the recommendations of the Home Affairs Committee and the Hodgson's Committee. Moreover, it has incorporated elements drawn from the Police and Criminal Evidence Act 1984, the law of receivership, the common law injunctions freezing suspected proceeds of crime, and criminal law and sentencing (Feldman, 1988).

1.3. AIM 2: THE PHILOSOPHICAL JUSTIFICATION

Close inspection of the historical and the socio-political development of the confiscation system, leads one to notice that the social justification for seeking confiscation of all the proceeds and the use of powerful procedures for tracing, seizing and then confiscating the suspected illegal gains from a convicted person was never questioned. Yet confiscation requires justification; rather the principle was implicitly accepted that confiscation should follow conviction as a matter of course (Talbot, 1991 and Mitchell et al, 1992). Levi & Osofsky (1995) asserted that confiscation
Chapter One

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and forfeiture have received very limited attention from English philosophers of punishment (p. 12).

The act of confiscation itself involves taking goods and service away from people. To search for justification, one has to begin with its character and effects. In this regard, Hassan (1997) indicates that confiscation systems undergo variable fluctuations which result mainly from the developments and changes of certain ideologies and theories of its various schools of thought (e.g. the classical school, the neo-classical school, the positive school, the social defence school and other subsequent reconciliatory schools). In Britain, the confiscation system is also bound up with a contention about its character and effects.

Many theories or rather different socio-legal approaches have presented a variety of perspectives which justify certain moral reactions and measures in dealing with particular behaviours or acts. The development of philosophies of punishment, theories of penology, the sociology of punishment, theories of sentencing, and restorative theories all represent the inevitable demand and search for a clear rationale. However, the extent of theorisation developed in those various disciplines with regard to confiscation appear to be scarce. This might be due to the novelty of the concept for the criminal justice systems. Feldman (1988) notes that 'the concept was unknown to the law prior to the enactment of the DTOA 1986'. More seriously, the lack of theoretical development has produced some doubt about the Act's rationale. It is still strange to see an assertion that even the social justification of forfeiture law has never been questioned. This latter statement has been repeated several times by some writers and practitioners. (see Talbot & Hinton, (1991) and Mitchell et al (1992)) and it seems as if citing this statement would somehow facilitate the writers' task in establishing the basis of their discussion and help classify and justify the subject they are dealing with.

The arguments dealing with the character of the British confiscation system seem to be influenced by two underpinning perspectives; the first is a belief that a confiscation order is an act of punishment, while the second is that confiscation is to be seen as a reparative act that aims merely at restoring the status quo of the drug trafficker.
The Hodgson Committee indicates that compensation, restitution, forfeiture, and confiscation orders discharge or reduce a defendant's civil liability or eliminate an advantage which he previously had over honest citizens. They try to restore the *status quo*; they do not punish. The Committee, contrary to the confiscation legislation adopted by Parliament, stipulates that to achieve a restorative type of confiscation, it should be confined only to the net profits from the offence. The Committee explains that if confiscation includes the gross proceeds of all involved expenses and payments for suppliers, then confiscation would go further than would be necessary to put it in the same position as if the offenders had not offended (Hodgson's Report, p.133; s. 4 (1) DTA 1994\(^{15}\)). This means confiscation is no longer considered as an aspect of mere restoration for the *status quo* anymore.

The original provisions of the 1986 Act, and even the subsequent amendments under the DTA 1994, does not allow a deduction for expenses, legitimate or otherwise as recommended by Hodgson's committee. The Act refers to confiscation of 'proceeds' not 'profits'. Zander (1989) considers this an extraordinarily wide confiscation power. It can be enforced, he says, against all of the property of the accused regardless of whether or not that property was itself the proceeds of drug trafficking. Moreover, if the accused has kept the proceeds of his drug trafficking abroad beyond the reach of the English courts, the courts are empowered to recover through confiscation order the sale of property of equivalent value which is within this country.

What the Hodgson report advocated seems to be overlooked by adopting such provisions. Moreover, punitive presuppositions have managed to sneak through. e.g. the use of the word 'draconian' by Mitchell *et al* and previously by the Home Affairs Committee (Fifth Report, 1984-85) and by Mr. Mellor the Parliamentary Under-Secretary of State for the Home Department, who asserts the need for more than the available punitive procedures (notably imprisonment). Mr. Mellor pointed out that sending drug traffickers to prison is not a sufficient deterrent and the scale of the

\(^{15}\)Section 4 (1) of the DTA 1994 provides that "any payment or other rewards received by a person at any time (whether before or after the commencement of this Act) in connection with drug trafficking carried on by him or another person are his proceeds of drug trafficking; and the value of his proceeds of drug trafficking is the aggregate of the values of the payments or other rewards".
international problem posed by major drug traffickers merits extraordinary procedures which one can call 'draconian' (Hansard, 1985). This term has been used by many judges. Law reports reveal that many judges see the provisions of the DTA as draconian (see R.v Chrastny (no 2) 1991; R.v Dickens, 1990; R.v Redbourne, 1992; R.v Robson, 1991 and R.v Saunders, 1991). When 'draconian' means extraordinary procedures that goes beyond the limited impact of imprisonment, this no doubt reflects a punitive trend. Mr. Hurd (the then Secretary of State for the Home Department) stated:

'This Bill offers us a sharp new weapon in the fight against drugs... we have to tackle both supply and demand. On the supply side, the key tasks are international co-operation, effective enforcement and deterrence... our determination to strengthen deterrence is exemplified in the Bill (Hansard, 1986).'

Mitchell et al (1992) when they discuss whether a defendant can elect not to pay a confiscation order state that:

'the original provisions of the DTOA 1986 provides that where the Crown Court makes a confiscation order it must fix a term of imprisonment to be served in case of default (s. 6). Consequently, confiscation orders are framed in terms that appear to grant the defendant the right to choose whether to pay such an order or to serve the further period of imprisonment stated therein. But is that in fact the case? If it were, confiscation would devolve into being a punitive measure which could not be justified. That is, the state would now punish the defendant not only for his transgression of the law but potentially, should the defendant elect not to pay a confiscation order, for his successful transgression of the law as measured in terms of financial gain: the 'successful' criminal thereby being awarded a more severe sentence than his unsuccessful co-offender. Suddenly confiscation loses its flavour of reparativeness, of righting the balance, and assumes the guise of a penal measure, something the legislation specifically seeks to avoid. To prevent such an outcome, the defendant must be compelled to pay the confiscation order; should he not be so compelled, the objective of the legislation would not be achieved. Prima facie, therefore, the defendant must be denied the right to choose whether to satisfy a confiscation order or not'.

This statement can be considered as clear evidence of the punitive character of the confiscation system. Mitchell and his colleagues say that if the DTOA 1986 provides that the defendant is granted the right to choose to pay or to serve a further period of imprisonment, then confiscation would devolve into being a punitive measure which could not be justified. The state would punish the defendant not only for his
transgression of the law but for other matters too; a fact which Mitchell and his colleagues did not explain is that the DTOA has indeed granted the defendant that right. This means that what Mitchell and his colleagues think are the consequences are in fact the actual character of the confiscation system provided by the DTOA 1986.

Attempts to avoid introducing a penal measure have not been successful. In fact, the legislation does not provide a clear description of the confiscation provisions. On the contrary Parliament's intention seems to be to use the toughest and most uncompromising means and powers against drug trafficking offences (by increasing the prison sentences, confiscation, forfeiture, fines, and no reduction in prison sentences).

The statement concludes 'defendants must be compelled to pay the confiscation orders'. Of course, this would not prevent or repeal any punitive feature of the legislation. There is built into it a determination to chase and claim the proceeds, even after the defendants have served the default sentences - and these will only confirm how extraordinary and punitive the system is.

Martin Hinton (1992) in 'Are Drug Trafficking Confiscation Orders Punitive?' argues that orders under the DTOA 1986 are reparative not penal. He thinks that the principle underpinning the purpose of the confiscation order is centred on the idea that confiscation is to compensate society for the loss it sustains as a result of drug trafficking. Where society is the victim, it is only right therefore, that society be compensated (p. 1264). To lay stress on the reparative aspect of the system is to make an amount equal to the defendant's benefit or the amount that he may realise, i.e. the amount he can pay, whichever is the lesser. Hinton adds that the legislation permits the defendant to seek a reduction in a confiscation order to account for a proportionate reduction in the value of his realisable property. Hinton points out that in this respect confiscation is tantamount to the doctrine of unjust enrichment. What is confiscated is no more than the amount that remains within the defendant's possession or control and represents his enrichment via illegal means. The defendant in this case is returned to that financial position he enjoyed prior to his conduct of drug trafficking. The advantages that accrue to a trafficker as a consequence of drug trafficking are denied the law abiding citizen. Thus
the making of a confiscation order sees the balance righted with the making of reparation (p. 1265).

Moreover, Hinton has linked the reparative aspect of the system to the adoption of a value-based system. He states that:

'the legislature has purposely favoured 'value confiscation' as opposed to confiscation per se, for the latter has a more profound effect upon the bank balances of traffickers, an effect the former could not have without contravening the European Convention on Human Rights, in particular article 6, by not attempting to override the defendant's proprietary rights in any specific property. Rather it seeks to value the financial defendant as a consequence of his illegal activities. This advantage the defendant has no right to, due to its illegal origin. If the defendant has no right to this advantage, then it follows that in confiscating the same no right can be breached by the state. Equally if it is an advantage accruing to the defendant that he has no right to that which is confiscated, then confiscation cannot be said to prejudice that defendant nor penalise him'(p. 1264).

Hinton's argument still appears to be insufficient and inconclusive. The evidence he is referring to is not quite so sound. Saying, for example, that the imposition of a confiscation order depends upon whether the defendant can pay it or not and that the defendant can seek reduction is not persuasive for three main reasons: First, the property-based system which has been enforced by the majority of countries in the world, and the majority of European countries in particular, and its legality which has been approved by many international circles like the United Nations and some National and Regional Councils, is in itself strong evidence of a legitimacy which entails consideration and respect for the European Convention on Human Rights. Second, the property-based system is by no means a new phenomena. It is almost similar to the British forfeiture order which operates in rem (i.e. the goods forfeited are tainted and thereby the defendant's proprietary rights in them is denied). This has been acknowledged by the British legislator himself without questioning the social justifications. If a property-based system has an effect which contravenes with the European Convention on Human Rights, then what will the government think about the general power of forfeiture provided under section 43 of PCCA 1973.

The third reason relies on the decision of the Strasbourg Court. As said earlier, nine judges at that Court rule unanimously that a British court
acted unlawfully in trying to confiscate £59,000 of Peter Welch's drug profits after he was convicted of a plot to smuggle £4 million of cannabis to UK. Ben Emmerson, the barrister representing the convicted drug trafficker in this case, says that despite warnings before the legislation was introduced that it would breach the convention, 'the Home Office has buried its head in the sand and built an entire legislative framework that these confiscation orders are not criminal penalties. It was that myth that the court exposed'.

One must notice that confiscation legislation is not just about an additional ancillary order but a system which includes different procedures and provisions. Each of these procedures has its own effects and consequences. Entering and searching a property of a person who was not suspected of being a drug trafficker or without any early notice or conviction; the confiscation of properties 'assumed' to be proceeds of a timeworn crime(s) just because the defendant does not have proof to disproof the court's allegation; preventing a person from contacting his relatives or even his lawyer and some other provisions, all raise some fundamental questions about individual and property rights. Many believe that infringing such rights without a solid criminal standard of proof is unacceptable.

Sue Taylor in an interview with Grania Langdon-Down (Independent, 1st Nov. 1995) states that:

'If a criminal was said to have made £100,000 from crime but had squandered all the money, then the order must be paid from the sale of other assets, legitimately owned or not, even if that means, for example, making his family homeless'.

She also added:

'I call it the 'but for' rule; but for the proceeds of the crime the person wouldn't have the house or the business or affluent lifestyle. Confiscation orders can make even bankruptcy seem generous as a receiver acting under the DTA or Proceeds of Crime Act can take every single asset, down to the clothes the person is wearing. While criminals may roll over quietly and accept a prison sentence, they will fight tooth and nail to keep their lifestyle sweet for their release'.

16Sue Taylor is the Head of the Central Confiscation Branch-London and co-editor with Mitchell et al., Confiscation.
These two statements clearly expose the character of the system and show to what extent it is punitive. Not only will the defendants suffer but so too will their families who will be liable to face unusual consequences such as losing their properties and being deprived of their facilities.

Levi & Osofsky (1995) further confuse the character of the system. On one hand, they seem to be advocating a reparation point of view and, on the other, they display sentiments of those offenders who view the proceeds of crime as their 'entitlement'. Removing this presumed entitlement would naturally cause resentment and be seen as punitive (p. 12). The authors here do not question the character of confiscation but they are led to this view because they accepted what Ashworth has said about the principle and justification of confiscation which says that confiscation is not part of the punitive component of the sentence and does not mitigate or aggravate it. This means that Levi & Osofsky are not sure about the actual character of confiscation or it was not one of their concerns for their 1995 study. In another study 'Regulating Fraud' (1987) Levi shows that the sanction of asset-confiscation means different things to different people 'it may be viewed as a general or individual deterrent, as retribution, and......as incapacitation' (quoted in Fisse, 1989, p.374).

1.4. SUMMARY AND DISCUSSION

This chapter has attempted to produce an historical perspective to the various conditions which have given the confiscation order its current shape. One of the most important developments was the operation 'Julie case' but even before that, it is clear that Parliament was concerned to secure better means of depriving offenders of the fruits of crime by considering how the principle of personal reparation by the offender might be given a more prominent place in the penal system (the Advisory Council Report 'Reparation by the offender' in 1970). The famous drug trafficking case (Julie case) attracted a great deal of public attention in 1980 and moved things further along. The judgement in this particular case was greeted by a chorus of disapproval from the public and press because it disclosed the inability of the British courts to deprive effectively an offender of the profits of his offending. It also exposed certain contradictions, ambiguities and defects not only in the available forfeiture
laws but in the clarity of definitions, principles and interpretations by law enforcement agencies (Crown Court, Court of Appeal, and the House of Lords).

This situation has led Parliament to search for new alternatives and new solutions. Two committees were established. The common aspects between them they were non-governmental committees (one was a Parliamentary Home Affairs Committee and the other was a private committee). Both committees recommended that courts must be empowered with a new confiscation system to permit law enforcement agencies to trace, seize and confiscate the proceeds and profits of drug trafficking offences.

However, the starting point of both committees was different. The Parliamentary Committee aimed at confronting the ruthlessness of drug traffickers with equally ruthless punishments, while the Hodgson's Committee recommended a conditioned confiscation system. The latter committee suggested certain safeguards and conditions for adopting the recommended confiscation order to redress, for example, the harm done and profits made by non-victim crimes within the safeguards of the ordinary criminal process.

In addition, the adoption of a new confiscation system reflected an awareness of the development of drug trafficking which has led to a change in the governmental policies and strategies. The discussions and arguments about the dangers of drug trafficking offences have progressed in such a way that there has been more awareness that confiscation might be the main weapon in the fight against drug trafficking offences. One can observe here how the concept of drug 'dealing', as Dorn et al (1992) mentioned, metamorphosed into that of drug 'trafficking' which aims at accumulation and the investment by laundering illegal proceeds and the shift from minor local dealings to national and international organised networks. Certainly this financial aspect has produced new and important dimensions leading to even more difficulties about defining the spheres and modes of confiscation proceedings, and the related functions of the law enforcement agencies. A drug trafficking offence has now begun to appear as a legitimate reason for confiscating benefits and proceeds from that offence; benefits which are now classified as illegal gains.
This chapter has shown that it is important to focus on the various social and political concerns that gives momentum to a confiscation order which has made them into an issue of contemporary importance. The essential point is that the shift in discourse from drugs as a social and national problem to a regional and international problem is a crucial condition for arguing that confiscation should be seen as a solution.

The chapter also revealed that there is a lack of extensive social theorisation in regard to the British confiscation legislation. The philosophical justifications have been considered. These show that there has been little theorising about confiscation. It is true that there are efforts to establish individual perspectives, seeking to sustain credibility and legitimacy in illustrating the principle and terms of application of such legislation. Nevertheless, the final results of such efforts remain restrictive. They mostly contribute to a simplification of the law, of which the practitioners often feel necessary. That the academic discussion has also been restricted, is a matter in regret. Perhaps this is due to the domination of other concerns which have reduced the opportunity for a critical understanding and analysis of the social principles and premises involved in confiscation.

A close look to the differences between the recommended confiscation system by the Hodgson's Committee and the current adopted legislation will determine the actual character of the system. This system is planned to be reparative, but the actual provisions and applications provided under the current legislation overlook this original principle. What is unusual and odd about the present practice is that allegations of the government and many of their followers define that the legislation is a mere reparative system and devoid of any punitive element.

In justifying confiscation, one can infer that it could embody elements of all theories and perspectives discussed in this chapter. In courts, justifications depend mostly upon the conditions of each case, for example, the backgrounds of the judges, quality of argument and the clarity of evidences. Some judges can be faced with different demands, some are dictated by law, while others are dictated by conventions appropriate to their offices. The judge, for instance, may sentence the first person for retributive reasons, the second person for deterrence and third
for reform, believing that his duty in the latter case is to help the offender rather than (say) to protect society. This is indeed more close to the actual fact of the current application of the British confiscation system.

Such applications will always produce inconsistencies. Philip Bean (1981) clarifies that such inconsistencies are accepted as a feature of modern life. This means that attempts to define or identify the characters of confiscation, must refer not to general constitutional principles and guidelines but to certain judgements by different courts which are rarely theoretically pure or which themselves are devoted to only one theory to the exclusion of others. Accordingly, if Parliament as the main legislative authority in this country did not intervene and explain its intentions and the theoretical bases for such unusual provisions, the disparity between interpretations and practices will continue until it is faced again with unsolvable problems like that of the Welch case.

Lastly, and as will be shown later the available literature about the historical and philosophical development of the confiscation system shows very limited analysis of this new concept of confiscation as a way of redress and compensation. This chapter shows also that there are no elaborate or exhaustive socio-legal studies which explain in detail the rationale and expectations of introducing new precedents in the criminal justice system (confiscation order). The following chapter, therefore, will review the most relevant literature concerning the British confiscation system.
2.1. INTRODUCTION

The new law of confiscation has not generated an extensive literature. That which is available can be divided into three groups. The first and largest, includes Parliamentary reports, government guides and manuals, law review articles, and innumerable reported judicial decisions. The second group contains professional writings mainly by practitioners involved in the enforcement of the legislation. The third includes some academic participations focusing upon 'good practice' in the enforcement of the system, legal interpretations, and comparative accounts with the American forfeiture system. There is little or nothing by way of research. This chapter will examine those studies which are included mainly in the last two groups. The first has been excluded, since other chapters if this thesis have already looked into the relevant government guides and manuals alongside some of the reported judicial decisions that provide an insight concerning certain legislative provisions (see chapter one and three).

It is important to mention that a great part of the literature is repetitive covering selected aspects of the confiscation system and providing a critique of some of the provisions of the DTOA 1986, which as said above has now been resolved by the latest consolidated DTA 1994. Accordingly, the literature examined in this chapter is selective, centring around the principles, aims, objectives, extent of application and the aspects of the system which distinguish it from other confiscation systems.

The studies to be included here are examined under two main headings. The first covers all the comprehensive studies of which confiscation is the main subject (books, special reports and studies). The second includes the most important articles which have looked at relevant aspects and provided a distinctive perspective, worthy to be accounted in the arguments about the work done on confiscation orders.
Chapter Two

Review of Relevant Literature

The selected literature is dealt with in chronological order to help determine the development of relevant arguments and interests which have accompanied the confiscation system before and after its enactment. The review of the selected literature will be approached from three theoretical perspectives:

a. locating the positions occupied by the subject of the discourses in the literature;

b. clarifying the modes that the subjects have relied upon; and

c. pointing out the themes and perspectives in the circulated discourse.

After demonstrating the criteria behind the selection of certain literature, the value of these criteria are expressed in a series of questions. Some of the most important questions are:

Q. 1- In what way does the contributions of the current studies and research suit and meet the changes and amendments that overtook the forfeiture laws?

Q. 2- Have the social rationales and justifications of the confiscation system attracted considerable attention and concerns from the researchers? How far is the established satisfaction about the necessity of these rationales and justification sustained?

Q. 3- Do the studies examine the relationship between the rationales, objectives and means of the confiscation system?

Q. 4- To what extent is the nature of enforcement, both in terms of support and defects, dealt with by the studies? Have the studies taken into account the value and impact of powers vested to judicial and law enforcement agencies?

Q. 5- Are there any arguments addressed to tackle the shortcomings of the confiscation system? Are the solutions provided (if any) sufficient to promote additional legislative amendments?
Q.6- What is the extent of awareness of systems currently in different countries? Do the studies take them as instructive models to support their arguments, and tackle the shortcomings and avoidance of any inconsistencies?

2.2. REVIEW OF INFLUENTIAL LITERATURE

The Hodgson's report 'The Profits of Crime and their Recovery' (1984) is not only the main source and the starting point in the debate about the origins of confiscation legislation, but also an important and valid reference for any examination of the principles and some of the main practices of the confiscation system. As explained in a preceding chapter, it is well-documented that the Hodgson's Report and the Interim Report of the Home Affairs Committee (1985) are the main two sources for the current British confiscation system. The main reason for considering the former in this study is that it provides not merely a list of recommendations, as is the case with the latter interim report, but a full inspection of the historical background of the available forfeiture laws, analogous civil and criminal provisions, review of relevant laws in other countries, and new practical innovations concerning relevant criminal pre- and post-proceedings. It has been widely referred to as a valuable reference in this study and particularly in the first two chapters.

As expected, the report reflects the views and backgrounds of the majority of the Committee members dealing heavily with jurisprudential questions. It is also an essential part in the current legal perspective which reflects the theory of confiscation; it discusses potential principles and some subsequent effects. The focus here is not to repeat what already has been discussed in a preceding chapter, but to illustrate the nature of any inconsistencies between a recommended model of confiscation based

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17 This Report was presented by a committee formed and financed mainly by the Howard League for Penal reform. This League, as Andrew Nicol (1983) had put it, is a 'research and pressure group' for reform of sentencing and penal policy. In addition to the well-known methods of law reform (Parliament, the Judiciary, the law commission and some Advisory Committees) there is also substantial and constant pressure by independent pressure groups like Justice, Liberty, the Howard League for Penal Reform, the Statute Law Reform Society and the legal Action Group (Darbyshire, 1992). The Committee consisted of two High Court Judges, a Queen's Counsel, a solicitor, a barrister, an accountant, a senior police officer, a member of Parliament, a former probation officer and one criminologist (Professor Nigel Walker).
upon fixed principles, aims and objectives, and the current governmental theory and applications for confiscation provided under the DTA 1994.

The report has provided a list of innovatory procedures and powers to be included as essential elements in any recommended model of confiscation. These procedures are: pre-trial restraint, powers for searching premises, compulsory disclosure of whereabouts of assets, the appointment of a receiver, the assessment of means, the interest of the third parties and the application of monies or properties received...etc. The importance of these procedures lies in the subsequent consideration and adoption by the government.

With regard to the theory that underlies the committee's recommendation whereby the courts have power of confiscation, the committee illustrates that society and its law require that the 'criminal should pay'. To accommodate this simple philosophy every reasonable effort needs to be made to require the offender to make amends and to recognise that victims should not suffer financial loss. The committee believes that imprisonment as a response to serious crime should no longer be the automatic reaction of the criminal justice system. In addition to overloading the prison system, the committee declared further that it had less confidence in deprivation of liberty as a general deterrent and as a means of reform. It argued that the belief that the deprivation of liberty in some way 'improves' a human being has been heavily eroded in recent times.

In the introduction to the report the committee indicates that they are in agreement with the utilitarian views in the writings of Jeremy Bentham. 'Compensation', wrote Bentham, 'will answer the purpose of punishment but punishment will not answer the purpose of compensation'. In 'Principles of legislation' Bentham declared 'punishment that went beyond the limit of necessity was a pure evil' (p. 284). This means that any resort to imprisonment can be justified only to the extent that the exaction of pecuniary penalties in the form either of victim redress or the confiscation of the fruits of crime is inadequate. As Bentham himself put it 'the value of the punishment must not be less in any case than what is efficient to outweigh that of the profits of the offence'. The Committee asserted that the aim must be to construct a
system of redress that is adequate to obviate, as much as possible, the necessity to resort to imprisonment (p. 7). The Committee also clarified that there is nothing new in the concept of redress by an offender, either for the loss or damage he has caused to his victim, or for the profit he has made. What is comparatively new is the intensified search for appropriate methods of achieving the laudable social objective which redress the crime.

Though the Committee, at the end of their report, recommended that criminal courts should have the power to order confiscation of proceeds of an offence and that certain procedures must be followed in doing so, it also recommended that certain conditions should exist for the application of these powers. For instance, the Committee believed that the defendant had to be convicted first; there should be a prescribed minimum amount below which no confiscation order could be made; the object of a confiscation order would be to restore the status quo ante and, therefore, to reach only the net profit made by the defendant (only expenses actually paid would, however, be deductible); the burden of proof should be on the Crown; and lastly, the judge might take account of the defendant's co-operation or lack of co-operation by reducing the period of imprisonment (p. 151).

A note of dissent, by Andrew Nicol and Clive Soley, objected to the proposed retrospective aspect (the sample counts) of the recommended confiscation proceedings. This meant that a person could have an order made against him for offences which were presumed, but not proven to have been committed.

In short, the note of dissent was merely about two aspects: the 'sample counts' and the so called 'clear case' requirement. The latter, is not related to these current discussion about confiscation, whereas the former is, and was the subject of prolonged debates. Andrew Nicol and Clive Soley simply rejected the idea that defendants should be ordered to pay a confiscation order in relation to offences for which they have (a) not been charged; (b) not been convicted and (c) not admitted to. The majority of the members of the committee, however, believed otherwise, so that

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18Two members of Hodgson Committee. Andrew Nicol is a barrister, and Clive Soley is a former Labour MP for Hammersmith.
where the defendant has been convicted of other counts the prosecution submissions would demonstrate a continuing course of wrong-doing. This meant that a conviction on the sample charges would justify ordering confiscation.

On the other hand, the dissenters thought that it was contrary to the basic principle of the British Criminal Justice System to sentence a person for an offence that has not been proved or admitted. Further, they indicate that defendants are entitled to have allegations of serious criminality resolved not by a judge, but a jury, and they did not see why the defendants should lose that right because they have been convicted of other offences.

The other members of the committee suggested that the defendant should also be asked about the other offences. The dissenters, however, pointed out that to do so would be contrary to the European Convention on Human Rights, Article 6 (2) which states:

'everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law'.

Moreover, the court of Appeal approved in R. v. Price (1979) of the trial judge basing his sentence on what is called the 'reality of the situation', a phrase which other members of the Committee invoked. The dissenters however, believed that this phrase advanced the argument no further: it only begs the question 'what reality?' The sentence of the court, they said, should be confined to the jury's verdict or the defendant's admissions in asking for other offences to be taken into consideration. Finally, they endorsed the opinion of D. A. Thomas (1979) that it is wrong, in principle, to base a sentence on uncharged or unadmitted offences.

In a subsequent study, Andrew Nicol (1987) criticised several features of the confiscation system provided under the DTOA 1986. Nicol pointed out that the relevant provisions of DTOA 1986 are not confined to the conditions and limitations provided by Hodgson's Report. Where the majority of the Hodgson Committee would have agreed to place the burden on the defendant to show where his assets came from if he had been convicted of wholesale supply of class A or B drugs with a street value of £100,000, they stipulated that the burden would only relate to
property acquired after the date of the first proven offence (Nicol, 1987, p. 78, see also Hodgson Report, 1984, pp. 82-84).

Nicol asserted that none of these limitations appear in the 1986 Act. He explained that a person convicted of possession with intent to supply say, one gram of cannabis in 1987 may be presumed to have paid for the house which he bought in 1981 with the proceeds of drug trafficking. Nicol described that as an extreme case (p. 78). In short, the basis of his objection was that the proof that a person has committed one offence gave no grounds for assuming that he committed another, and that the reversal of the burden of proof depends on that fallacious reasoning.

Lastly, Nicol found the lengths to which Parliament has gone in working out the confiscation system to be 'profoundly disturbing.' He stated:

'In its zealous desire to ensure that not one unlawful penny is left unseized, Parliament has brushed aside several major tenets of criminal law procedure'.

In addition to Nicol's comments, Derek Hodgson, the chairman of the Committee himself, provided clear views about confiscation provisions provided under the DTOA 1986 in the 'Forward' of the Mitchell et al's text on 'Confiscation' (1992). A detailed examination of his views will be highlighted later in this chapter.

A full legal examination of the definitions, provisions and relevant laws and rules of the confiscation legislation introduced by the DTOA 1986 are conducted by three major works: Feldman's (1988) 'Criminal Confiscation Orders', Fortson's (1992) 'The Law on The Misuse of Drugs and Drug Trafficking Offences', and Mitchell et al's (1992) 'Confiscation'. These provide detailed analyses of the legislative provisions including collecting information and restraint through the making of orders in the Crown Court and other courts. In what follows is a review of the most distinctive aspects of each of these three works.

19The author criticised in particular the method for calculating the amounts of benefits, the reversal of the burden of proof, the repeal of the right to silence, the required presumptions, the retrospective effect, the discretionary power vested to judges, and the sentencing policy. There will be an examination of the arguments concerning these provisions in later stage of this chapter.
Professor David Feldman (1988) in his work 'Criminal Confiscation Orders: The New Laws' was the first to examine the provisions of the new confiscation legislation provided under the Drug Trafficking Offences Act 1986. This book provides a comprehensive but practical account of the powers accompanying the confiscation proceedings given to the law enforcement agencies. It is mainly a personal response to a suggestion by two officers of the Regional Drugs Squads, that there was a need for an explanation of the powers under the confiscation legislation. It provides also a systematic explanation of most of the powers and orders that incorporate this legislation. However, the subsequent amendments and the major alterations to some of the confiscation provisions necessarily entail updating the contents of this study. But even so, it is widely considered by some practitioners and police officers as a sound reference beside the work of Mitchell et al (1993).

Feldman has approached his study by providing some insights about the background and the legal conditions before the enactment of DTOA 1986. He attributes, for instance, the grounds for the adoption of confiscation powers by the government to a wave of public concern in 1985 about drug addiction which swept across the country. He indicates that the government's strategy for law enforcement in combating the problem of drug abuse in the 1980's is to strike at the big suppliers by creating extra powers for investigators and ensuring that anyone who is caught supplying drugs will find that the business is unprofitable. This point repeats a previous statement which provided that the 1980's has indeed witnessed rapid developments in high level drug enforcement and that there are also new laws, new penalties and new Customs and police strategies against those trafficking in large consignments of drugs (see preceding chapter).

Feldman pointed out his concerns about the theory of confiscation. He thought that confiscation orders were to be a deterrent means in the hands of the government against drug traffickers. But as things turn out it seems the object of the order is not penal, because it merely deprives the defendant of what is not rightfully his. Feldman believes that the court views each case individually and will vary decisions on the basis that the legislation is very punitive, especially when it comes to assessing the
proceeds of or benefit from offences, and where the phrase 'in connection' is very wide (Feldman, 1988, p. 102).

A great part of Feldman's study is confined to a detailed review of the confiscation proceedings of the DTOA 1986. This includes determining the definitions of most of the terms in the legislation, clarifying some unclear provisions, highlighting the differences with the confiscation system provided under the Criminal Justice Act CJA 1988 and examining the powers which facilitate the enforcement of the confiscation proceedings (from different laws and rules).

The remaining part of the study consists of miscellaneous matters relating to reimbursement and compensation. This is mainly about the receivers' immunity from liability and their rights to remuneration and reimbursement, immunity of informants from liability in contact, and compensation for the defendant.

During his examination on the practical account concerning the enforcement of certain provisions, Feldman appeals to the government to reconsider the importance of incentives for the law enforcement agencies. Here, he is referring to the use made of seized assets. He notices, or perhaps is made to notice, that this matter is a continuing bone of contention between the government and the police. He indicates that the police want the recovered proceeds or the payments of the confiscation orders to be sent back to the forces which track down the traffickers and their assets as is the practice in the United States (p. 7). After he explains that the police have had to work with additional financial pressures because of the expense of implementing the new legislation, and that they have nothing to show for their achievement, he then appeals to the government to reconsider the importance of that as an incentive for efficiency (para 1.14).

A major contribution of this study is that it was considered to be an important reference (for more than four years since the date of the enactment of the Legislation (the DTOA 1986)). In short, the study offers three main features: (a) a systematic review and explanations of the confiscation provisions under the DTOA 1986 and CJA 1988; (b) some comments concerning certain practical implications of some of the
Chapter Two

Review of Relevant Literature

legislative provisions; and (c) an appeal to the government to support the law enforcement agencies and in particular the police by allowing the return of the recovered confiscation orders to the force(s) which initiated and worked on relevant cases. In fact, such an appeal did not succeed because it was not supported by sufficient evidence, i.e. it did not include a detailed explanation of the actual losses and expenses, or applications for confiscation proceedings, and a variety of other minor matters that might have led to more tangible results.

Rudi Fortson\(^{20}\) (second edition, 1992) devotes a chapter in his work *The Law on The Misuse of Drugs and Drug Trafficking Offences* to the provisions of DTOA 1986, while other chapters are concerned with drug control and classification; legislations regarding crime related drugs (possession, supply, importation, exportation, manufacture and production of controlled drugs); some provisions of MDA 1971; powers of police and Customs officers; provisions related to conspiracy and evidences and powers of forfeiture and sentencing.

The study consists of a comprehensive examination of the most important drug-related laws and powers provided for the courts and other law enforcement agencies in the 1970's and late 1980's in England and Wales. Fortson considers the introduction of the DTOA 1986 by Parliament as providing a sweeping and radical change in the law which enables courts to recover the proceeds of drug trafficking (p. 201). He also indicates that the legislation is enacted to meet certain weaknesses of earlier legislation. The imposition of a substantial fine, on the accused coupled, as an example, with an order to pay the costs of the trial (either wholly or in part) is, he says, a crude method of recouping drug profits and rightly regarded as bad sentencing policy, being a 'back-door' approach (p. 201).

Fortson believes that the DTOA is a draconian piece of legislation and was intended to be so. He thinks that the required assumptions and the burden of proof are the core elements of such a description. He points out that the method by which a court may assess the value of the proceeds of drug trafficking is one of the most controversial features of the DTOA 1986. Moreover, the Act creates the assumption that there are provisions to deal

\(^{20}\)Rudi Fortson is a barrister, Middle Temple, London.
with any lack of evidence likely to prove that the property received over a period of years represents the proceeds of drug trafficking (p. 201).

The rest of the chapter provides a summary of the mechanics of the confiscation proceedings of the DTOA 1986 and some subsequent amendments provided under the Criminal Justice Act 1987, Criminal Justice Act 1988, and Criminal Justice (International Co-operation) Act 1990. Fortson's examination of confiscation provisions is similar to that of Feldman's and Mitchell et al's works in terms of content, method of analysis and, strangely enough, in missing the most important subsequent amendments of the CJA 1993. The work is or could be considered to be a valuable classification of the various types of controlled drugs, types of drug-related offences, and all relevant penalties up to the enactment of the DTOA 1986. It is however necessary to update such a review.

The work of Andrew Mitchell, Martin Hinton, and Susan Taylor21 (1992) 'Confiscation' can be described as the second post-analytical study of confiscation legislation. The work presents a similar examination and interpretation provided by Feldman (1988). The only difference is that this work is a little more valid in terms of some of the comments that are relevant to the subsequent amendments provided under the CJA 1993. In an interview with Kennedy Talbot22 a Principal Crown Prosecutor (CCB, 1994), whilst praising this work pointed out that it is the only important interpretative reference for financial investigators, prosecutors, clerks, analysts, researchers, accountants, Customs officers, and anyone involved in confiscation matters whether in theory or in practice.

The authors indicate that the main purpose of this work is 'an effort to encourage practitioners both in the Crown Court and the High Court to adopt a more positive attitude to this growing area of the law' (p. xi). They notice that there is a problem in practising confiscation proceedings by some law enforcement agencies which they mainly attribute to a misunderstanding or an unwillingness to enforce the legislation. They state:

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21 This is a study that was conducted by three barristers: Andrew Mitchell is a member of the Irish Bar, Martin Hinton works for the Supreme Court of South Australia and the Supreme Court of England & Wales, and Susan Taylor is the Head of the Central Confiscation Branch (CCB) in London.

22 In 1994, Talbot Kennedy was a Principal Crown Prosecutor at the Central Confiscation Branch, Crown Prosecution Service Headquarters, London.
'the procedures to be followed in the Crown Court to seek to identify and then confiscate the unjust gains of the convicted drug trafficker under the Drug Trafficking Offences Act 1986 are sometimes ignored, it is merely to pay lip service to the Act rather than to enter into the spirit of the legislation' (p. xi).

Their theory of confiscation is according to those authors not a form of extra punishment for a convicted person, but rather the taking away of unjust profits, and ensuring that there will be no pot of gold awaiting the trafficker once punishment has been served. They consider confiscation law as the civil consequence of criminal wrong doing, and in so doing take away the raison d'être for the criminal. They believe that the power given to the courts to confiscate the proceeds of crime is an essential weapon in society's battle with drug traffickers. Moreover, they indicate that with the prisons over-flowing and the steady reduction in sentences being passed, it becomes increasingly necessary to ensure that the profits of crime are not available to convicted persons when they return to society (p. xi-xiii).

It is quite obvious that they justify confiscation orders according to reparative purposes and to the doctrine of unjust enrichment. In confirming that confiscation is not punitive, they say that:

'where a defendant benefits as a consequence of his commission of an act contrary to the law, he should not be permitted to retain such profits, he should be compelled to make good the loss he has caused, he should redress the harm, compensate the victim, right the balance' (p. 1).

They pointed out that such a school of thought is by no means unknown to the criminal law prior to the enactment of these statutes. Moreover, this school of thought forms the basis of the law of tort and contract, and is the justification for many other remedies available to complainants in the civil jurisdiction (p. 1). They state:

'where legal philosophers have explained the purpose of the criminal law as the avenue by which society may impose sanctions on those individuals that act in contravention of the inherent social

23 A collective rubric 'unjust enrichment' was described by Hodgson Committee as analogous to the recommended confiscation order. One someone has wrongfully deprived another of his property the law entitles the wronged individual to recover that property or its value. A wrongdoer can be deprived by law of the profit he has made, and the remedy provided effectively penalises the wrong committed (for more details see Hodgson' Report, 1984 or Birks, P, 1982).

24 'redress' a term which has been used by Hodgson Committee, p. 6.
contract; that is, each and every citizen inherently contracts with his fellow citizens to behave in a manner acceptable to society as a whole. Should a particular citizen behave in a manner unacceptable to society, he acts in breach of the terms of the social contract and is liable to be punished for such breach by society. Where his behaviour has caused loss to a specific citizen, that citizen should be compensated. Where his behaviour damages society as a whole, society should be compensated. To this extent, confiscation serving to compensate society as a whole, and compensation for the individual victim, are mutually exclusive. The judiciary’s concern is to seek compensation on behalf of society for the benefit the defendant has accrued at society’s expense. Where the defendant has benefited from crime he is to be denied such benefit irrespective of the sentence he is to receive for his commission of the crime. As it is recompense for a crime against society as a whole that is sought, the court of trial is in the best position to assess the amount to be recovered’ (p. 2).

The final decisions in some confiscation cases reveal that appellate judges have not always followed the logic of this consistently. Mitchell & Hinton (1990), in a previous work, ‘Confiscation Inquiries: What the Dickens’, have come to a conclusion that the confiscation law is in a state of confusion from which only the Court of Appeal can rescue it (p. 208). This means that the government was aware of certain defects in the system. The writers, as mentioned above, reflect a clear government perspective in regard to the consistency of the legislation, the changing of intentions and policies and their reaction to the differences in the implementation of the legislation by the law enforcement agencies. Some of the odd differences in interpreting certain provisions and features of confiscation will be examined in the following chapter but a brief explanation of how the government changed its perspective toward the principles of confiscation law is important to examine here.

The change of government perspective, or of some jurists, does not necessarily mean that the old perspective was wrong. The Home Affairs Committee whom it was asked by the government to provide recommendations about the best ways to combat drug traffickers indicated that the penalty for drug traffickers should be no less than the penalty for premeditated murder (see the Fifth Report from the Home Affairs Committee, session 1984-85). This means that the confiscation of assets and the profits of drug traffickers, as an additional measure to imprisonment, can produce an effect no less than the effect of the penalty

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25R v Dickens; R v Redbourne; R v Thomas; and R v Atkinson

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of premeditated murder. Moreover, in a Law Report by Evans, R (The Times, 30/7/95) it was indicated that 'the tough new measures, to be introduced by Mr Leon Brittan, the Home Secretary, will reflect the recommendations of the Common's Home Affairs Committee which gave warning in May that Britain would inherit America's drug crisis within five years unless there was immediate action'. He continued saying that 'Mr David Mellor, who is masterminding the Government's offensive against hard drugs, told The Times that the new legislative measures would amount to:

'a comprehensive, effective and tough package. If one really believes in a policy of deterrent against those ruthlessly involved in a large-scale drug trafficking you have to have a two-edged approach: prison and seizure of assets'.

These two statements and many others besides i.e. those mentioned earlier in chapter one, strongly support the views of those who believe in the punitive feature of the confiscation system. It looks as if those who represent the government have begun to take the government's perspective for granted. An examination of the effects of certain powers, provisions and certain court's decisions in an earlier chapter, and particularly the so called 'presumption power', the standard of proof, the retrospective effect, the Welch case, the comment by Mr. Dewer (MP), and many others, shows clearly that there is a strong belief that the powers of confiscation are punitive. Hodgson who has written the 'Forward' for the Confiscation book by Mitchell et al commented on the use of the word 'draconian' by the authors, when they wanted to describe the new powers given to the courts, he said:

'it is a correct description and the legislation in some ways goes further than was contemplated even by the majority of the Committee' (p. vii).

Hodgson says that he was disappointed by some of the provisions of the confiscation legislation. As said earlier he explains that his Committee considered, almost as a matter of course and an unobjectionable issue, that the co-operation of an offender in tracing and seizing of ill-gotten gains and a plea of guilt should be reflected as a matter of mitigation in any sentence of imprisonment passed upon an offender. Pleas of guilt cannot, retrospectively, alter the criminality of the offending, but that a sentence of imprisonment must be reduced below its 'tariff' level in any case where
there is a plea of guilt. This applies even when the evidence is virtually conclusive of guilt, and is now a settled principle in sentencing. Hodgson indicates that if a judge does not give a discount or sufficient discount for a plea of guilt then the Court of Appeal will invariably allow an appeal and reduce the sentence as it considers appropriate. He concludes by saying that the only logical reason for reducing a sentence because of a plea of guilt is that it shows an acceptance of guilt and perhaps a measure of contrition - and anyway it will save the court time by avoiding a trial (p. vii-viii).

Hodgson believes that in providing section 2 (5) (c) of the DTA 1994 (formerly section 1 (5) (c) of the DTOA 1986) the legislature has set itself against this philosophy; a philosophy which was supposed to be adopted as the main justification for the recommendation for a new confiscation order by Hodgson's report. This means that to add new provisions like confiscation orders with its attached proceedings to the principal penalty (imprisonment) without considering the size of the principal penalty, makes the addition of confiscation provisions a punitive act. This means that the government has clearly favoured a strict punitive perspective.

It is interesting that in both the work of Mitchell and his colleagues and that of Feldman (1988) there is a similar detailed examination of provisions and powers. Although Mitchell et al have rushed in order to present their work prior to the enactment of the most important amendments to the DTOA 1986, their examination of certain amended provisions show their awareness of the proposed changes. They indicate that they are aware of most of these amendments which are provided as recommendations by the two reports, Home Office Working Group (1991 Report (DTOA 1986) & 1992 Report (CJA 1988)). Nine out of ten chapters are devoted to legal and professional interpretations of the confiscation provisions provided under the DTOA 1986 and the CJA 1988. They have indeed attempted to address some of the suggested amendments whilst discussing relevant provisions. They referred to the amendments provided under the Criminal Justice Act (CJA) 1993 like for example, the Act which empowered the court to confiscate the proceeds of drug trafficking in certain cases where the trafficker has died or absconded; the repealing of the mandatory power provided under section 1 of the DTOA 1986; and the new provision concerning the default sentence where the
default sentence will not expunge the confiscation order which will continue to be susceptible to enforcement by other means.

2.3. OTHER ACADEMIC LITERATURE

There are two important studies which examined different aspects in the confiscation system. Michael Zander (1989) presented a valuable comparative account with the American forfeiture system, and Levi & Osofsky (1995) have examined the implementation of the system by law enforcement agencies. The most important issues and the main findings of these are as follows:

Professor Michael Zander (1989) has provided, for the first time in England, a useful comparative review and critique of the English and the American laws on the confiscation and forfeiture of assets. The study 'Confiscation and Forfeiture Law: English and American Comparisons' consists of four main sections: the first section examines the confiscation system provided under the British DTOA 1986; the second highlights relevant international actions; the third describes the American criminal and civil forfeiture systems; and the last is devoted to a discussion which mainly includes an argument about the similarities and the dissimilarities between the two systems with some significant comments and recommendations.

Zander believes in the proportionality of punishment. He indicates that forfeiture should be proportionate to the offence, so that seizing assets which are not proceeds of crime is objectionable since it is disproportionate (p. 43). He also thinks that forfeiture or confiscation of valuable assets involved in the drug business is aimed at discouraging drug trafficking. This, he says, is a punitive procedure which may have a deterrent effect:

'if it does not discourage those concerned, it punishes them by taking away the ill-gotten gains of their activity. It also, incidentally, makes society feel better' (p. 44).

26Unlike the British 'confiscation and forfeiture systems', the American legal system uses only the term 'forfeiture' in the laws that deal with illegal proceeds of crime. More explanations provided in Chapter Six.
Besides the importance of this as a comparative study, Zander provides some responses to certain significant inquiries concerning several legislative and practical issues about the American system. In brief, two important parts of his study are worth mentioning here: (a) the main findings concerning the American system, and whether there are any aspects that Britain should consider copying; and (b) the main legislative changes or additions for the British confiscation system.

With regard to the first issue, Zander concluded that copying the powers available under the American laws, would be a serious mistake (p. 2). He reveals that the US law with regard to forfeiture and confiscation is greatly excessive. He says it goes considerably further than the British law in permitting confiscation/forfeiture without any hearing, but operates simply by administrative action:

'...to take away the profits of crime is one thing; to seize assets that have no connection with crime is quite another' (p. 43).

(A more detailed examination of the powers, definitions, scope of enforcement and the similarities and differences of both systems is the main concern of subsequent part of this thesis (see chapter five)).

In respect to the suggested legislative provisions, Zander indicates that the British government should rather follow the Australian and the Canadian legislation. He recommends that the police should be permitted to ask a judge for an order to allow them to obtain information regarding the drug trafficker's affairs from the Inland Revenue as operates in Canada. Zander attributes the problems of the recovery of confiscation orders shown by Home Office Research and Statistics Department, to the mandatory powers of the courts in imposing confiscation orders. He suggests that it might be better to abolish those powers.

The particular importance of Zander's report is that, as it turns out, most of the suggestions have been adopted by the government. The mandatory power of courts to impose a confiscation order in every individual drug trafficking offence, for example, has been abolished. The DTA 1994 also include new provisions that deals with absconded and deceased drug traffickers.
Lastly, Zander raises a controversial issue which has also been discussed by Feldman (1988). It is about the use of assets recovered from convicted drug traffickers. While Feldman has appealed from the interest of the police who claim these assets, Zander disagrees. He says:

'a closer inspection to the American approach of sharing the fruits of confiscation with law enforcement agencies is important, because many people in England are attracted to this particular American provision. Such approach has an obvious advantage in providing a tangible incentive to the police by making them more effective in their pursuit of criminals, and that the more effective they are the greater the resources will be available to them. However, there is a serious danger that such incentives will distort law enforcement. Some investigators may hoard the information rather than sharing it for fear that their organisation might otherwise have to share the ultimate spoils of success. Furthermore, some units may opt to suffer pressure to make bigger and bigger seizures to ease other financial burdens within the organisation. This can lead to hurried investigations, poorly prepared prosecutions and unjustified acquittals' (p. 48).

Instead, Zander recommends the setting up of a national fund which would take a proportion of the proceeds of confiscation. He adds that the central administration for such a fund would improve co-ordination of major investigations, and could additionally be used to strengthen the hand of the ACPO Crime Committee, the National Drugs Intelligence Unit and the Regional Crime Squads' central organisation, assisting them in their capacity to cope with the drugs problem both on the national and the international front (p. 49). Yet despite this, it is quite surprising then to find that the Police Foundation misunderstood Zander's position. The Police Foundation said that Zander wanted the government to:

'follow the United States practice of using assets seized from drug traffickers to help finance law enforcement. That is the conclusion of Professor Michael Zander of the London School of Economics, whose report Confiscation and Forfeiture Law: English and American Comparison is published today by the Police Foundation' (Zander, 1989, Introduction by The Police Foundation).

Perhaps one of the reasons the Police Foundation appeared to misunderstand Zander was as a latent yet unsuccessful second27 attempt by the police to help in their plea to the government about the use made of the seized assets. That is to say that by introducing Zander's report in

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27Feldman's study was also prompted by some police officers of one of the RCSs (Feldman, 1988, p.)
such a way it became an attempt to cover any unexpected findings that may appear.28

The Work of Professor Michael Levi & Lisa Osofsky29 (1995) Investigating, Seizing and Confiscating the Proceeds of Crime, which was commissioned by the Home Office Police Research Group (PRG)30, is the most recent to include theoretical and empirical research on the British confiscation system provided under the DTOA 1986 and the CJA 1988. It is also the first study of a confiscation system jointly conducted by a non-jurist academic.

This work comprises two core elements: (a) to identify 'good practice' in the enforcement of the confiscation proceedings, and (b) to review the impact of confiscation upon offenders and upon the organisation of crime (p. 1). I. M. Burns, the Deputy Under Secretary of State31, in the 'Forward' to this work, says 'the authors suggest that a number of factors have mitigated against the effective use of the provisions related to the confiscation proceedings, in attempting to investigate, seize and confiscate the proceeds of crime. Whilst identifying the difficulties that exist, the research describes how the new legislative provisions will ease the situation in the courts, and makes some practical suggestions about how the police and other enforcement agencies might improve their procedures in order to make financial investigation and confiscation more effective in future' (p. iii).

With regard to the theory and the rationale of a confiscation procedure, the researchers did not provide a clear opinion. Instead they explain that in England and Wales, the theory underlying confiscation relieves the criminal of financial gain from unacceptable social behaviour. In determining the nature of confiscation, they refer to the theories of

28The Police Foundation indicates that Zander has recommended setting up a national fund, but in the same time they declared that Zander recommended that the British government should follow the American approach in dealing with the proceeds of crime which is obviously not what Zander said. Such a declaration may lead the readers to misunderstand Zander's perspective in such a particular issue.
29Michael Levi is a professor in criminology and the Director of White-Collar and Organised Crime Research Unit at the University of Wales College of Cardiff. He has published many studies on matters of fraud, money laundry, policing and perceptions of crime seriousness, while Lisa Osofsky works for the US Attorney's Office in Chicago.
30PRG was formed in 1992 to carry out and manage research relevant to the work of the police service. The terms of reference for the Group include the requirement to identify and disseminate good police practice.
31Deputy Under Secretary of State, Home Office, Police Department, May, 1995.
Ashworth (1992) and Mitchell et al (1992) in which confiscation is 'not part of the punitive component of the sentence and does not mitigate or aggravate it'. However, they point out that those involved in investigating the proceeds of crime view confiscation as 'an attack that truly hurts the criminal by depriving him of the monetary benefits that he covets most, and undermining his credibility as a criminal' (p. 12).

The researchers also refer to a philosophical justification for confiscation stating that confiscation has a possible 'deterrent value'. This philosophy is based upon the belief that if criminals are convinced that 'crime does not pay', and that if caught they will be unable to retain their ill-gotten gains, then, presumably, at least some criminals will be deterred from committing certain crimes. The researchers reveal that one of their findings from interviewing offenders suggests that many offenders view the proceeds of crime as their 'entitlement' and by removing this would naturally cause resentment and be seen as punishment. They think that there seems no reason to expect that confiscation will lead such offenders to abstain from crime in future, but it might simply lead to greater determination to 'get their just deserts'. They provide an example of the snake and ladder game, which means that the offenders may find it hard to get back to where they were before. However, the researchers conclude their work by indicating that determining whether or not confiscation legislation is a deterrent is somehow speculative, and might depend mainly upon to whom and how it is being enforced (p. 12).

The report comprises eight sections. These sections discuss the extent of application of confiscation provisions, provide a brief comparison with US yields from similar systems, discuss the impact of confiscation on individuals and on criminal investigation, provide also some relevant proceedings (e.g. restraint order), give details of the organisation of financial investigation within the police service, examine the relationships between the police and some other agencies, and present some practical difficulties encountered by the police. The last section provides suggestions for ways forward for a 'good practice' approach by the financial investigation system.

In general, Levi & Osofsky believe that the confiscation system 'in its contemporary state cannot be successful'. They provide a list of identified
difficulties (p. vi). Four out of the nine difficulties in this list are merely comments concerning old confiscation proceedings already amended by the CJA 1993. The other five are mainly concerned with the lack of organisational incentives for those involved in the enforcement of the confiscation system, the dispersal of confiscation cases among counsel and judges, the high costs of receivers and accountants compared with the level of cases, problems encountered in enforcement by magistrates' courts, and the costs and difficulties involved in assessing realisable assets of defendants.

With regard to the major problem of the British confiscation system concerning the deficiency in recovering confiscation orders, Levi and Osofsky say there is no pattern which could be discerned to ensure successful results for confiscation purposes. They think that the extent to which judges, prosecuting counsel, and Crown prosecutors are well-versed in the relevant law and the co-operation of defendants are obvious factors in improving the yield from confiscation. This study is an essential reference for law enforcement agencies. It highlights several legislative and technical shortcomings which need to be resolved in order for law enforcement agencies to be able to achieve the desired 'good practice'.

In contrast with Zander's (1989) work, and particularly when Levi and Osofsky discuss confiscation in making police investigation financially self-sufficient, Levi and Osofsky provide a similar perspective to that of Zander. They suggest avoiding a narrow focus to the financial cost-benefit of each individual investigation which might frustrate some of the broader reparative and deterrent/incapacitative purposes of the legislation. Moreover, they believe that comparisons with the American forfeiture system might be misleading (p. 8).

In addition to these two main academic literature, there are also other important studies which discussed confiscation as a secondary focus. These studies concern for example, certain principles in the criminal justice system, the strategies of enforcement, and some other relevant issues.
Andrew Ashworth\textsuperscript{32} (1992) in 'Sentencing & Criminal Justice' views the matter of depriving offenders of the profits of their crime as a complicated process. But on the other hand, he thinks that 'it is quite wrong that offenders should be allowed to keep any profits from their offending' (p. 74). Ashworth believes that confiscation legislation is a consequence of over zealous concern by politicians. He states that:

'political pressures to 'combat' organised crime lead too easily to provisions which are over zealous and which trample on what are ordinarily considered to be defendant's rights' (p. 74).

Moreover, he asks two questions: Does the legislation create presumptions against offenders which, in effect, require them to make a case for keeping their property? If so, is this a sufficient justification? Or is it simply that normal rights are swept aside by a tide of moral panic? He explains that these two questions have been answered by the European Court of Human Rights, which has declared the original provisions of the Drug Trafficking Offences Act 1986 to be contrary to Article 7 of the European Convention on Human Rights. This is in regard to a British court's decision which includes a retrospective effect in relation to events which have been committed before the enactment of the DTOA 1986 (referring to a specific case 'Welch v United Kingdom' mentioned earlier). Accordingly, the European Court's judgement classifies confiscation orders as punishment.

Ashworth has linked this decision to another relevant issue concerning the proportionality of the overall sentence. He thinks that regarding confiscation as a punishment means that the deprivations imposed ought to be taken into account when determining whether the overall penalty is proportionate to the seriousness of the offence. The British Court of Appeal seems to reach the same conclusion but on pragmatic grounds. It provides that such an order may have a severe financial effect on a defendant subject to it, and must therefore be taken into account in deciding 'the overall penalty' (\textit{R. v Dickens [1990]}).

\footnotetext[32]{Andrew Ashworth has been the leading English writer on the law of sentencing for a decade. He is editor of the Criminal Law Review and was chairman of the Council of Europe's Select Committee of Experts on Sentencing (1989-92). In 1993 he worked for the School of Criminal Justice, Rutgers University, Newark, New Jersey, USA.}
Chapter Two

Review of Relevant Literature

Ashworth here, relating part of the theory of a confiscation system to its application, as all previous writers have done, states that 'what should be avoided, in all instances, is a disparity of result which means that an offender who can readily discharge obligations under the confiscation order receives a lower sentence, especially a lower prison sentence, than one who cannot'. Ashworth then, operating according to a long-standing principle, advocated that a wealthy offender should not be allowed to 'buy a way out of prison'. Lastly, he declared that even if courts do take account of the onerous effects of a confiscation order, they should bear in mind the principle of equality before the law, and consider whether the order really is an additional penalty or merely an attempt to remove an unfair advantage gained from the crime by restoring the status quo (p.76).

It seems that even Ashworth, who was expected to give a clear picture of the theory underpinning the current confiscation legislation, mentions so little about it and is left to conclude his argument with a question. This would, therefore, lead us to assume that attempts to classify confiscation in terms of punishment is difficult only because it requires a parallel attempt to disentangle that which underlies philosophical theories of punishment.

Nickolas Dorn, Karim Murji and Nigel South have conducted several important studies concerning drug trafficking offences and law enforcement strategies. In Traffickers: Drug Markets and Law Enforcement (1992), a chapter has been devoted to the development of the financial penalties entitled 'The punishment illusion: your money and your life'. The authors pointed out that asset confiscation, as originally recommended by the Hodgson Committee, is intended to be a just but humane penalty. However, they say, this aspect was overlooked by the then current government who announced that maximum terms of imprisonment for drug trafficking are to be increased due to the excitable anti-trafficker climate of the 1980's (p. 176). This means that the authors believe that the current application of the confiscation system is a strict penalty.

33It is important for this study to identify the speciality of the major writers about the confiscation system. Here, Dorn is a Development Director at the Institute for the Study of Drug Dependence.
Chapter Two

Review of Relevant Literature

The authors reveal that it was not until the 1980's that the concept of drug 'dealing' metamorphosed into that of drug 'trafficking'. During the 1970's, most people referred to drug 'pushers' or drug 'dealers'. Anyone who referred to 'trafficking' would have been regarded as rather quaint, and the term seeming to hark back to nineteenth-century concerns with slavery. By the end of the 1980's, however, the term 'drug trafficking' had come into common usage, in the context of increased penalties and images of violence. And it is clear that 'trafficking' has similar, albeit, more extreme connotations, carrying definite implications of dangerous foreigners and a need for severe punishment (pp. 178-179).

Their work exposes the diversity of drug trafficking offences, and provides an account of how police operations work. It includes: (a) accounts of the development of drug markets from the 1960's to the 1990's; (b) a discussion of the evolution of new policing methods; (c) insider views on the development of a national detective agency for Britain; and (d) a challenging look at the processing and sentencing of drug traffickers; and (e) extended extracts from then unpublished and confidential report from the ACPO.

The authors indicate that during the initial years of operation of the DTOA, some police officers voiced concern that the courts were failing to follow the full requirement of the Act, especially in relation to relatively minor trafficking offences. It is felt that traffickers who do small deals over an extended period of time, generate considerable cash-flows (p. 182). On the other hand, the authors explain that the financial cost, in terms of police investigation and court time, of enforcing the confiscation order is unknown.

They identified seven different and important sorts of drug trafficking offences. These types are:

- *Trading Charities*: enterprises involved in the drug business because of ideological commitments to drugs, with profit as a secondary motive;

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34 Murji is a senior lecturer at the Department of Sociology and Social Policy-Roehampton Institute.
35 South is a senior lecturer at the department of Sociology-University of Essex.
- **Mutual Societies**: friendship networks of user-dealers who support each other and sell or exchange drugs amongst themselves in a reciprocal fashion;

- **Sideliners**: the licit business enterprise that begins to trade in drugs as a 'sideline';

- **Criminal Diversifiers**: the existing criminal enterprise that diversifies its operations to include drugs;

- **Opportunistic Irregulars**: individuals or small groups who get involved in a variety of activities in the 'irregular economy', including drugs;

- **Retail Specialists**: enterprises with a manager employing people in a variety of specialist roles to distribute drugs to users (an increasingly common 'street dealing' format); and

- **State-sponsored Traders**: enterprises that result from collaboration between control agents and others; for example, collaboration between police undercover agents and their informants who may be allowed to continue to trade; or 'buy bust' covert operations (p. xiii)

Dorn & South (1990) in *Drug Markets and Law Enforcement*, indicate that the police should revise their anti-trafficking strategies to better attack the different types of traffickers. They suggest that the way forward for the police is to identify the different types of enterprises, find out how permanent they are, discover their financial operations and security, and exploit their weaknesses. They also believe that asset confiscation does not work for all drug trafficking types. Not, for instance, for those people who are identified as opportunistic irregular, because they form and dissolve in response to short-term projects (p. 186, see also Boothroyd, 1989, p. 334).

Dorn & Murji (1992) in *Low level Drug Enforcement*, point out that the 1980's saw rapid developments in high level drug enforcement aiming at major manufacturers and importers, yet, during the 1990's, the area of greatest innovation and progress is likely to be low level drug
enforcement (p. 160). If this is correct, then one expects subsequent changes in the enforcement strategies and policies, not only in police forces but also in government. The CCB, as a government's supervisory team for the enforcement of confiscation by police, stipulates a minimum threshold policy for those who are seeking restraint or charging orders from High Court. If this Branch continues to operate this policy, then most of the confiscation cases of low level drug enforcement (the focus of law enforcement agencies in 1990s) will face a dead end.

Jane Goodsir (in Bean, 1993) questions the civil rights and civil liberties surrounding the use of confiscation proceedings. She indicates that rights and civil liberties in the UK have been described as a state of mind, rather than a set of rules, relying on institutions and formal procedures, rather than a character or written constitution. She also explains that there is no overriding principle from which 'rights' are derived. Instead, she recommends that jurists have to look at a web of different legal cases, Home Office guidelines, and official procedures to determine what freedoms people enjoy as citizens (p. 130). In regard to confiscation proceedings, Goodsir believes that it raises some fundamental questions about general freedom and the right to privacy. She concludes by stating that:

'our collective sacrifice of freedom and privacy may be seen as a futile gesture in support of unenforceable panic measures' (p. 144).

Stephen Gilchrist (1993) in 'Crime Reporter', discusses human rights in relation to retrospective legislation and points out that this has long been an anathema to English constitutionalists and lawyers. Retrospective legislation occurs infrequently in criminal law as one might expect. So that to be prosecuted for an act which is not an offence at the time it is committed, will indeed raise a storm of protest. The issue is addressed by the Court of Appeal in R. v Barretto (The Times, 26 October 1993), when a receiver is appointed to collect out-standing sums (due from Barretto in 1992). The receiver argues that the wider provisions of the 1990 Act should be allowed to have retrospective effect to Barretto's conviction three years earlier. He claims that Parliament's intention about confiscation is not a penal proceeding, but a procedure designed to ensure that drug traffickers do not profit from their crime. The Court of Appeal, however, has taken the view that the consequences of a confiscation order are broadly penal
rather than an administrative procedure for recovery of monies, to which the defendant in this case is not entitled. Gilchrist concludes that to the authorities, the application of the 1990 law would subject the defendant to a substantial disadvantage in respect of events which had occurred well before the change and, in the court's view, the defendant is not to be substantially prejudiced in such a way unless Parliament's intention was to that effect (pp. 1124-1125).

While John O'Connor (1993) in 'Out of Control', reveals that more than 70% of all prosecutions and drug seizures in Britain occur within the boundaries of the Metropolitan Police (Met), he adds that the Metropolitan Police has no written strategy for dealing with the criminal misuse of drugs.

Sara Dayman (1994) in 'Squeezing Their Assets', indicates that although the DTA 1994 has strengthened the confiscation powers, without bilateral confiscation agreements the legislation is virtually useless. She concludes that 'targeting the massive rewards of this shadowy trade is certainly one of the most powerful weapons in the war against the drug traffickers' (pp. 22-23). On the other hand, Keith Potter (1995) in 'Lost Assets', reviews police perceptions concerning the recovered assets and finds that new legislation is required to enable police forces to retain a proportion of seized assets for training and drug education. He indicates that Parliament appears to be unmoved by efforts to change legislation. D/Supt Derek O'Connell, head of Merseyside Drugs Squad, believes that unless those changes are made, the trade will continue to be 'a cancerous corruption of society as a whole'.

'We are not asking to keep all of the assets we seize. But we feel that if we could obtain a proportion of what we confiscate to support our enforcement, education and prevention initiatives, it would be more beneficial, and would relieve the Government and the taxpayers of the cost of tackling the whole issue'.

Potter indicates that the assets in form of cash are diverted directly to central funds at the Treasury. Under the MDA 1971, assets are forfeited, but police could request that a forfeiture order is made out to the force involved. In most cases the request is approved, and provides a lucrative source of funding for training and drug education programmes. But such forfeiture funding has disappeared. He reveals that 'to make the matters
worse, where large amounts of cash but no drugs are recovered from a search, forces can only use the difficult and outdated legislation of the Police Property Act 1897 to retain the money, but only to cover property expenses or for charitable purposes. Certainly this is a very frustrating situation, while D/Supt O'Connell comments that it seems ridiculous to use 'an antiquated Act' to deal with 1995 problems. O'Connell also says that unless extra funding is forthcoming, the progress made so far on Merseyside could suffer a major setback. However, the then Home Office Minister David Maclean in a recent response to a relevant question in the House of Common states: 'I have no plans to change existing arrangements under which confiscated money is treated in the same way as fine revenue and paid directly into the consolidated fund from which Government expenditure generally, including substantial support for drug-related work, is financed' (pp. 26-27). This clearly illustrates that the Minister is not convinced about this issue.

Alison Jamieson (1992) in 'Drug Trafficking After 1992: A Special Report', provides an outcome of a long term study of the security and response implications of Drug Trafficking for the Single European Market. It deals with money laundering legislation as 'the spearhead of any successful attack on the business of drug trafficking' with particular reference to Britain and Italy. The writer indicates that Italian laws of confiscation were introduced as a weapon against organised Mafia, while in Britain, there is no concept of 'Mafia association', and confiscation proceedings deals only with those suspected to benefit from drug trafficking (p. 30). Jamieson exposes three legal difficulties in the British system: (a) the difficulty of establishing the defendant's benefit to a criminal standard of proof; (b) the problem with enforcing the system if the accused either dies or absconds; and (c) the difficulty of recovering the confiscation orders. Two of these are resolved already by the new amended provisions, while the third is still the subject of persistent debates about the system.

Several other writings have focused upon legal interpretations of some disputable provisions of the system, like for example the restraint order, the retrospective effect, and the variation of the confiscation orders. Some of the writings are already covered or referred to during an examination of the confiscation provisions in chapter three, while others have only repeated what is known about certain parts of the system. There are also
some important critiques which have been widely considered by the new amended legislation (the DTA 1994).

2.4. SUMMARY

This chapter presents a brief review and critical appraisal of the main literature on confiscation theory that have been produced during the last fifteen years. This review is largely intended to determine the distinctive features of the confiscation system which have attracted the attention of the writers, and to find out whether the writers have covered the main aspects of concern in this research.

Having presented the main argument about the confiscation system in this chapter, one can clearly observe that the majority of the literature has reflected the concerns and the dominance of one single school of thought, the juristic perspective. The major part of the literature has been presented by jurists, practitioners and legal academics. It is then axiomatic to find that the majority of the literature is mainly focusing upon interpreting the provisions of the legislation and criticising certain legal and technical loopholes and shortcomings.

Some of the studies have highlighted the historical background, the underpinning philosophy, the justifications of confiscation, and provided a practical account of the powers and their applications. Some writers believed that the current confiscation system is a clear example of 'the end justifies the means' policy. They think that the political pressures upon Parliament had brushed aside several major tenets of criminal law procedure under the auspice to ensure that not even one unlawful penny is left unseized.

Others have explained that one of the important reasons is the misunderstanding or the inability to recognise the spirit of the legislation which has caused unwillingness to enforce it by some practitioners. Some writers believe the system to be draconian where rights have been intentionally abolished.
As has been mentioned earlier the majority of literature represents one school of thought (juristic perspective) which almost dominates the debate about the theory and practice of a confiscation system. However, there have been some differences in the views of some of the writers (holding same perspective) which have led some of them (like Mitchell et al, 1992) to declare that the law of confiscation is in a state of confusion.

Derek Hodgson, the chairman of the Hodgson Committee, points out that the legislation has disappointed the committee because it brushed aside settled principles in sentencing. Fortson asserted that by indicating that certain provisions are causing controversial decisions among courts (e.g. decisions about assessing the realisable property, burden of proof and about setting the required assumptions) (Mitchell, 1992).

The works of Zander (1989) and Levi & Osofsky (1995) provide valuable information. Zander has compared the British confiscation system with the American forfeiture systems (criminal and civil forfeitures). The study has indeed covered the exigency for a detailed examination of analogous experiences elsewhere in the world to support the debate and the argument about having a national confiscation system. Levi & Osofsky provide a practical examination of the confiscation proceedings which are experienced by the law enforcement agencies. The examination include some indications concerning the value and impact of the powers vested to courts and the police. It also presents a determination of the factors which have mitigated against the effective use of the system. Levi & Osofsky have identified certain essential difficulties and shortcomings that exist and provide practical suggestions for improvement. Accordingly, these two studies have covered most of the aspects of questions 4, 5 and 6 stated in the introduction of this chapter.

No doubt some of the views, comments, and critiques that came after the enactment of the DTOA 1986 have been considered for subsequent legislative amendments. This means that the current consolidated legislation (DTA 1994) included some of the proposals and suggestions which were originally raised by those studies mentioned in this chapter. There have been issues raised in two of the research questions (2 & 3) with regard to the availability of justifications for the underpinning social rationale, conviction about legality, and the availability of studies which
examine the relationship and the differences between the rationale, justifications, objectives and aims of the system and the outcomes of applications. These still lack a thorough inspection and detailed appreciation of the nature of confiscation, despite some writers having highlighted aspects of some of these issues.

The studies which have been examined in this chapter did not provide, for example, enough coverage of the legality in granting extended powers to the police. Mitchell et al (1992) indicate that the social justification for seeking forfeiture of proceeds of crime was never questioned; rather, it was implicitly accepted which should, in principle, follow conviction as a matter of course (para. 1.07). The point here is that such social justification which could determine legality is still missing. Garland (1994) explains that the system and even the public are used to taking things for granted (p. 3). Goodsir (1993) indicates that the rights and civil liberties in the UK have been described as a state of mind, rather than a set of rules, relying on institutions and formal procedures, not on a character or written constitution (p. 130). She also says that the confiscation system was passed with relatively little opposition, although it raises some fundamental questions about general freedom and the right to privacy (p. 134). In fact it raises an important question about the role of sociologists and the criminologists in this country. Why those specialising in the sociology of law and socio-legal studies did not provide in-depth studies or at least explanations of all the surrounding conditions and difficulties? The only available answer to this question is by Garland who says 'we are led to discuss penal policy in ways which assume the current institutional framework, rather than question it, as when we consider how best to run prisons, organise probation, or enforce fines, rather than question why these measures are used in the first place' (p. 3).

The literature here has shown that most of the writings about confiscation legislation, have been confined to an examination of the textual provisions, the difficulties in interpreting certain terms and conditions, and determining the shortages and obstacles in enforcing the confiscation system as experienced by law enforcement agencies (courts, prosecution, police, etc.).
This also applies, for example, to the work of Levi & Osofsky (1995). This work is considered to be the first study about the confiscation system which is partly done by a social scientist (Levi), but it did not attempt to question the actual underpinning principles and legality. It seems, as Garland indicated, social scientist and even criminologists are led to serve certain purposes which are far from their professional speciality. Levi & Osofsky were indeed asked to focus on certain applications and to provide recommendations, not about why there is confiscation in first place, but to look at some practical issues and certain mechanisms which need to be improved.

Lastly, the ready-made answers provided by the government are not sufficient in justifying the powerful provisions of the confiscation system which lead to a deprivation of certain individual and property rights. What is needed are comprehensive socio-legal studies and researches which could intervene or mediate in looking for solutions originating from basic social understanding of the nature of the relationships between the individuals and the state. This is a crucial element in confiscation.
CHAPTER THREE

THE BRITISH CONFISCATION SYSTEM
(LAW AND ENFORCEMENT)

3.1. INTRODUCTION

In chapter one the rationale behind the confiscation system was discussed. In this chapter some of the distinctive elements of the British confiscation legislation provided under the consolidated DTA 1994 (DTA) are examined. In this chapter aim 3 of main aim I is to be realised which is to determine the distinctive elements of the British confiscation system with particular reference to the DTA 1994.

This legislation has created substantial powers to obtain information about where suspected criminals have invested their assets, to freeze assets with restraint and charging orders, and to confiscate them from convicted defendants. Most of the powers have already begun to affect criminal investigations since the enactment of the original DTOA 1986. Accordingly, this study will proceed more specifically to examine the features and extent of the main amended powers and provisions under the consolidated DTA 1994. In order to achieve that, a three-stage approach is adopted. This approach is used to help in determining the basic elements and aspects of asset confiscation provided by the DTA and some other relevant legislations. The three-stage approach includes: the pre-trial stage, trial stage, and post-trial stage.

This chapter includes also an examination of certain provisions in the system which have raised some fundamental questions about their unusual nature, difficulty in application, consistency, fairness and the

36Unlike the DTOA 1986, DTA 1994 provides a clear definitions of 'drug trafficking' and 'drug trafficking offence' (Part I, Introductory, s. 1 (1) (2) (3), DTA 1994). The legislation also provides a list of particular drug trafficking offences which the provisions of this Act cover(s. 1). The legislation provides that it works jointly with other relevant statutes, like for example, the Misuse of Drugs Act 1971, the Customs and Excise Management Act 1979, the Criminal Justice (International Co-operation) Act 1990, the Criminal Law Act 1977, and the Criminal Attempts Act 1981.
extent of the state's rights in relation to the liberties of individuals and institutions. It represents a combination of various positions: the legislation, the critiques addressed to some provisions of this legislation, and the impressions and inferences one can possibly reach. These critiques unfold in such a way that they brings forth the importance of an in-depth analysis of the main elements of confiscation.

3.2. THE DRUG TRAFFICKING ACT 1994

This Act shows that the recovery of illegal gains begins by a 'confiscation order'. The trial and conviction are two main pre-conditions for the imposition of the order in 'clear cases'\(^{37}\) (s. 1). The confiscation system has been in force since the enactment of the DTOA 1986 in January 1987, and the courts accordingly, have been imposing this order alongside the use of imprisonment, fine, forfeiture orders, and deprivation orders. As with all new laws, their practical operation often exposes difficulties and faults. The original DTOA 1986 has indeed exposed some criticisms and some major practical difficulties which have led practitioners and reviewers to believe that the Act in its original form cannot be considered a successful piece of legislation.

Sallo\n and Bedingfield (1993) for instance, emphasised that many of those who practise in this area find the DTOA 1986 illogically conceived and consequently impossible to apply in any coherent or reasonable manner. Both authors seem to believe the problems are at the level of definition and application. However, Thomas (1993) wants to marginalise such criticisms by focusing on its many difficult technicalities and unnecessary complications, pointing out that the Act failed to provide an adequate procedural structure for decision-making.

Such criticisms experienced by law enforcement agencies have led the government to adopt recommendations based on two reports of the Home Office Working Group on Confiscation which suggested radical changes to the way in which confiscation orders are made and enforced. However, it seems that the amendments contained in several different Acts have

\(^{37}\)Section 19 of the DTA 1994 gives the High Court the power, in certain circumstances, to make confiscation orders against defendants who abscond at any time after proceedings have been instituted, whether before or after conviction.
caused even more confusion and burdened the practitioners and others who are involved in this process. Consequently, the government decided to consolidate the DTA which received the Royal Assent on the third of November 1994 and came into force on the third of February 1995. This Act consolidates the DTOA 1986 and its subsequent amendments. Therefore examining confiscation as a whole necessarily involves referring to the new revised provisions as well as the old ones. It must be said here that the amended provisions of the Act will apply only to offences committed after the commencement date of each relevant provision. This restriction, as Thomas (1993) has indicated, is thought to be in deference to the principle against retroactive criminal legislation. The DTOA 1986 made no concession to this principle. It applied to proceedings began after the commencement date, irrespective of the date of commission of the offences concerned. Thomas also described this restriction as 'a recipe for chaos in cases involving drug trafficking'. Consequently, it seems that the old and the new provisions of the Drug Trafficking Offences Act 1986 will in effect continue to exist side by side, possibly for many years to come, at least until all offences committed before the commencement date of the amendment have passed through the system.

3.2.1. Confiscation Proceedings (Practice And Procedure)

Section 2 of the DTA 1994, says that the court is obliged to make a confiscation order only when the prosecutor asks it to do so. Where the prosecution does not make a request, the court is empowered to proceed only where it considers it appropriate to do so. Previously, the court was obliged to have a confiscation hearing following a conviction for a drug trafficking offence in every case. This point will be discussed at a later stage in this chapter.

The application of confiscation legislation to a particular matter as it proceeds through the Criminal Justice System is immediate and enduring until such time as a confiscation order is either paid or the defendant acquitted (Mitchell et al, 1992). 'Criminal Confiscation Orders' by David Feldman (1988), and 'Confiscation' by Andrew Mitchell et al., (1992) suggest the breaking up of the confiscation proceedings into three main stages (the three-stage approach), namely (i) pre-trial stage, (ii) trial
proceedings stage and (iii) post-trial procedures (enforcement of the confiscation order). It was suggested that such a division would help in determining the extent and limitations of the confiscation legislation. Hence, this study has adopted the same approach.

The two latter studies have also highlighted some of the relevant court's rules, orders and regulations which had been essential in backing up the drive to identify and secure the proceeds of drug trafficking offences. It is important to indicate that this study is confined to the confiscation provisions of the DTA 1994 and any new amendments which may be introduced after the enactment of the DTA 1994 will not be considered here. It must also be said that all the aspects of the legislation and all the relevant rules and regulations are beyond the scope of this study. It is essential therefore, to note that this section is devoted only to the main aspects of British confiscation proceedings. Once this has been done, the most controversial matters will be examined including the organisational changes required by the law enforcement agencies.

3.2.1.1. Pre-trial Procedures (Powers And Features)
The powers vested to police and courts in the pre-trial stage have been described by Goodsir as unusual (Goodsir, 1993, p. 130). The pre-trial proceedings incorporate elements of criminal law and sentencing, law of receivership, and common law injunctions freezing suspected proceeds of crime. Presumably Goodsir regards these powers as unusual because they were new to the criminal justice system. For example, the police were empowered, for the first time, to conduct searches of premises where the occupiers were not suspected of crime (DTA, s. 55 (1)). It may also be due to the impact or consequences the pre-trial powers inflict upon detainees or suspects. Goodsir (Ibid.) explained that the powers embrace intrusive measures that threaten individual freedoms. She pointed out that judges

38The DTA 1994 also provides an important supplementary provision about for example, reconsideration of a case where the court has not proceeded under section 2, re-assessment of whether the defendant has benefited from drug trafficking, inadequacy of realisable property, bankruptcy, winding up of company holding realisable property, protection for insolvency officers, enforcement of orders made outside England and Wales, offences in connection with proceeds of drug trafficking (money laundry) and lastly the repealing proceedings. However, the focus of the study is toward the basic elements of the confiscation proceedings which represent the British confiscation approach in dealing with assets of drug traffickers.
considered the consequences of imposing the pre-trial powers 'a striking and extraordinary consequence of the Act' (p. 134).

Pre-trial procedures concern the period which starts with the criminal investigation of the defendant and concludes with the return of a verdict guilty or otherwise. Here, investigating officers (police financial investigators or officers from the HM Customs & Excise) are required to trace the proceeds of a drug trafficker early on, if possible even before making an arrest. However, such work needs to be supported by some specific powers, and indeed most of these powers are now contained in the DTA 1994. However, to achieve the maximum or effective confiscation proceedings the law enforcement agencies need to apply some of the powers provided by the Misuse of Drugs Act 1971 and the Police and Criminal Evidence Act 1984. The powers available for any confiscation case under the DTA 1994 are categorised under two main groups: (1) powers during early investigations (warrants to search for evidence, production orders, warrants to enter premises, delay allowing a person in custody to receive legal advice or to inform his relatives for up to 36 hours, and to detain without charge for over 24 hours, and (2) powers once proceedings are instituted (restraint and charging orders).

Mr. Corbett (MP) commented on these powers by saying;

"The powers proposed by this amendment are in terms of civil liberties, quite draconian. The Bill gives the police power to delay notification of the arrest and detention of somebody for up to 36 hours for reasons which, I quickly add are wholly justified in the circumstances. When saying that in some circumstances this kind of intrusion into civil liberties is justified we have to be careful. I want to remind the Minister that the reason why we have gone along with this is that we are determined, as are the Government, to use every weapon in our armoury to deal effectively with people who not only make vast fortunes out of drug trafficking, which is bad enough, but do it by ruining young lives. In many ways this is a historic Bill (referring to the DTOA 1986), and it is regrettable in the sense that there is a need for it" (Parliamentary Debates, Common, 2/7/86, Col.1137).

Goodsir indicates that the power to defer access to legal assistance for up to thirty six hours is applicable only when investigating serious offences such as drug trafficking (Goodsir, 1993, p. 136). This power affects the capacity of the detainee to exercise the right to silence, which is a
significant individual liberty. However, admissions by suspects to the police have great evidential value.

Restraint and Charging Orders

Here legislation is concerned with the preservation of the defendant's assets from dissipation or depreciation with a view to their application toward the satisfaction of a confiscation order. To achieve this purpose the legislation makes provision to obtain a restraint order or charging order over the property of a defendant. Broadly speaking, these orders serve to hold in abeyance all dealings with certain assets in which the defendant holds an interest pending resolution of the criminal charges against him. Once issued, both orders may remain in effect until the defendant is acquitted or a confiscation order is made and satisfied. The DTA allowed the High Court to make a restraint or charging order, and it may make them before or after a confiscation order has been made; such an order as it is listed under the pre-trial powers can even be made before the defendant is charged with an offence. If the pre-charged restraint order is granted the court will discharge the order if proceedings for the offence are not instituted within such time as the court considers reasonable (s. 25 (5) of the DTA 1994).

Sections 25-28 of the Act deal with cases in which restraint orders and charging orders may be made and the effects of those two orders. The High Court may, by the restraint order, prohibit any person from dealing with any realisable property\(^\text{39}\). It applies to all realisable property i.e., any property held by the defendant, and any property held by a person to whom the defendant has directly or indirectly made a gift caught by this Act. However, property is not realisable property if there is in force in respect of it an order under s. 27 of the MDA 1971; s. 43 of the PCCA 1973; s. 223 or 436 of the Criminal Procedure (Scotland) Act 1975; and s. 13 (2), (3) or (4) of the Prevention of Terrorism (Temporary Provisions) Act 1989.

\(^{39}\)S. 6 (2) of the Act provides that in this Act "realisable property" means any property held by the defendant; and any property held by a person to whom the defendant has directly or indirectly made a gift caught by this Act. However, property is not realisable property if there is in force in respect of it an order under s. 27 of the MDA 1971; s. 43 of the PCCA 1973; s. 223 or 436 of the Criminal Procedure (Scotland) Act 1975; and s. 13 (2), (3) or (4) of the Prevention of Terrorism (Temporary Provisions) Act 1989.
Act\textsuperscript{40}. It also applies to realisable property held by a specified person, being property transferred to him after the making of the order\textsuperscript{41}.

The broad scheme involved in making protective orders is to prevent a person (not just the defendant) from rendering any confiscation order nugatory by disposing of his assets prior to conviction (Fortson, 1992). On the other hand, the restraint order is subject to some conditions and exceptions specified in the Act (s. 26). It may be made only on an application by the prosecutor, and may be made on an \textit{ex parte} application to a judge in chambers. As the practice has evolved, all such applications made by the Crown Prosecution Services (CPS) are submitted and reviewed in the Central Confiscation Branch in London (Talbot, 1994). The application consists of an originating motion and a supporting statement or a so-called 'affidavit' (Appendix III) which sets forth the grounds for believing that the defendant has benefited from drug trafficking to which the confiscation provisions apply (Rules of the Supreme Court Order 115).

Where the High Court has made a restraint order the court may at any time appoint a receiver to take possession of any realisable property and to manage or otherwise deal with any property in respect of which he is appointed. Restraint orders may apply to property that is located outside the jurisdiction of the High Court. Whilst the orders have no effect on financial institutions located outside UK, a restrained defendant within the country may be liable to contempt if he deals with property located beyond its borders.

Lastly, the restraint order can be varied or discharged by the High Court in relation to any property, and must be discharged when proceedings for the offences are concluded.

\textsuperscript{40}A gift means a transfer of property made by the defendant at any time since the beginning of the period of six years ending when the proceedings were instituted against him or a transfer made at any time which was a gift of property which directly or indirectly represented property received by him in connection with drug trafficking, and for which there is no, or no proper, consideration (s. 8 (1)).

\textsuperscript{41}The application of the gift provision is where the legislature intended to abandoned one of two main legal characteristics of any procedure in the penal system which is the personal liability.
To make the disposal of property more difficult, the Act empowers the High Court to make a charging order on realisable property for securing payment to the Crown. It should be noted, however, that an application for a restraint order cannot be made in relation to property subject to a charging order made under sections 25-28. The reason for this is that the powers of the High Court, and the receiver appointed by the Court to manage or otherwise deal with the property are extensive.

In contrast, a charging order applies to interests in specified property. This property may include any beneficial interest that the defendant owns in land, securities, such as government or other stock, and units of any unit trust, if such property is in the jurisdiction of England or Wales. A charging order is especially well-suited to a situation in which the defendant owns a portion of an asset in which there are multiple interests. The charging order secures the Crown's potential interest in the property and will be discharged when the payment of the confiscation order is paid or because of acquittal.

Moreover, charging orders provide proceedings with a mechanism to monitor and support the prohibition against dealing with assets embodied in restraint orders. The mere existence of the restraint order does not prevent a defendant dissipating his assets, and breaching the order may amount to an act of contempt of the High Court and is punishable by imprisonment (see Mitchell et al., 1992). Charging orders aim to relieve the prosecution from having to take any further steps to monitor compliance beyond ensuring that the charge is entered as an encumbrance on the central register of title relevant to the type of assets charged. The registry in this case will inform the prosecution of any attempt to sell the charged assets. This means that the defendant will not be able to change the name of the owner or the title unless the burden of the charging order is removed from the register. This kind of utility of the charging order may help to restrain assets which were unknown to the prosecution.

In short, the purpose of the restraint and charging orders is to help and facilitate the work of the financial investigators and prosecution to fulfil a statement which is required by section 11 of the DTA 1994 (formerly section 3 in DTOA 1986), and referred to as a 'prosecutor's statement'. This statement is considered to be important machinery for ascertaining
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matters relevant to the court's determination of the amount to be paid under a confiscation order. Therefore, it is very important to law enforcement agencies (police and prosecution) to make full use of all pre-trial powers and procedures if they are willing to achieve the desired aims of the legislation.

3.2.1.2. Confiscation Procedures During Trial
As said earlier, where the defendant appears to be sentenced before the Crown Court for a drug trafficking offence, the court is obliged to make a confiscation order only when the prosecutor asks it to do so. Where the prosecution does not make such a request, the court is empowered to proceed where it considers it appropriate to do so (s. 2 (1) of the DTA 1994).

The court must go through a four-step process: (a) to decide whether or not the defendant has benefited from drug trafficking; (b) and if he has, the court must assess the value of the defendant's proceeds from drug trafficking; (c) the court must determine the amount to be recovered (this includes a determination that property is in fact available for realisation (realisable property) (s. 2 (2-5)); and (d) the court can then make a confiscation order in the amount of the defendant's benefit or the amount of his realisable property if this is less than the benefit held to have been received by the defendant.

In assessing the amount of the proceeds, the court after conviction shall make assumptions called in the Act 'required assumptions' to determine issues relating to benefit from drug trafficking and assessing the value of the proceeds. The application of these assumptions are mandatory except where they are shown to be incorrect in the defendant's case, or where the court is satisfied that there would be a serious risk of injustice if they were made (s. 4 (4)).

Section 2 (8) of the DTA 1994 shows very clearly that a standard of proof is required to determine any question arising under this Act as to whether a person has benefited from drug trafficking, or the amount to be recovered is applicable in civil proceedings (proof on the balance of probabilities)42.

42The rules of evidence in civil and criminal proceedings differ. In criminal cases the burden of proof is more difficult to discharge than in a civil case. A presumption of notice,
(a) Assumptions Required for Restoring Confiscation's Proof

The DTA provides that the court in order to assist in deciding the question of benefit and the issue of the defendant's proceeds of drug trafficking, shall make the so-called 'required assumptions' (see section 4 (3) of DTA 1994, Appendix III). This section does not allow a deduction of expenses, legitimate or otherwise which were recommended by the Hodgson Committee (p. 151). Quite likely this could be another reason to support those who described this Act as having extraordinary wide and draconian powers.

In practice, when the prosecutor asks the court to proceed under section 2 to consider a confiscation order, he/she shall give the court a statement (Affidavit, see Appendix III) clarifying his assessment of the value of the defendant's proceeds (s. 11, DTA 1994). This statement should always include two accounts; the assessment of all the defendant's proceeds43 which include also the amounts of benefits from drug trafficking offence(s), and an assessment of the realisable property (any property held by the defendant or by a person to whom the defendant has directly or indirectly made a gift). The latter account refers to the available property held by the defendant. The main purpose of such statement is to simplify the determination proceedings by providing written a statements to be tendered by the Crown.

The court after stating the assumptions shall: (a) order the defendant to pay the amount of the confiscation order; and (b) take account of the order before: (i) imposing any fine on him; (ii) making any order involving any payment by him; or (iii) making any order under section 27 of the Misuse of Drug Act 1971 (forfeiture orders) or section 43 of the Powers of Criminal Courts Act 1973 (deprivation orders) (s. 2 (5) DTA).

Subsection (c) of section 2 of this Act means that the court must leave the confiscation order out of any decision when determining the appropriate

for example, under civil law is no proof of actual knowledge in criminal law (more details concerning this matter see Kiralfy. A, 1990).

43Section 4 (1) of the DTA provides that any payments or other rewards received by a person at any time (whether before or after the commencement of this Act) in connection with drug trafficking carried on by him or another person are his proceeds of drug trafficking; and subsection (2) provides that the value of his proceeds of drug trafficking is the aggregate of the values of the payments or other rewards.
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sentence. This statement does not give a clear indication as to whether a confiscation order is part of the sentence or not. If, for example, a fine is considered because it is part of the punitive component of the sentence and dealing with the questions of fines or deprivation orders requires taking confiscation orders into account then, this may indicate that the confiscation order is also part of the whole sentence and could not be left out in determining the 'appropriate' sentence. More detailed analysis of this matter will be discussed later in this chapter.

If the court is satisfied that the amount that might be realised is less than the amount the court assesses to be the value of the proceeds, the amount to be recovered therefore is the amount appearing to the court to be the amount that might be so realised; or a nominal amount where it appears to the court that the amount that might be so realised is nil (s. 5(3)). It seems that the reason for including this is that the court's power to increase orders under section 16 only applies when an order has been made; if no such order had been made there would be no jurisdiction to order an increase (see Millington, 1995).

Subsection (8) of section 11 of the DTA provides that if the defendant fails in any respect to comply with a requirement to indicate to the court within such a period as it may direct, the extent to which he accepts each allegation in the statement (the assumption), he may be treated for the purposes of this section as accepting every allegation in the prosecutor's statement in question. This means that the right to silence has been abolished. This issue has been the subject of widespread civil libertarian concern. Levi & Osofsky (1995) added that the proof of connection between the assets held by the defendant or his associates and the offence(s) is often a matter of dispute (p. 25). These issues will also be examined later.

(b) Postponed determinations

Prior to the enactment of the amended provisions provided by the Criminal Justice Act 1993 (CJA), which came into force on the 3 February 1995, the Crown Courts must issue confiscation orders after conviction and before imposing sentence. This provision, as indicted by those suggested the amendments, impose a great pressure time-wise on police, defence and courts. The new amendments under CJA 1993 allowed the
courts to postpone their determination of confiscation related issues but pronounce sentence without delay.

This provision merely provides a statutory basis for a practice which has been adopted by the court for some time, that of granting adjournments in exercise of its inherent jurisdiction (Millington, 1995). Except where there are exceptional circumstances, any postponements granted may not exceed six months. Section 3(7) of the CJA 1993 remedies a much criticised provision in the 1986 Act whereby the court could not impose sentence until the financial enquiry had been completed. This resulted in defendants being kept in suspense for many months before knowing their fate, but now the court may proceed to sentence for the substantive offence, notwithstanding that the confiscation enquiry is to be postponed.

3.2.1.3. Confiscation order after sentencing (enforcement)
The last stage in the confiscation system is where a confiscation order is recovered by a Magistrate Court. Section 9 (1) of the Act shows that where the Crown Court orders the defendant to pay any amount under section 2 of this Act, sections 31 (1) to (3C) and 32 (1) and (2) of the PCCA 1973 shall have effect as if it were a fine imposed on him by the Crown Court. There are two methods by which a confiscation order may be enforced. The first is by treating such an order as a fine, as (s. 9) of the DTA provides: a defendant who is tempted not to pay the fine faces the prospect of a consecutive sentence of imprisonment in default. The second method is by the appointment of a 'receiver' who will, if necessary, seize, realise and manage the defendant's realisable property. The Criminal Justice Act (CJA) 1993, however, introduced a new concept into section 6 of the DTOA 1986 which is now under section 9 (5) of the DTA. This provides that where the defendant serves a term of imprisonment or detention in default of paying any amount under the order, serving that term does not prevent the confiscation order from continuing to have effect. The section states:

'Where the defendant serves a term of imprisonment or detention in default of paying any amount due under a confiscation order, his serving that term does not prevent the confiscation order from continuing to have effect, so far as any other method of enforcement is concern'. (s. 9 (5), DTA 1994).
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By virtue of the implementation of section 32 (1) of the Powers of Criminal Courts Act 1973, the responsibility for the enforcement of confiscation order falls upon a different court, the Magistrate's Court. Where the Crown Court makes a confiscation order, it should, as part of that order, direct that payment be made to the Clerk to the Justices of a stated Magistrate's Court. It is important that the enforcing Magistrate's Court be notified quickly of its duty so as to prevent any delay in the enforcement process. This court is at liberty to explore each and every option that would be available to it to secure the payment of the confiscation order. The new provisions in the DTA 1994, as Levi & Osofsky (1995) indicate are designed to ensure that the Magistrate's Courts should consider or try all measures to enforce payment before issuing a warrant of commitment. Fortson (1992) indicates that the purpose of the DTOA is that a person convicted of a drug trafficking offence should be deprived of the proceeds to the extent that they were realisable. Committing a defendant to prison by way of a warrant of commitment is a course of last resort (p. 252).

Section 139 of the Magistrate's Court Act 1980, directs that priority in payment be given to certain types of financial order. Confiscation orders, which that section does not refer to, are to be afforded priority in payment over all other punitive financial orders (s. 2 (5) of the DTA 1994). Mitchell and others in their book on Confiscation (1992), stated that the reasons for that is that where the Crown Court has determined the defendant's benefit from his criminality and proceeds to assess his realisable property, the court must deduct any sum due in respect of any financial order made in the past upon the conviction of the defendant, i.e. any fine or order for costs or compensation made upon conviction for a criminal offence (DTA, s. 6 (4) (a)). Furthermore, the Crown Court may consider confiscation before sentence and thus must satisfy itself that confiscation is appropriate and can be paid before considering the imposition of any other financial order in addition to a confiscation order. Whilst it cannot take into account the existence of the confiscation order in determining the severity of such penalty, it will undoubtedly have in the back of its mind the defendant's ability to pay both orders. (p. 140)

As has been mentioned above, one of the most important aspects of legislation is that confiscation orders operate in _personam_ and not in _rem_
warrants, so that a defendant may be permitted the choice of which of his resources he shall resort to in order to effect payment and time in which to exercise that choice. This means that once the Crown Court sets the amount of the confiscation order the defendant is faced with a choice. Nothing in the order dictates what property must be used to satisfy the order. Instead, it is up to the defendant to make this determination (Levi & Osofsky, p. 24).

3.2.1.3.1. Treating the Confiscation Order as a Fine (Magistrate's Court)

Section 9 (1) of the DTA clearly sets out the general principles to be applied:

'Where the Crown Court orders the defendant to pay any amount under section 2 of this Act, sections 31 (1) to (3C) and 32(1) and (2) of the Powers of Criminal Courts Act 1973 (powers of the Crown Court in relation to fines and enforcement of Crown Court fines) shall have effect as if that amount were a fine imposed on him by the Crown Court'.

Table (3.1) indicates how the legislator has measured the size of the penalties to be imposed in default to reflect the amount of the confiscation order.
### Table (3.1) Size of penalties imposed upon defaulters.

<table>
<thead>
<tr>
<th>Amount</th>
<th>Sentence</th>
</tr>
</thead>
<tbody>
<tr>
<td>Not exceeding £50</td>
<td>5 days</td>
</tr>
<tr>
<td>Exceeding £50 but not exceeding £100</td>
<td>7 days</td>
</tr>
<tr>
<td>Exceeding £100 but not exceeding £400</td>
<td>14 days</td>
</tr>
<tr>
<td>Exceeding £400 but not exceeding £1000</td>
<td>30 days</td>
</tr>
<tr>
<td>Exceeding £1000 but not exceeding £2000</td>
<td>45 days</td>
</tr>
<tr>
<td>Exceeding £2000 but not exceeding £5000</td>
<td>3 months</td>
</tr>
<tr>
<td>Exceeding £5000 but not exceeding £10 000</td>
<td>6 months</td>
</tr>
<tr>
<td>Exceeding £10 000 but not exceeding £20 000</td>
<td>12 months</td>
</tr>
<tr>
<td>Exceeding £20 000 but not exceeding £50 000</td>
<td>18 months</td>
</tr>
<tr>
<td>Exceeding £50 000 but not exceeding £100 000</td>
<td>2 years</td>
</tr>
<tr>
<td>Exceeding £100 000 but not exceeding £250 000</td>
<td>3 years</td>
</tr>
<tr>
<td>Exceeding £250 000 but not exceeding £1m</td>
<td>5 years</td>
</tr>
<tr>
<td>Exceeding £1m</td>
<td>10 years</td>
</tr>
</tbody>
</table>

Source: PCCA 1973, s. 31.

It is quite apparent from the above table that the size of the default sentence is based upon the amount of the confiscation order. Hinton et al (1992) clarified that when DTOA 1986, first has come into force, the default sentences of (s. 31) of the Powers of Criminal Courts Act (PCCA) 1973 were thought to be an inadequate reflection of the Parliament's attitude toward those who deal in drugs for profit (p. 132). Consequently, section 6 (1) (b) was included in the DTOA 1986 raising the default sentences to be imposed beyond that which could be set in s. 31 of the PCCA, when a drug trafficker failed to satisfy a confiscation order. Afterwards the provision in DTOA altered s. 31 of the PCCA, but it seems that the draftsman of the Act was satisfied. This table appears only in the PCCA and is not included in the consolidated DTA 1994.

#### 3.2.1.3.2. Appointment and Powers of a Receiver

In brief, once a confiscation order has been made which is not subject to appeal and which has not been satisfied, the High Court or a County Court are empowered that they may, on the application of the prosecutor, appoint a receiver to realise any realisable property (s. 29 - s. 31). The material powers conferred on a receiver are set out in section 29 (see Appendix III).
Subsection (5) provides that if the realisable property considered as illegal gains and drug-related proceeds are not available or their value is less than the amount of the confiscation order then the appointed receiver is empowered to realise any other property in 'such a manner as the court direct'. This means that it could also cover or realise any other legally obtained property. Moreover, subsection (8) of this section provides that a reasonable opportunity must be given for persons holding any interest in the property to make representations to the court. Fortson (1992) concludes by saying that the principal object of the provisions under this section is to satisfy the confiscation order notwithstanding any obligation which the defendant or the recipient may have which conflicts with the satisfaction of the order (p. 255).

3.2.1.3.3. The Application of Proceeds of Realisation
The application of proceeds of realisation and other sums is explained in section 30 of the DTA. Subsections (2) and (6) provide that before satisfying the confiscation order by depositing the payment into the Treasury the court shall pay the expenses of an insolvency practitioner or the receiver's remuneration and expenses.

Set out below is a chart of the proceedings relevant to this thesis which is aimed at clarifying some of the complex procedures:
Figure (3.1) shows the steps and powers granted to the police and court to trace, seize and confiscate the proceeds as provided under the DTA 1994.
3.2.2. **Safeguards and Compensation**

The DTA stipulates certain conditions and restrictions for the enforcement of some of its powers which are vested in the law enforcement agencies. It also provides some protections and compensations for the defendants and third parties who may suffer substantial loss from a serious default on part of the prosecution.

The application for a production order, for example, provides that there are some important conditions needing to be satisfied. The judge may make such an order only if he is satisfied that there are reasonable grounds to do so (see section 55(4), Appendix III).

Section 2 of the Act also provides an important condition for the imposition of a confiscation order. The section provides that where a defendant appears before the Crown Court to be sentenced in respect of one or more drug trafficking offences, he must not previously have been sentenced or otherwise dealt with in respect of his conviction for the offence or, as the case may be, any of the offences concerned. This is to avoid double jeopardy, and notice too that judges must be aware of previous sentences.

Section 4 (4) of the DTA provide that the court shall not make any of the required assumptions in relation to any particular property or expenditure if such an assumption is shown to be incorrect or the court is satisfied that there would be a serious risk of injustice in the defendant's case if the assumption were to be made.

Section 4 (6) also provides that for the purpose of assessing the value of the defendant's proceeds of drug trafficking, in a case where a confiscation order has previously been made against him, the court shall leave out of account any of his proceeds of drug trafficking that are shown to the court to have been taken into account in determining the amount to be recovered under that order. This provision is to protect the defendant from being ordered to find a sum twice over for one benefit, and thereby not having the available proceeds.

Section 18 of the DTA 1994 provides that if the defendant is acquitted, or his conviction quashed on appeal, or he is subsequently pardoned, the
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High Court may order compensation to be paid to the defendant, if there has been some serious default on the part of the prosecution and the defendant has suffered substantial loss.

With regard to the innocent third party, section 31 (4) of the Act provides that the court can allow him or her to retain or recover the value of any property held by him or her. This means, he or she is protected. However, he or she may find that the confiscation order encompasses their property. A third party may come under suspension of criminal involvement with the defendant, e.g. though some form of association. If so, he or she may have to prove his or her innocence and the innocent entitlement to the property, or to prove his or her right to the return of money when the property is confiscated and sold, if at some stage it has passed through the hands of the defendant. So the third party may expect some anxious times (Samuels. A, 1986). The law enforcement agencies (courts and police) expect that the third party should keep for instance, all the ownership records for at least six years.

The new provision of section 3 (3) of DTA 1994 provides that unless it is satisfied that there are exceptional circumstances, the court shall not specify a period of postponement under this section which exceeds six months beginning with the date of conviction. If there is an appeal, subsection (6) provides that unless the court is satisfied that there are exceptional circumstances, any postponement or extension shall not exceed the period ending three months after the date on which the appeal is determined or otherwise disposed of.

Lastly, the defendant is allowed also to apply for the variation or discharge of the production order, the restraint order and even the confiscation order (ss. 55, 26, 21).

3.2.3. Complementary Provisions

The above examination presents the most distinctive elements of the confiscation proceedings in the British system related to drug trafficking offences. The DTA 1994 and in particular the Powers of Criminal Courts Act (1973) provides other important complementary provisions which support confiscation proceedings, including powers of variation of the
order, power to discharge the order, provision for defaulters (instalments process), interest on sums unpaid, provisions about revising the assessments of the realisable property, powers where the defendant has absconded or died, and some other points that are related to confiscation proceedings in a drug trafficking offence. Moreover, the Act has defined five new offences in connection with proceeds of drug trafficking. These are; concealing or transferring the proceeds; assisting another person to retain the benefit of the drug trafficking; acquisition and possession or use of the proceeds; failing to disclose knowledge or suspicion of money laundering; and lastly the offence of tipping-off the defendant. Most of these provisions are important and support law enforcement agencies, and even the defence in some cases where enforcement is faced with difficult developments. Some of these provisions will be discussed later when examining the debates on the system, including the perceptions of some of the practitioners.

It must be mentioned that confiscation legislation applies to England and Wales only. It does not apply to Scotland and Northern Ireland but orders made in England or Wales may be registered in Scotland. The International Criminal Policy Division of Home Office indicated that Scotland and Northern Ireland have their own confiscation legislation (Home Office, 1994).

3.2.4. Practical Difficulties and Domains of Disputes

The law is extremely complex in respect to the actual making of an order and its enforcement. It is likely that this will result in many Court of Appeal cases dealing with the interpretation of these provisions' (Bazell, 1989, p. 352).

The DTOA 1986 in its original form cannot be considered to be a particularly successful piece of legislation. It was burdened by many difficult technicalities and unnecessary complications, and failed to provide an adequate procedural structure for decision-making (Thomas, A. 1993, p. 93).

The practical implementation of confiscation provisions according to their context under the DTOA 1986 at the preliminary period (which extend from the date of commencement on the 1 January 1987 up to 1993) has exposed a number of difficulties, whether experienced by the law enforcement agencies or by some academics. The Home Office Working
Group on Confiscation\textsuperscript{44} (1991) acknowledged that the provisions under the DTOA were innovatory and their practical operation has exposed a number of difficulties (p. 1). Accordingly, the recommendations listed in the Report of the Home Affairs Committee on Drugs Trafficking and related Serious Crime (1989)\textsuperscript{45} and the Report of the Home Office Working Group on Confiscation (1991), which were originally extracted from several important studies by some of those interested practitioners and academics\textsuperscript{46}, had led to some new amendments provided under subsequent legislation (Criminal Justice (International Co-operation) Act 1990 and CJA 1993).

Most of the important recommendations, later changed not only the rules of law enforcement but the perspectives and the theory of the system. These did not find their way into the system until the actual date of enactment (CJ(IC)A 1990 and CJA 1993). These new provisions were introduced by means of the DTA 1994 which came into force on 3 February 1995. It took more than eight years for most of the new provisions to be operationalised. Presumably if the recommendations were suggested by those involved who experienced defects and unnecessary complications to the system and the delays in putting these suggestions and recommendations into force is the government responsibility, then the subsequent contradictions and conflicts in the enforcement of the system are understood.

Before listing the areas of disputes, it has been noticed that the legislation is written in language which seems to be designed to obscure more than to clarify. An example of this is section 59 (2) which provides:

\begin{quote}
The power to make an order under subsection (1) above is exercisable if: (a) the powers conferred on the court by sections 26 (1) and 27 (1) of this Act are exercisable by virtue of subsection (1) of section 25 of this Act, or (b) those powers are exercisable by virtue of subsection (3) of that section and the court has made a restraint or charging order which has not been discharged; but where the power to make an order under subsection (1) above is exercisable by virtue only of
\end{quote}


\textsuperscript{45}The seventh Report of Session 1988-89 on Drug Trafficking and Related Serious Crime (HC 370)

\textsuperscript{46}Some of these valuable writings are, for example, David Feldman (1988), Michael Zander (1989), Mitchell et al (1992), Thomas. A (1993), and Sallon et al (1993).
paragraph (b) above, subsection (4) of section 25 of this Act shall apply for the purposes of this section as it applies for the purposes of section 26 and 27 of this Act'.

In addition, this part of the section examines the measures which are central to the disputes about the British confiscation legislation provided under the consolidated DTA 1994. They will be discussed according to their status and according to the three stages of proceedings (pre-trial, the trial, and post-trial proceedings).

3.2.4.1. Pre-trial Measures
The impacts of the four main provisions have been described as extraordinary wide and draconian. These provisions are provided under Part I (s. 25 to s. 28) and Part IV (s. 55 to s. 59) of the DTA 1994. The latter Part embraces two main powers which are vested in the law enforcement agencies: a production order under section 55 (order to make material available) and a warrant order (authority for search). The former Part include restraint orders and charging orders (s. 26 and s. 27). In addition to what has been stated in the review of the relevant literature (Chapter Two) concerning these procedures, the following selected statements would describe the perceptions of those interesting in the system in regard to the nature, extent, and the defects of the system.

3.2.4.1.1. Production and Warrant Orders
Mitchell et al (1992) indicate that the powers available to investigators into drug trafficking are extensive (p. 11). For example, section 55 (1) of the DTA 1994 states that 'a constable may for the purpose of an investigation into drug trafficking apply to a Circuit Judge for a production order'47.

The term 'for the purpose of an investigation into drug trafficking' is deliberately wide (Ibid., p. 11). It permits the judge to exercise his powers at every stage of a drug trafficking enquiry so that the investigator can use production orders: (a) as an intelligence-gathering tool, (b) to identify area of evidence for a prosecution, (c) to gather evidence for contempt hearings for breach of High Court orders, and (d) for the financial investigation into

47The section exactly provides that 'A constable may for the purpose of an investigation into drug trafficking, apply to a Circuit Judge for an order under subsection (2) of this section in relation to particular material or material of a particular description'.
the benefit derived by a defendant from drug trafficking. This means that the investigators can apply for such an order at any time if it is for the purpose of an investigation into drug trafficking.

Though there are certain conditions needed to be satisfied, these important matters are not declared in the legislation, presumably because they may provoke unnecessary disputes among practitioners about the actual intention of the legislature. Moreover, the legislation does not provide guidelines on the procedure to be adopted for the making, variation and discharge of the production orders. Mitchell et al pointed out that guidelines were given by Stuart-Smith L.J. (1989) who stated

'It is unfortunate that no rules have yet been made under paragraph 4 (1) of the Schedule (Schedule 7 of the POT (TP) A 1989) in their absence we have been asked to give guidance to those involved in such applications as these. We do so, but we must emphasise that these are not intended to be hard and fast rules, since much will depend upon the judge's discretion as to how information should be disclosed and at what stage' (p. 12).

'Material' is not defined in the 1994 Act, but it seems to cover any material whatever (Feldman, 1988, p. 38). The Act provides that the applicant must satisfy the judge that there are reasonable grounds for suspecting that the material does not consist of items subject to legal privilege (s. 55 (4) (b) (ii)). Feldman pointed out that there is no lawful procedure in English law by which people can be coerced into producing or giving access to privileged items. But s. 10 (2) of the Police and Criminal Evidence Act (PACE) 1984 provides that the privilege does not apply if material is held with the intention of furthering a criminal purpose. This means that there is nothing to prevent access to any kind of drug trafficking related material.

It seems too that injudicious use of the material itself is to be expected, i.e. the power to enter and search the premises to obtain access to the material (s. 55 (5) and s. 56 (1) (2)) by police or other law enforcement agencies even where the Act would provide a compensation to be awarded to the victim or the one who had been harmed. It may, if it happened, affect deeply the relationship, trust and creditability of the public in the police. This could lead the police to lose the most important source of information and support. It also could weaken or destroy respect from the financial institutions and law firms, where they are considered to be the main source for disclosures of suspicious transactions. This means not only that
the persons or institutions who are in possession of the material are affected by such powers, but also the law enforcement agencies themselves are also at risk of losing their credibility. In this matter, one can see why these procedures were described as far-reaching both in their potential intrusion upon the rights of individuals and the overt intrusion into the confidentiality of the adviser/client relationship even if such confidentiality is not protected by legal privilege (Ibid., p. 15).

Section 56 of DTA provides that a constable may, for the purpose of an investigation apply to a Circuit Judge for a warrant under this section in relation to specified premises. This would empower a constable to enter and search the premises where the occupiers are not necessarily suspected of any crime. The conditions referred to in section 56 provide that there are reasonable grounds for suspecting that a specified person has carried on or has benefited from drug trafficking (s. 56 (3) (a)), but it is not necessarily that the specified person is the occupier of the premises. Goodsir (1993) indicates that in one instance, a solicitor's office was searched for documents relating to property transactions undertaken on behalf of a suspected trafficker (p. 140).

There are other dimensions too. Assume a solicitor for instance, comes into conflict with section 50 of the DTA 1994 (i.e. assisting another person to retain the benefit of drug trafficking) when he is acting for a client in a transaction involving substantial sums of money and becomes suspicious about the source of the funds. If he wishes to allay his fears he must question the client but this could bring him in breach of section 58 (offence of prejudicing investigation). If his suspicion as a result of section 55 (orders to make material available), he will not be able to continue to act for his client because this could result in him being prosecuted under section 50. However, simply ceasing to act without giving a reason to the client may not provide sufficient protection unless he also discloses his suspicions to the police. Burton (1989) pointed out that even if the police give their consent for the solicitor to continue to act, he must consider carefully whether or not he can continue to do so because, in effect, he has become an agent of the police. On the other side, the firm's professional reputation would also suffer if it became known that the material belonging to their clients had been handed over.
3.2.4.1.2. Restraint and Charging Orders

It seems that one of the reasons the DTOA 1986 is called 'innovatory' is that it borrowed a number of powers already existing in the civil law and applied them for the first time to the criminal law. Most of the disputes about the restraining system provided under this legislation centre around four main issues. The first is related to the extent of the order. Section 26 (1) of the DTA 1994, provides that the High Court may by order prohibit any person from dealing with any realisable property, subject to such conditions and exceptions as may be specified in the order. Subsection (2) (a) provides that a restraint order may apply to all realisable property held by a specified person, whether the property is described in the order or not. The system provides that even legitimate property will be subject to a restraint order, unlike that of the restraint order concerned with other types of offences where the totality of the defendant's realisable property will not need to be restrained to enable payment of any confiscation order which may be made (see CJA 1988). Or in a case where the police may be allowed to search for and seize material held by parties not suspected of any offence; or in a case where a restraint order covers properties of more value than actual proceeds of the offence.

In this regard, the Parliamentary Under-Secretary for the Home Office then Mr. David Mellor in 18/2/86 (Parliamentary debate, Col. 197,198) stated that;

'...it is a serious infringement of individual rights that property should be so restrained. This power cannot be given lightly because it is an interference with the liberty of the subject. Because this is a serious matter, we have given the power to a High Court judge, not to lesser judges. It will require the judge to take a balanced view as to whether it would be proper to make the order. Plainly, the only basis on which he can determine that it would be proper is if he is satisfied, on the merits, that there is evidence that the individual concerned has been involved in drug trafficking and has benefited from it'.

Levi & Osofsky (1995) indicate that the British legislature has deliberately broadened the extent of the restraint order in an attempt to ensure ultimate satisfaction for the confiscation order (p. 19). But is this permissible and fair at the expense of the innocent parties? Edward D. Re (1951) pointed out that the Magna Carta, in England and in countries whose jurisprudence is based upon the heritage of the common law, the concept of due process is firmly embedded in municipal law to tolerate
any appropriation of private property without adequate compensation. This kind of application needs to be carefully examined to see whether it is consistent with the main objectives and principles of a confiscation system.

The second issue is about the Central Confiscation Branch (CCB). To obtain a restraint or charging order, a prosecutor is supposed to file an ex parte application in the chambers of a High Court judge. In practice, all such applications made by the prosecutors are submitted and reviewed by the CCB in London, where assigned business is dealt with. To proceed with the application the CCB requires a minimum threshold of £10,000. This means that if the application for a restraint order to a property with a value is less than that the application will be rejected. This issue may lead to dissatisfaction and complaints by police who are obliged to deal with the CCB. Levi & Osofsky pointed out that this minimum threshold of the CCB has prevented them from confiscating the working capital of street-level dealers, which they view as an important objective, irrespective of whether or not it is financially cost-effective to make and enforce the order (p. 10).

The third issue relates to variations in the restraint order. Restraint orders can be varied by any person affected by them. The most common reasons for varying the order include allowing the defendant's funds to cover 'reasonable' legal fees or permitting additional living expenses. This has become a source of complaint from the police who believe that the benefit from crime is often dissipated in this process. This means that some police question the appropriateness of allowing the defendant or his family to take out monies that should go to central funds.

The last issue is related to disclosure order. Restraint orders are normally coupled with such orders as a means of identifying and ascertaining the whereabouts and value of assets affected by the restraint order. Nothing is expressly stated in the DTA 1994 which empowers the High Court to compel a defendant to swear on affidavit disclosing the nature, whereabouts and value of assets held by persons affected by the restraint order. However, section 49 of the DTA provides that a person is guilty of an offence if he conceals or disguises any property or converts or transfers that property, or removes it from the jurisdiction, being the property
which in whole or in part represents the proceeds of drug trafficking for
the purpose of avoiding, *inter alia*, the making or enforcement of a
confiscation order. The legislature was aware of the common law rule
against self-incrimination which provides that no man shall be compelled
to comply with an order which might incriminate him. So an appropriate
condition was provided at section 11 (11). The subsection provides that

'No acceptance by the defendant under this section that any
payment or other reward was received by him in connection with
drug trafficking carried on by him or another person shall be
admissible in evidence in any proceedings for an offence'.

In addition to restraint orders, the High Court is also empowered to grant
a charging order. This order reveals another extraordinary aspect of the
system where it applies to interests in a specified property. This property
may include any beneficial interest that the defendant owns in land,
securities, stocks, and units of any unit trust. The order secures the
Crown’s potential interest in the property and will be discharged when the
payment which is secured by the charge is paid into court.

Broadly speaking, these two orders serve to hold in abeyance all dealings
with those assets in which the defendant holds an interest pending
resolution of the criminal charges against him. Once issued, these orders
may remain in effect until the defendant is acquitted or a confiscation
order is made and satisfied. The jeopardy lies because these two orders can
be issued long before criminal conviction. Under the DTA, the High Court
may issue them as soon as a defendant is arrested for a crime covered by
the confiscation laws, or even earlier when the Crown is able to establish
that a charge will be forthcoming ‘within a reasonable time’. The
legislation here does not explain what 'within a reasonable time' means,
or what is the maximum time which is expected for establishing a charge
against a person whose property is restrained or who is restrained from
dealing with his own property and businesses. These kind of procedures
would lead to an inquiry about the attitude of human right societies. It
seems that accepting such a situation as a course of action which would be
vested in such cases (drug trafficking offences) or taking things for granted
is not a sufficient answer. Providing that 'the court shall discharge the
restraint order if proceedings in respect of the offence are not instituted
within such time as the court considers reasonable' (s. 25 (5)) will irritate
the proponents of human rights and offend individual freedoms.
3.2.4.2. Confiscation Proceedings in Trial

3.2.4.2.1. The Burden of Proof (the erosion of the right to silence)

Section 11 (5) of the DTA 1994 provides that the court may require the defendant to indicate to it, within such a period as it may direct, the extent to which he accepts the allegations of prosecution in regard to the value of his proceeds of drug trafficking and to give particulars of any matters on which he proposes to rely in case he does not accept any of the prosecutor's allegations. This section clearly provides that the defendant is obliged to co-operate and the right of silence does not protect him in any confiscation proceedings.

The 'right to silence' has continued to be a matter of some controversy, not least in the context of the European Convention on Human Rights (Levi & Osofsky, 1995, p. 55). Andrew Nicol and Clive Soley (Hodgson Committee, 1984) rejected such provision which was originally recommended by the majority of the Hodgson Committee on the basis that reversal of burden of proof would contravene the European Convention on Human Rights. Article 6 (2) of the Convention states that

'Everyone charged with an offence shall be presumed innocent until proved guilty according to law'.

The common law rule against self-incrimination, as previously mentioned, clearly provides that no one shall be compelled to comply with an order which might incriminate him. The point here is that abolishing the right to silence in spite of all the justifications provided by the government, continues to be a matter of controversy within law enforcement agencies. There are some courts or judges, for example, as indicated by DI David Hickman (pers. communication, West Midlands Police) who would rather not breach the common law rules regarding this. This reveals that some courts suspect that the new provision contradicts common law rules. Following common rules by some courts is more safe than adopting new and unprecedented provisions. Human rights, individual freedoms and liberty are the main underpinning reasons for the reluctance or hesitation of judges to compel defendants to disclose any information. Some judges still believe that it is the function of the prosecution to find evidence to support allegations against the defendant. Goodsir (1993) indicated that was so in 1988 when the
government proposed to abolish the right to silence. It was said that major criminals were getting away with crimes because they knew how to 'operate the system'. By keeping quiet, and refusing to answer questions, detainees were able to avoid self-incrimination. A committee set up with the responsibility of coming up with practical proposals for the abolition of the right of silence failed to report publicly (p. 136). This suggests that there are some practitioners who still do not agree with the new provision in the DTA 1994 (s. (11) (5)).

Fortson (1992) has examined several confiscation cases during 1990 and 1991 and found out that none of the cases has made clear the standard of proof which the defendant must discharge, but it is plain that the standard is the civil standard. He also observed that not one authority has suggested a contrary proposition. He concluded by saying that it is not clear whether the prosecution or the defendant has the burden of proof concerning the correct value of the property. He thinks that if the defendant contends that the amount that might be realised under s. 4 (3) of the DTOA 1986 is less than the value of property alleged by the prosecution, then it seems that it is for the defendant to prove the lower valuation (p. 235).

3.2.4.2.2. The Standard of Proof
Since the enactment of the DTOA 1986 the courts were confused about the standard of the proof. Different and contradicted decisions were made. Section 2 (8) of the DTA 1994 came afterwards (after more than seven years), to deal with these contradicting arguments and the decisions which had emerged from ambiguous provisions regarding the standard of proof. This section makes it clear that the standard of proof required to determine any question arising under the Act shall be applicable in civil proceedings, which is or the 'balance of probabilities'. This means that the courts are no more obliged to present evidence which is beyond reasonable doubt about the amount of benefits of drug trafficking offence (s).

Prior to the enactment of section 2 of the DTA 1994, and since the commencement date of the DTOA 1986, the situation was ambiguous.

This caused trouble to the courts up and down the country notwithstanding the warnings and the related debates accompanying the examination of the 1986 Act in the two Houses of Parliament and in some academic circles. The DTOA 1986 did not define the standard of proof. Differences, therefore, have occurred in the interpretation of the related provisions in the DTOA, particularly in those (the assumptions, the burden of proof, and the standard of proof) in confiscation proceedings. The legislative context has become very complex, affecting its purpose and the final outcome. In the last six years since the date of the commencement of the DTOA 1986 up to the day just before the commencement date of the Criminal Justice Act 1993 there have been extensive demands for more effective governmental intervention. It appears that this has been a major impetus to establish the final form of section 2 (8) of the DTA.

It seems that the government never anticipated that such a problem may arise. The government was satisfied with the interpretation of some courts which believed that the provisions of the DTOA 1986 are constituting a punitive law which requires a criminal standard of proof. On the other hand, there were some others who adopted the civil standards for the purpose of the Act's provisions. This meant that defendants held the burden of proof. This was in contrast to the criminal standards which would require the prosecutions to prove beyond reasonable doubt. Raffan (1985) considered that the reverse of the standard is 'not a novel concept', for the reason that such fundamental change in the criminal justice system already exists in taxation matters (Parliamentary Debates, 1987). Lord Denning also asserted that it is already established in English law (Ibid.).

In the Court of Appeal in Dickens (1990), the Court held that the DTOA and confiscation orders made thereunder were punitive. It was decided then that the amount of a defendant's benefit, must be proven by the Crown to a criminal standard (i.e. beyond reasonable doubt). A similar decision was also given in \textit{R}.\textit{v} Chapman (1991). In this case the Court of Appeal was faced with two equally valid methods of valuing a gift caught up by the DTOA 1986. One method favoured the defendant and would result in the reduction of the value ascribed to his realisable property, which in turn would result in a proportionate reduction of the
confiscation order made against him. The sentencer decided that as the DTOA was a 'penal statute'; it must be construed in favour of the defendant wherever ambiguity arose. Accordingly, the method of valuing a gift most favourable to the defendant was to be preferred.

The guideline judgement of Lord Lane in *R v Dickens* ([1990] 2 WLR 1384), may explain the rationale underpinning the adoption of the criminal standard of proof (proof beyond reasonable doubt). There the Lord Chief Justice said of the DTOA:

> The grounds of appeal advanced... raise a number of points under the Act which we understand have caused trouble to courts up and down the country and it may be of assistance if we try to deal with the structure and import of the Act in general before turning to the specific points which arise in this appeal'.

Accordingly, the prosecution has the task of proving both the fact that the defendant has benefited from drug trafficking, and the amount of such benefit. It seems that the context of the Act and the nature of the penalties which are likely to be imposed, make it clear that the standard of proof required is - criminal standard, i.e. proof beyond reasonable doubt. Consequently, the Court of Appeal has in other cases, referred to the case of *Dickens*, considering themselves bound by the decision of Lord Lane.

The Home Office responded at a very late stage by saying that this was not the original intention behind the legislation (Home Office, 1994). A spate of cases afterwards, *R v Thomas* (1992), *R v Redbourne* (1992) and *R v Atkinson* (1992) provide reason to challenge the wisdom of the decision in *Dickens*. In stark contrast to the *Dickens* decision lies the judgement of Leggatt L.J. in the case of *Thomas* there, his Lordship decided that compliance with an order requiring the defendant to disclose the full extent of his realisable property did not amount to self-incrimination (The Times, 19 May, 1992). The only adverse effect of the disclosure may be the making of a confiscation order greater in amount than would have been made had not the defendant disclosed. Leggatt L.J. said 'it is not self-incrimination because a person does not by making reparation incur punishment.' In addition to that, Parker L.J. considered s. 3 of the DTOA to reveal;

> 'a very clear Parliamentary intent, first, that a person convicted of a drug trafficking offence, in addition to being punished for that
It is most likely that the Government decided not to refer to the civil proceedings of the Act and instead moved to the criminal proceedings for drug trafficking offence. The question here is not only whether it is right or wrong about which standards of proof to choose, but why the government and even the legislative authorities decided not to define in a clear statement a particular standard of proof, and why it let the courts enter in a controversial situation without any formal intervention. Finally, the question that is worth addressing is who is responsible for the many confiscation orders which were quashed or repealed due to the ambiguity that has led to the emergence of different understandings?

3.2.4.2.3. The Value-based System
Another distinctive feature of this legislation which is worth examining is the value-based aspect of the system. The confiscation order, generally speaking, is ultimately treated like a fine for enforcement purposes.

Regardless of how reasonable underpinning justifications are, this approach does not reflect the original theory. The main concept of 'confiscation' was to deprive the owner of the tainted property and the proceeds is defined for example, by the Hodgson's report (1984). Kennedy Talbot, a Principal Crown Prosecutor, at the Central Confiscation Branch, in an interview in 1994 (pers. communication, hereinafter (Talbot, 1994)) described the confiscation order as a misnomer; it confiscates or deprives nothing.

When the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psycho Tropic Substances 1988 indicated that confiscation was of two types, either a property-based system or a value-based system, it seems it was obliged or bound to consider the already existing applications of a different member's states. The 1986 Act had already been in force in Britain when the 1988 United Nations Convention came into existence. There were other jurisdictions that rejected the value-based principle for confiscation. The French legal system for instance, refer to the value-based system as 'confiscation par equivalent'. This principle is rejected by the French system because it violates the particularity of the 'legalite', and
reverts to the era of judges’ dominance and arbitrary discretion, leading to a transference from a specific confiscation to a general one49 (Hassan, 1973).

Hodgson’s Committee (1984) referred to a similar issue. ‘Consideration should be given to allow the defendant to pay a pecuniary penalty to the value of the goods instead of losing his property’ (p. 130). Accordingly, they recommended that a change in the law would be desirable. The Committee gave the defendant another choice, whether to lose the property or to pay a sum of money equal to the value of the property. They justified this by saying that if a car is forfeited, expenses will be incurred in storing and selling it. Its value to the defendant in terms of convenience or sentiment maybe greater than what it would fetch at a public auction.

There is an obvious difference between adding a new option to the original legislation and the complete substitution of the original system by adopting that option. What happened in British law is that the legislature considered this old option as the main mechanism of its confiscation system. It has been deemed as 'a revolutionary innovation'. (See Mr. J. Enoch Powel's statement, Parliamentary Debates, Hansard 1986). It is very difficult for the researcher to be able to assess the efficiency of a value-based system and to estimate its capacity to produce the desired results for two main reasons: (a) because a major part of the original legislation (the DTOA 1986) was amended and new provisions were added to it; (b) the time from the passing of the legislation (DTOA 1986 was amended and passed again in January 1995) to the completion of the thesis (January, 1998) seems inadequate to study the full impact of a confiscation system provided under the DTA 1994.

From what has been stated, it is evident that the confiscation system has always been encountering certain reservations and criticisms. Sallon and Bedingfield (1993), argued that DTOA 1986 was illogically conceived and consequently impossible to apply in any coherent or reasonable manner. Moreover, they assert that amendments to the Act will only increase the confusion. Regarding the value-based system, they indicate that one of its negative consequences is the accountancy exercises and relevant

49General confiscation in the French terms meant to be a confiscation that requires no restriction whatsoever. (see Hassan, 1973)
speculations. Sallon and Bedingsfield point out that entering into an accountancy exercises is one thing, but being involved in pure speculation is quite another. In the assessments made by the judges (Crown Courts) to establish the worth of a convicted drug trafficker's assets, they have to take 'blind stabs in the dark'. They continue saying that the speculations involved in this exercise are openly acknowledged, and it is true that courts often say they are giving the defendant the benefit of the doubt. The fact remains however, that the defendants are being tried and sentenced to years in jail based on guesswork and not on evidence properly tested before a jury.

This argument gives a hint of unfairness about the value-based system. The judge in Comiskey [1991], 93 Cr. App. R. 227 (C.A.), according to the Court of Appeal:

'took the view that the amounts suggested by the Crown for each importation were probably reasonable, but in view of the fact that it was impossible to be precise... etc.'

The application, therefore, of such an approach would demand great precision and reasonable grounds to believe that the proposed amount to be confiscated reflects the exact value of the tainted property of the defendant. This issue, as was mentioned earlier in this chapter, is the responsibility of the police to evaluate the property of the defendant and propose an equivalent value for the court. This means that the success of the system depends mostly upon the work of the police financial investigators. It is important then to examine the experience the police have in regard to this, whether of their accountancy, and financial acumen and comprehensive knowledge of the confiscation provisions under the DTA 1994. Restricting or allocating such functions to a non-professional agency is another matter which requires to be examined thoroughly.

3.2.4.2.4. The Status of the Confiscation Order in the Sentence
The status of the confiscation order within the sentence is not clear, not even in the new provisions under the DTA 1994. Most of the guides, manuals and the pamphlets published by the Home Office since the introduction of the Drug Trafficking Offences Act 1986, have asserted that
one of the most important features of the confiscation legislation is that the order is neither additional nor an alternative penalty, but simply a means of depriving the offender of the profits illegally acquired through drug trafficking (Hinton, 1992). It was also considered not to be part of the punitive component of the sentence and does not mitigate or aggravate it (c.f. Ashworth (1992) and Mitchell et al., 1992). The latter consideration is understandable, but the former assertion would lead only to a more undesirable confusion.

Confiscation orders were classified as ancillary orders (see Criminal Law, Evidence and Procedure, Vol. 11 (1, 2), para 1282, p. 1094, 1990). The most recent definition for ancillary order is the one provided by Stone's Justice's Manual, (1996):

'ancillary orders are available to a court when passing sentence. These orders do not stand alone, but may be made at the same time as other sentences are passed for the same offence. (a). Subject to certain exceptions, ancillary orders are deemed to form part of the sentence for the purposes of any appeal against sentence to the Crown Court (para 3-519)\textsuperscript{50}.\n
Hinton (1992) said that confiscation is considered independent of the sentence and has no bearing upon it. But in the same paragraph he mentioned that confiscation forms part of the sentence (p. 1265, Solicitors Journal, 11 Dec. 1992)

Under the 1986 Act, the Crown Court is required to make a confiscation order against every offender who appears before it following a conviction for a drug trafficking offence. Accordingly, sentencing the drug trafficker would be incomplete if a confiscation order is not issued, and this, in turn leads us to understand that a confiscation order is not only a part of the sentence but an essential part. Without the order being imposed, the court will never be able to proceed in sentencing the offenders. This does not mean that the order is not independent from the original sanction, but

\textsuperscript{50}Some other jurisdictions, like for instance the French or the Egyptian systems differentiate between three kind of sanctions (Original, Ancillary, and Complementary). The ancillary procedure is meant to be the first definite consequence that follows the committing of certain serious offences, like for example, the deprivation of the right to hold a public job, dismissal from job, invalidation of a contract with any governmental departments, depriving the right to be elected in any Council and general assemblies. The complementary procedure on the other hand, depends upon its pronouncement by a judge whether it is obligatory or discretionary (e.g. confiscation order, popularisation of the sentence, sealing off the shop, and deportation for foreigners) (Al-Ghamaz, 1985).
unlike what Ashworth and Hinton said above, it is an additional procedure in the sentence. Lord Widgery in *R v Johnson* (1991) indicated that confiscation is part of the sentence because it is an order made by the court and an order contingent on there having been a conviction, and contingent on the person who has to pay being the person who has been convicted. He added that a confiscation order, must therefore be treated as part of the sentence and so subject to appeal under the Criminal Appeal Act 1968.

After the Criminal Justice Act 1993 came into force, it introduced some important amendments to the DTOA 1986. One of the major amendments has been to repeal the mandatory power of the Crown Courts to impose the order in every drug trafficking case and to restrict the court's power with special conditions:

Where a defendant appears before the Crown Court to be sentenced in respect of one or more drug trafficking offence, then if the prosecutor asks the court to proceed under this provision, or if the court considers that, even though the prosecutor has not asked it to do so, it is appropriate for it to proceed under this provision.' (s. 2 (1), 1994)

In this case, a confiscation order does not necessarily become a part of the original sentence, and it is, therefore, up to the trial judge whether to consider it or not. Section 2 (5) (c) DTA 1994 clarified the issue when it stated that the court should leave the order out of account in determining the appropriate sentence. This does not mean that confiscation is completely independent of the sentence, because if a confiscation order is considered by the court, the final sentence then stands incomplete without the imposition and the completion of the order. However, if the judge did not announce the imposition of a confiscation order in the final verdict, the sentence will be legally intact.

The Advisory Council on the Penal System in one of its reports 'Reparation by the offender' (1970), recommended that reparation must be treated as part of the sentencing process. This means that those who alleged that confiscation is reparation, the committee asserts that reparation must be an integral part of sentencing in criminal proceedings (p. 53). The point here is to determine again why the legislature had
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presented some provisions of the law in such a confusing and ambiguous form.

3.2.4.2.5. Co-operation of the Offender

In the foreword of the Mitchell et al., 1992, on Confiscation, Derek Hodgson, as said earlier, indicates that one of the areas of confiscation legislation which has disappointed him and the members of the Committee (referring to the Hodgson's Committee) is that the committee considered as a matter of course, the co-operation of an offender in tracing and seizing of his ill-gotten gains should be reflected as a matter of mitigation in any sentence of imprisonment passed upon him. He explains that the committee pointed out that this was unobjectionable and could be taken into account, in mitigation of penalty, a plea of guilt. He asserts that a sentence of imprisonment must be reduced below its 'tariff' level in any case where there is a plea of guilty. This applies even when the evidence is virtually conclusive of guilt, and has become a settled principle in sentencing. The only legal reason for reducing a sentence because of a plea of guilt is that it shows an acceptance of guilt and perhaps a measure of contrition. A practical reason, Hodgson claims, is no doubt to save the court's time by avoiding a trial. However, the provisions in the DTOA and even in the subsequent amendments have set their face against this philosophy. Section 2 (5) (c) of the DTA 1994 provides very clearly that the court shall leave the order out of account in determining the appropriate sentence. Hodgson suggests a procedure whereby, when the defendant has been sentenced to imprisonment, there would be a report back to the sentencing court so that it can consider whether there are mitigating circumstances in the conduct of the confiscation proceedings which would justify a reduction in the prison sentence.

Dorn et al (1992) attributed the assertion of the government upon being tough with drug traffickers to the excitable anti-trafficker climate of the 1980s. The Home Office, in the knowledge of the likely recommendation of the Hodgson Committee, and in spite of being concerned about Britain's growing prison population, nonetheless announced that maximum terms of imprisonment for drug trafficking were to be increased, and this was subsequently confirmed by the Controlled Drugs (Penalties) Act 1985, and supported by the Association of Chief Police
Officer's Broome Report (herein after ACPO, 1985). Dorn et al revealed that from judgements handed down by the courts in Britain it appears that a combination of a guilty plea and giving information on other traffickers may result in a reduction in sentence by about one-third. They considered the co-operation of the defendants as one of the main basis of sentencing.

3.2.4.2.6. The Combination of Imprisonment, Confiscation Order, and Fine

The DTA 1994 provides that if the court determines that the defendant has so benefited from committing one or more of the offences listed in s. 1, the court shall, before sentencing or otherwise dealing with him, determine the amount to be recovered by ordering the defendant to pay that amount and to take account of the order before imposing any fine, before making any order involving any payment, and before making any order under s. 27 of the Misuse of Drugs Act 1971 (forfeiture order) or s. 43 of the Powers of Criminal Courts Act 1973 (deprivation order) (s. 2 (4) (5) (a) (i) (ii) (iii)). However, these provisions include a discretionary power for courts to consider imposing a fine, forfeiture, and any other financial orders on top of the confiscation order. This means that the priority of the confiscation order shall not prevent the court from imposing more than one financial order. These provisions support the allegations of most of those who wrote about the system and described it as having an extraordinary wide and draconian powers.

Mr. Dewer (MP), for example, has commented on these provisions by saying:

'It seems remarkable that someone who has suffered the major penalties... should suddenly find himself the subject of a further fine. We are doing that confiscation legislation because it was said or at least clearly implied that the Government felt that a fine was not really an appropriate way of approaching the problem, if someone is going to prison, to add a punitive fine was something of a legal nonsense, and it would be much better to go for confiscation and forfeiture. The Under-Secretary gave an example in which a person accused and finally convicted of drug trafficking was given a 10-year sentence. We were to assume that his assets were £200,000 that there was consideration of a confiscation order, but that when it came to the point, the presumption was rebutted for some portion of those assets. Suppose that the drug trafficker could prove that £20,000 of shares that he held in company X had come to him indirectly from the will of his old aunt Euphemia, whose reputation in relation to drug trafficking was beyond reproach. He had
therefore clearly rebutted the presumption that all of his assets had come from drug trafficking, and the £20,000 could not therefore be the subject of a confiscation order. In such circumstances, the man would receive a 10-year prison sentence and £180,000 would be the subject of a confiscation order. However, his family would have saved from the wreck the £20,000, because they had been able to establish that it had nothing to do with his history of crime'.

He also reported that

'The Minister said, I thought rather it would be possible to put such people in a catch 22 by using clause 44 and fining them £20,000. Although the offender had managed to use that tightly-drawn loophole, rebut the presumption and save some money from the confiscation order, he could then be told, 'Your endless ingenuity, my man, has done you no good. I hereby fine you £20,000'.

Mr. Dewar therefore, concluded by saying

'If that is the theory on which we are being invited to put this power on the statute book, it does not seem to me to do much for the legal system or the courts. The more that I have thought about the matter, the more I have come to the conclusion that it would be better to do without it'.

He then suggested leaving the courts, in cases relating to controlled drugs, with the power to impose fines.

'I accept, and indeed support, the confiscation concept. I do not think that they should say, we will get you with a gaol sentence and hit you with a confiscation order, and when you manage to avoid some of the consequences quite properly by using the legal machinery on the statute book, we will finally get you with a catch-all fine provision. That seems to be going too far'. (Parliamentary Debates, Commons, 12/5/87).

Combining a fine with a confiscation order although technically possible, would be highly unusual because the confiscation order is the means by which the defendant is deprived of his assets. That sum may be sufficiently great to exhaust the defendant's means to pay a fine.

3.2.4.2.7. The Retrospective Aspect of the Confiscation Proceedings

Section 4 (3) of DTA provides that the court, for the purpose of this Act, shall make the required assumptions. Part of the required assumptions are any property appearing to the court: (i) to have been held by the defendant
at any time since his conviction, or (ii) to have been transferred to him at any time since the beginning of the period of six years ending when the proceedings were instituted against him; (iii) was received by him, at the earliest time at which he appears to the court to have held it, as a payment or reward in connection with drug trafficking carried by him.

This sweeping statutory assumption provides that all property and money passing through the offenders hands over a six-year period is the fruit of drug trafficking unless the offender can prove otherwise.

On 9 February 1995, the European Court of Human Rights in Strasbourg found that there had been a violation by Britain of Article 7 of the European Convention on Human Rights. The ruling casts doubt on the validity of the above section. The Strasbourg Court declared that this provision is illegal because the powers of British Courts to order confiscation of drug profits could not be applied retrospectively to offences committed before the DTOA 1986 came into force on 12 January 1987. This means that no one convicted of a crime shall suffer a heavier penalty than one applicable at the time the offence was committed. Nine judges at the Strasbourg Court ruled unanimously that a British court acted unlawfully in trying to confiscate £59,000 of Peter Welch's drug profits after he was convicted of a plot to smuggle £4 million of cannabis. Accordingly, although the confiscation order has not been enforced because of Welch's plea to Strasbourg, Britain was ordered to pay him nearly £14,000 in costs for penalising him under a law which had not come into force when his crimes were committed (The Times, Feb. 10, 1995).

This ruling, which Britain is forced to accept, angered politicians at Westminster. Mr. David Maclean, the Criminal Justice Minister, denounced the 'incorrectness and daftness' of the decision. He said:

"The whole Commons shares the indignation of the decision these jurists have reached. The decision is not the view of the Government. We have robustly defended our corner. We shall reflect on it, but we remain convinced that the laws we have are just and appropriate for dealing with drug dealers' (Ibid.).

Peter Welch was arrested in November 1986 and charged with drug offences. He was found guilty in August 1988 and sentenced to 22 years' imprisonment. The judge made a confiscation order for £66,914 under the Act, which came into force in January 1987, two months after his arrest.
Ben Emmerson, the barrister representing the convicted drug trafficker in this case, said that despite warnings before the legislation was introduced that it would breach the convention, 'the Home Office has buried its head in the sand and built an entire legislative framework that these confiscation orders are not criminal penalties. It was that myth that the court exposed' (Ibid.). The DTA 1994 (s. 4 (3) (a)) provided the same old provision which had led to the Strasbourg Court. But D. A. Thomas (1993) in his study of the Criminal Justice Act 1993 has pointed out that the amended provisions of the DTOA 1986 will apply, by virtue of Criminal Justice Act 1993, s. 78 (6), only to offences committed after the commencement date of the relevant provision. Thomas commented that this restriction is thought to be in deference to the principle against retrospective criminal legislation. This means that it applies to proceedings began after the commencement date, irrespective of the date of commission of the offences concerned and continues to authorise the confiscation of the proceeds of offences committed long before the Act was passed. He then pointed out that the restriction of the application of the amended version of the Act seems a recipe for chaos in cases involving drug trafficking.

3.2.4.3. Post-trial Proceedings
There are two issues concerning the post confiscation proceedings. The first concerns the dispersal of some of the most essential proceedings among different courts which hold different jurisdictions. It is clear from the previous detailed review of confiscation proceedings that the system depends upon a variety of different courts. When one considers that application for a production order is supposed to be obtained from a circuit judge, and an application for a restraint order must be from the High Court via the Central Confiscation Branch in London, and an application for the appointment of a receiver from either county court52 or High Court, and the enforcement or the responsibility for recovering payments of the orders is vested to the magistrate courts, and all the remaining proceedings suppose to be conducted at the Crown Court which could be extended to the Court of Appeal and even to the House of Lords, one may wonder whether the British Legislature is truly believing that this is the best practice for those intended draconian confiscation powers of the DTA

52The new provisions in DTA empowered the county courts to appoint a receiver if the prosecution apply for it (s. 31 of DTA 1994).
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1994. It is expected that the field work for this study will reveal the impact of such an approach.

The second issue is relevant to the first. Some governmental resources revealed that the confiscation system, and in particular the recovery process, was suffering from a significant defect. Information from Home Office Committee\(^5\) (1989) revealed that there was a shortfall between the value of confiscation orders imposed by courts and the amount actually recovered. The Committee pointed out that despite the drugs trade giving rise to many millions of pounds of profits, where the estimation of NDIU\(^4\) that there is at least £1,800 million derived from drug trafficking in the UK, only £11 million was confiscated as a drug-related profits up to May 1989 (paragraph 74). The Home Office Statistical Bulletin provides also that the value of (8215) confiscation orders imposed from 1987 to 1995 is £95.4 million (Table 3.2).

Table (3.2) The number and the amount of the confiscation orders from 1987 to 1995.

<table>
<thead>
<tr>
<th>Year</th>
<th>Number of Orders</th>
<th>Value</th>
</tr>
</thead>
<tbody>
<tr>
<td>1987</td>
<td>203</td>
<td>1.2</td>
</tr>
<tr>
<td>1988</td>
<td>539</td>
<td>8.1</td>
</tr>
<tr>
<td>1989</td>
<td>802</td>
<td>7.9</td>
</tr>
<tr>
<td>1990</td>
<td>871</td>
<td>10.1</td>
</tr>
<tr>
<td>1991</td>
<td>1005</td>
<td>5.5</td>
</tr>
<tr>
<td>1992</td>
<td>1002</td>
<td>9.1</td>
</tr>
<tr>
<td>1993</td>
<td>983</td>
<td>9.7</td>
</tr>
<tr>
<td>1994</td>
<td>1248</td>
<td>25.4</td>
</tr>
<tr>
<td>1995</td>
<td>1562</td>
<td>18.4</td>
</tr>
</tbody>
</table>


However, the Home Office Annual Report 1996 show the Government’s Expenditure Plans 1996-1997 to 1998-99, and provides that between January 1987 and December 1994, around £77 million was ordered to be confiscated from 6,653 drug traffickers in England and Wales. During the same period, £25 million was actually realised and paid into the Consolidated Fund. This means there was a defect of £52 million, more than double the recovered amount.


\(^4\) The National Drug Intelligence Unit which were substituted by the current National Criminal Intelligence Services (NCIS).
The Home Office S3 Division also indicates that between April 1988 and March 1993, only £10,756,740.03 was either completed or written off (Table 3.3)\(^{55}\).

Table (3.3) The values of the confiscation orders (written off and completed from 1/4/1988-31/3/1993)

<table>
<thead>
<tr>
<th>Year</th>
<th>Brought forward</th>
<th>New Orders</th>
<th>Write-Offs</th>
<th>Completed</th>
<th>Carried Forward</th>
</tr>
</thead>
<tbody>
<tr>
<td>1988 - 89</td>
<td>17,444.00</td>
<td>493,323.10</td>
<td>2,746.25</td>
<td>98,124.81</td>
<td>411,940.04</td>
</tr>
<tr>
<td>1989 - 90</td>
<td>4,973,648.06</td>
<td>7,196,045.28</td>
<td>26,489.57</td>
<td>963,547.25</td>
<td>9,462,582.43</td>
</tr>
<tr>
<td>1990 - 91</td>
<td>2,696,941.75</td>
<td>6,809,197.27</td>
<td>206,008.71</td>
<td>1,151,170.69</td>
<td>8,301,706.63</td>
</tr>
<tr>
<td>1991 - 92</td>
<td>19,042,051.94</td>
<td>5,144,333.37</td>
<td>169,939.83</td>
<td>1,737,598.34</td>
<td>18,072,696.03</td>
</tr>
<tr>
<td>1992 - 93</td>
<td>21,119,384.82</td>
<td>11,909,894.60</td>
<td>1,720,757.41</td>
<td>5,132,357.17</td>
<td>25,804,143.09</td>
</tr>
<tr>
<td>Total</td>
<td>47,849,470.57</td>
<td>31,552,79\text{j}.62</td>
<td>1,673,941.77</td>
<td>9,082,798.26</td>
<td>62,052,968.22</td>
</tr>
</tbody>
</table>

Source: Home Office, S3 Division.

Despite the inconsistency and some contradiction among these figures and the ambiguities they produce between the values of the confiscation orders and the actual amounts recovered or completed, if we compare the amount recovered (declared by the Home Office Committee\(^{56}\)) which is almost £11m with the value of the confiscation orders imposed for the same period and declared by the Home Office Statistical Bulletin which is £40.7m, we find that the difference is £29.7m.

While the difference between the previous two sources revealed such a defect, information from NCIS shows that the value of the confiscation orders actually recovered between 1987 and 1995 is more than £119m\(^{57}\).

\(^{55}\)Levi & Ososky referred to petty sessional divisions who suggests that from 1987 to May 1993 only £14,885,415 was either obtained or written off as a result of offenders serving imprisonment in default (p.3). The statistics concerning confiscation orders (properties and actual recovered properties is difficult to be obtained due to the wide inconsistency between the produced figures from different governmental departments, Parliamentary Committees, and NCIS (the National Criminal Intelligence Services).


\(^{57}\)The data of NCIS was provided to the researcher by DS/John Leek, the Strategic & Specialist Intelligence Branch, NCIS (the National Criminal Intelligence Services).
Table (3.4) The value of confiscation orders recovered between 1987 and 1995 compared to the values of the restrained properties.

<table>
<thead>
<tr>
<th>Year</th>
<th>Restraint</th>
<th>Confiscation</th>
<th>No. of Cases</th>
</tr>
</thead>
<tbody>
<tr>
<td>1987-92</td>
<td>50,925,210</td>
<td></td>
<td></td>
</tr>
<tr>
<td>1992</td>
<td>16,396,797</td>
<td>16,168,733</td>
<td>2,014</td>
</tr>
<tr>
<td>1993</td>
<td>10,258,839</td>
<td>12,248,133</td>
<td>1,595</td>
</tr>
<tr>
<td>1994</td>
<td>14,288,110</td>
<td>27,043,599</td>
<td>1799</td>
</tr>
<tr>
<td>1995</td>
<td>10,452,401</td>
<td>13,715,843</td>
<td>1756</td>
</tr>
</tbody>
</table>

Source: The National Criminal Intelligence Services (NCIS) 1996

The figures need to be clarified, and the defects need to be justified especially when the legislation provides that in assessing the realisable property of the defendant, the Crown Court has satisfied itself that the defendant can pay the confiscation order. This is also sufficient evidence to support the presumption that not only the defendants or the convicted drug traffickers are responsible for the cause of this defect. But even the provisions of the legislation itself and the enforcement policies and strategies of the government and the law enforcement agencies (police, prosecution and courts) are widely accountable. Mr. Kennedy Talbot from the Central Confiscation Branch (in an interview, 1994) stated:

'I do not think the Magistrate’s Courts are any good at enforcing confiscation orders at all, primarily because of the way there are funded. They are funded in their success in ensuring a confiscation order is complied with. The easiest way to be successful is to take a person to prison for default.'
A Normal Case Involving The Act's Main Provisions

Bank makes suspicious transaction disclosure to NCIS/Police/Customs

◊

Police/Customs apply for production order to obtain material about account (from the High Court)

◊

After analysis of material, Police/Customs conduct investigation into drug trafficking

◊

Restraint and/ or charging order obtained from High Court to prevent dealing in property

◊

Proceedings instituted (Crown Court)

◊

Conviction (Crown Court)

◊

Confiscation order made by the Crown Court (if the prosecutor asks the court to do so, or if the court considers that, even though the prosecutor has not asked it to do so)

◊

Confiscation order (if made) enforced by the Magistrate court
Figure (3.3) shows the pre-trial confiscation proceedings conducted by West-Midlands police. Source: West Midlands Police, Drug Profit Confiscation Unit.
3.3. CONFISCATION SYSTEM IN PRACTICE

In this section the second part of aim 3 is to be realised, i.e. to determine the distinctive elements of the British confiscation system with particular reference to...... strategies of enforcement and organisation. In order to deprive the illegal benefits and proceeds from drug traffickers, Parliament, as previously stated, has enabled the police and the courts to carry out this function through the powerful provisions contained under the DTA 1994 accompanied by certain other relevant statutes and regulations. These laws and powers alone are not sufficient to create a proficient law enforcement system able to implement the provisions of the legislation without loopholes or defects. There must be a special operational strategy that can transform the provisions of the legislation into enforceable practices; that is there must be a strategy capable of co-ordinating the text of law and its practical implications with the capabilities of the law enforcement agencies.

Accordingly, this section will focus mainly on the operational side of confiscation provisions. It examines the government policies and the strategies of law enforcement agencies concerning the execution of the confiscation system. The section will also review the role of the law enforcement agencies which form the operational organisation of the confiscation system provided under the DTA 1994.

3.3.1. The Strategical and organisational Development of the Financial Investigation system

The present form of organisation and strategies adopted for implementing a confiscation system is the result of developments from the April 1984 National Drugs Conference. A recommendation was made that a working party was to be established to make proposals relating to the organisation and staffing response of the police service in England and Wales to drug related crime and drug abuse. This recommendation was accepted by the Association of Chief Police Officers' (ACPO) Crime Committee, and a Working Party (under the Chairmanship of Mr. R. F. Broome the Chief Constable of Avon and Somerset Constabulary) was established (ACPO, Report of the Working Party, 1985).
The final report of the Working Party on Drugs Related Crime recommends that police operational strategy should be based on a three-tiered approach: Divisional, Local, and Regional levels (para. 3.2, p. 20). The report published in the latter half of 1985 still forms part of the Government's strategy on national response to drug misuse. In November 1985, following consultation with the police, Customs and Excise and other related bodies, the government published its proposals for tracing and confiscating the proceeds of drug trafficking. Accordingly, the ACPO Crime Committee requested that the Broome Committee be reconvened to make recommendations relating to the implementation of the proposed confiscation system. To help in their deliberations, a 'Project Team' was established comprising members of the Working Party (of the ACPO Crime Committee) and officers from the Home Office Police Requirements Support Unit. Their brief was to examine relevant systems which were actually operating or being developed in other countries. The Project Team felt that the work of the Working Party needed to be supplemented by details of actual experiences elsewhere in the world (ACPO, Crime Committee Report, 1986, p. 4).

The Project Team decided, therefore, to examine, in particular, the experience of the Royal Canadian Mounted Police (RCMP), the US Drugs Enforcement Administration (DEA) and the US Federal Bureau of Investigation (FBI) who were recognised as the most advanced systems in this particular area. In Part Two of the Report of the Working Party on the Implementation of the DTOA 1986, it indicated that the visit of the Project Team to Canada and USA enabled the Working Party to formulate definite recommendations. The Report presented thirty recommendations. It revealed how the Team admired the American DEA and the Canadian systems. It also stated that in the DEA, the tasks of investigating a suspect to identify assets and their subsequent forfeiture is combined in one body, the 'Divisional Asset Removal Teams' (DARTs).

The most important recommendation called for setting up a network of Drug Profit Confiscation (DPC) teams. It suggested that a network of

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58 The government strategy for 1995-98 Tackling Drugs Together, stated that the Government aims to have in place effective investigation and prosecution arrangements to deter traffickers and dealers. The report asserts that police should act against the various levels of drug offending through street level policing, force level drug squads and regional crime squads (p. 7).
specially selected and trained officers should work in conjunction with officers engaged in drug trafficking investigations. The report indicated that DPC teams should concentrate on carrying out in depth financial investigations to elicit evidence in support of drug trafficking prosecutions, establishing and confiscating drug trafficking related assets by exercising the powers and procedures contained within the DTOA 1986 and other relevant legislation.

The report also recommends an 'advisory team' within the National Drugs Intelligence Unit (NDIU) to support the work of the DPC nationwide. The remaining part of the report concentrates on the need to supplement the DPC with civilian experts, training and computerisation.

The report indicated that the Divisional Asset Removal Teams' (DARTs) of the American DEA can call upon the services of civilian financial analysts to relieve them of the time consuming routine work associated with intelligence and the sifting of seized documents (p. 12). The Project Team believe that applying civilian financial analysts would merely extend the existing policy of some forces in England, leading to the enhancement of evidence which required professional interpretations and opinion. Accordingly, they recommended that civilian support is to be provided by a financial analyst and two clerical officers at each of the Drug Profit Confiscation teams.

The American system of confiscation gained wide support from the Project Team. The Team recommended that most of the American strategies be adopted by the British law enforcement agencies. There was, for example, an emphasis that the British system should follow closely the principles and objectives established by the American DEA and the Canadian RCMP (para. 2.64).

Before demonstrating the functions of the current law enforcement agencies, who are directly involved in the implementation of the confiscation system, it is important to begin by highlighting the underpinning basis of the financial investigations' strategies. The current financial investigations at the forty three police Constabularies in England and Wales vary in terms of resources and subordination. In most cases, the financial investigation system is part of the Drugs Squad or the Fraud
Chapter Three

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Squad. The three tier approach which dominates the strategies of most, if not all the Drug and Fraud squads in dealing with the drug trafficking offences, is also reflected in the enforcement of the attached financial investigations. How and to what extent the general strategy of the Drug Squad as reflected in the financial investigation system are examined in the following paragraphs.

In advocating a 'three tier approach' the Broome Committee stated that:

'When examining the drug problem it became apparent to the Working Party that the effort against drug abuse can effectively be structured on three levels. In many respects this already occurs, but in our view a clear strategy needs to be identified' (ACPO, 1985, p. 19).

Accordingly, the Committee identified a pyramid structure, with three tiers. The first consisted of a national intelligence unit (combining both police and Customs personnel under Home Office control), together with police Regional Crime Squads (RCS). The second comprised drug squads of county police forces, city drug squads in major cities, and the Area Drug Squads in London. The tier at the local level consist of some CID\(s\) (Criminal Investigation Departments) and uniform branches (see Dorn et al, 1992).

Each of these tiers was intended to target a corresponding level of the drug market. The first tier; intended for the 'big or major traffickers', the second tier; a middle-level response was to deal with the main in force' dealers and distributors who have evaded the first level of control, and the third tier was intended to target the retail level of the market and at drug users and the street dealers who have evaded the second level of control (Broome Report, 1985: para. 2.26).

The Home Affairs Committee (1988) indicated that both, the Home Office and ACPO were convinced of the merits of the three tier system established after the Broome Report (para. 110). In May 1996, the ACPO declared that one of the main aims of the strategic direction of the police forces is that they should be rigorously enforcing the law in relation to the trafficking and supply of controlled drugs (ACPO Journal, May, 1996). More importantly, the recent White Paper of the Government's Strategy
for 1995-98 *Tackling Drugs Together*,\(^5^9\) has clearly upheld the merits of the Broome's three tiers system as the main strategy for the law enforcement agencies (see Footnote (1) of the Paper).

The West Midlands Police Drug Squad reveals in their booklet 'Policy Document' (1996) that, 'the Force follows Broome's recommendation in determining the strategy of the West Midlands Police in relation to the investigation of controlled drugs'. DI Hickman from the West Midlands Police states:

> 'Our confiscation strategy is mainly based on the national programme for the nation' (pers. communication, an interview, 1996)

This statement has been repeated by several police officers who participated in the field work for this study. It gives an impression that there is a sort of mutual co-ordination and correspondence between the government' strategies and the police's policies represented by ACPO. Furthermore, DI Hickman asserts that 'there is an obligation on all police forces to adopt the national strategical policy stated in the government *Tackling Drugs Together* report.

He continues by saying that:

> 'this governmental policy made most police forces adopt similar strategies in combating drugs crime. They are basically the same. The way they go about collecting revenue may be different because it depends on the courts. But at the end of the day, it is a national policy which they should adhere to'.

Another example, the Greater Manchester Police's Drug Misuse Strategic Action Plan which states that 'the drug law enforcement policy embraces the recommendations of the Broome report in relation to investigations into major drug dealers operating at international, national and regional levels, together with those who operate at force level'.

Although in practice, the influential outline of the three-tier approach to the drugs market, through regional, local and divisional levels, created the structure of drugs enforcement which exists today, there is an

increasing challenge and criticism to this approach. Wright et al\textsuperscript{60} (1993) in their report 'Drugs Squads: Law Enforcement Strategies and Intelligence in England and Wales' conclude that the development and control of drug enforcement is a complex process which depends upon understanding the connection between values, resources, organisational factors and relationships (p. 109). The report explains that a connection needs to be made between the political and practical responses to the contemporary difficulties of drugs enforcement. The report reveals that at both levels, there are pressures from the public, from the increase in drug trafficking, from constraints upon resources and from differences in perceptions about priorities.

Much of the evidence of this study shows, however, that what happens at the operational level does not result automatically from the implementation of policies, whether they are decided within Government, Home Office, Drugs Intelligence Steering Group, ACPO or at a high level within police forces or the Regional Crime Squad. This means that the actual responses of the practitioners to perceived problems are determined by a range of factors, some of which are concerned with resources and organisational structures, others are concerned with the availability of information and the preferences and values of the practitioners themselves. The fact remains, as the report indicates, that the real power to achieve strategic and tactical ends is held by the practitioners. Each of the forty three police Constabularies, for example, is commanded by a Chief Constable who is the head of the police authority which comprises representatives of the area over which the force has jurisdiction. It is obvious that there are variations between police forces, depending upon the problems likely to be encountered in each police district; thus the concerns of the Chief Constable for Leicestershire or Devon and Cornwall are likely to be very different from those of the Commissioner of the Metropolitan Police.

The Wright et al's report clarifies that if there is a failure in policy implementation, it is because of the misalignment between the perceptions of the practitioners and the political intentions of the policy-makers. This is reflected not only in differences in resources and

\textsuperscript{60} Alan Wright (The University of Manchester), Alan Waymont (The Metropolitan Police) and Frank Gregory (The University of Southampton). This study is commissioned by The Police Foundation.
information, but also in the limited voice afforded to the practitioners who are nearest to the market realities, in the formulation of drugs policy and strategies (p. 108).

The report criticises the three tier approach recommended by the Broome working party. It indicates, first that the development of drug law enforcement as part of an integrated drugs control strategy has been comparatively recent. Then it points out that the Broome Working Party's view of the drugs market was in essence qualitative, in the sense that it described the drug market in terms of the qualities of the offenders and investigators at each level, rather than in terms of the analysis and interrelation of quantities of activity or products. No substantial evidence, however, was cited as the basis for the adoption of this model. The reorganisation of police drugs enforcement was based upon the efficacy of the fit between the new enforcement arrangements and the supposedly tiered market. A reflection upon alternative ways of describing that market in the report, according to some findings and evidences shows that the fit has proved to be less than efficacious (p. 41).

The report asserts that it is questionable whether the market actually has such a tiered structure. The need for a new approach to understand the complex inter-relationship between law enforcement strategies, the misuse of drugs and the market within which illicit trafficking takes place, was described by Dorn, Murji and South in their memorandum of evidence to the Home Affairs Committee in June 1989. They drew attention to the dynamics of the inter-relationship between law enforcement and the drugs market:

"The market in illicit drugs is in a state of continuous interaction with law enforcement strategies and agencies. In the same way that law enforcement seeks to respond to drug distributors, so the distributors react to the forms of law enforcement. This means that law enforcement and drug distribution tend to 'mirror' one another" (Home Affairs Committee, 1989).

Dorn & South, as Wright's report indicates, have maintained that the market can not be characterised by a simple distribution pyramid. The actual market is more like a network, with individual dealers being described by virtue of their roles rather than through the level at which they operate. Accordingly, they assert that the Broome's pyramid is flawed
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(cf. Dorn & South, 1990). The report in supporting Dorn and South's perspective, indicates that the drugs market exhibits a dynamism which entails a more or less constant interchange of players between these various categories. Concentrating upon specific categories of enterprise encourages strategic rather than tactical intervention by enforcement agencies. The study observed that the tiered perception was generally disregarded by RCS drug wings and force drug squads in the attempt to understand the dynamics of the networks, to identify the key players and systematically to gather evidence on their activities.

Lastly, it is not clear whether a consistency exists between the theoretical strategies and the actual fronts in the drugs market. The experiences of the financial investigators and the Drug Squad's officers are the main determinants of the practical policies that surround the local drug market. Drug problems are not always of the same level in one area or between all districts. The drug strategies of each of the forty three forces in England and Wales are unique and at the same time are of a changing nature that reflect the continuing development of drug problems and drug markets in the same area. Accordingly, the priorities of each police force are different and the strategy and techniques of the attached drug squads are supposed to reflect the real understanding of the dynamism of local drug markets not of national strategies which may have no practical meaning to some forces.

Dorn & Murji (1992), for example, point out that the 1980s saw rapid developments in high level drug enforcement. There were new laws, new penalties and new Customs and police strategies against drug trafficking offences and especially those trafficking in large consignments of drugs. Progress had been made, but it is generally acknowledged that little more can be done to reduce the manufacture and importation of illegal drugs. Middle level enforcement is considered by Dorn et al (1992) as the province of the specialist drug squads in each police force (p. 78). During the 1990s, however, Dorn & Murji asserted that the area of greatest innovation and progress was likely to be at the low level drug enforcement (p. 160) (see also Feldman, 1988).

Table (3.5) below shows a clear evidence of the predominance of investigations involving low and middle-levels of drug trafficking cases.
(street-level) rather than high-level cases (against wholesaler dealers) during the period 1988 to 1995.

Table (3.5) Numbers of confiscation orders made by Crown Courts from 1988-1995.

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<tr>
<td>Orders made under £1,000</td>
<td>339</td>
<td>528</td>
<td>568</td>
<td>719</td>
<td>675</td>
<td>712</td>
<td>921</td>
<td>1,117</td>
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<tr>
<td>£1,000 and under £3,000</td>
<td>98</td>
<td>133</td>
<td>149</td>
<td>121</td>
<td>164</td>
<td>126</td>
<td>160</td>
<td>224</td>
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<tr>
<td>£3,000 and under £10,000</td>
<td>47</td>
<td>81</td>
<td>77</td>
<td>86</td>
<td>82</td>
<td>78</td>
<td>97</td>
<td>120</td>
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<tr>
<td>£10,000 and under £30,000</td>
<td>18</td>
<td>36</td>
<td>48</td>
<td>39</td>
<td>43</td>
<td>37</td>
<td>29</td>
<td>56</td>
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<tr>
<td>£30,000 and under £100,000</td>
<td>8</td>
<td>14</td>
<td>13</td>
<td>28</td>
<td>22</td>
<td>15</td>
<td>22</td>
<td>20</td>
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<tr>
<td>£100,000 and under £300,000</td>
<td>21</td>
<td>7</td>
<td>10</td>
<td>11</td>
<td>13</td>
<td>7</td>
<td>9</td>
<td>12</td>
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<tr>
<td>£300,000 and under £1 m</td>
<td>8</td>
<td>1</td>
<td>4</td>
<td>1</td>
<td>1</td>
<td>6</td>
<td>8</td>
<td>9</td>
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<td>£1 m and over</td>
<td>0</td>
<td>2</td>
<td>2</td>
<td>0</td>
<td>2</td>
<td>2</td>
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<td>Total</td>
<td>539</td>
<td>802</td>
<td>871</td>
<td>1005</td>
<td>1002</td>
<td>983</td>
<td>1248</td>
<td>1562</td>
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<td>Sum-total</td>
<td>8012</td>
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It is important to mention that no clear benchmark has been set and agreed upon by the regional and local police financial investigators, to define the boundaries and the range of confiscation orders, and to describe cases of confiscation as high, middle, and low level cases. If hypothetically the £100,000 is considered as a benchmark for justifying the confiscation order enacted by the Regional Crime Squads, then just a few cases are entitled to be acted upon. As table 3.5 shows, 8012 confiscation orders were imposed during the period 1988-1995, 7870 (98%) confiscation orders were under £100,000 and only 142 (2%) orders became ascribed to £100,000 and above. Out of the 98% of confiscation orders, 71% (5579 orders) were made under £1,000, and 29% (2291 orders) between £10,000 and less than £100,000 cases. These variations suggest that the majority of drug trafficking confiscation cases involves low level enforcement undertaken by local police forces and 2% can be described here as rare cases. This means that the confiscation system in drug trafficking is dominated by low and medium enforcement. It also indicates that despite the capability of the RCS, for instance, in dealing with threats which are perceived to be beyond the resources of each individual force, the majority of the financial investigations and subsequently the confiscation orders are dominated by local police which mostly work against street-level dealers and distributors. The increase in the number of confiscation cases of £30,000 and less is a clear evidence that low level drug enforcement is indeed the focus of law enforcement agencies in 1990s (see Dorn & Murji, 1992, p. 122).
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160). This asserts the conclusion of Levi and Osofsky (1995) that few 'Mr Bigs' have been convicted and consequently few are available to have their assets confiscated (p. vi).

Dorn et al (1992) assert that the RCSs are supposed to investigate only major crimes which cut across the boundaries of county forces, but in practice the RCSs in some 'quieter areas' is used as an adjunct to the work of a county force, investigating serious crime within the jurisdiction of a single force (p. 78).

Dorn et al (1992) also pointed out that the organisation levels of tiers of enforcement do not correspond in any neat or easy way to distinctions in the market, and deciding which targets 'belong' to which enforcement level can be problematic (p.78). Boothroyd (1989) mentioned that senior police officers are increasingly inclined to agree that the police must have a set of strategies to deal with different types of drug enterprises. Detective Sergeant Mike Lloyd, an Avon and Somerset officer who trains officers in techniques of financial investigation also advocates that, by saying, 'that as many as one in three suspected dealers 'who appear to have nothing’ turn out to have benefited substantially from the sale of drugs'. If only the finances of bigger drug enterprises are investigated, he warns, smaller dealers will flourish. 'Since we began using the provisions of the DTOA in August 1986, we have literally been tripping over people involved in drug dealing who were totally unknown to us beforehand', he says. He gives the example of a tip-off which led to the arrest of a man selling drugs from a car outside a sports centre on the edge of Bristol. The man had no criminal record and police know nothing of him. He had a steady job as a labourer in a wood yard, lived with his parents, and had 'an air of respectability' and listed among his favourite pursuits 'going to bed early and listening to Radio 4'. He admitted having two bank accounts, one with £31 in it, another with about £35, but investigations revealed at least nine building society accounts and led to the confiscation of £25,000 in drug assets (Police Review, 1989).

'Assets confiscation will work only against some enterprises', (Boothroyd, 1989, p. 335). Boothroyd explains that if you have the type of enterprise which shifts its money around in suitcases then a highly sophisticated system of bank disclosure is not going to be much good to you. 'It is
applicable to the old criminal firms that diversify into drugs. It is applicable to the legitimate businesses that 'sideline' but it is not applicable to family structures which base money transactions on trust, or to 'irregulars' people who engage in short term operations which don't require bank accounts' (p. 335). Dorn et al (1992) think that police should revise their anti-trafficking strategies to attack the different types of distributors. That is to say the way forward for the police is to identify the different types of enterprises, find out how permanent they are, discover their financial operations security and exploit their weaknesses.

3.3.2. Law Enforcement Agencies

The enforcement of the confiscation system is conducted by two groups of law enforcement agencies: the first includes police Financial Investigation Units (FIU) or the Drug Profit Confiscation teams (DPC) at the police forces, local prosecutors, the Central Confiscation Branch (CCB) and the National Criminal Intelligence Service (NCIS). The second includes the enforcement of confiscation proceedings by a variety of courts (Crown Court, High Court, Magistrate Court, and County Court). The main relevant functions of the courts have been already discussed in the preceding chapter. A brief examination of the role of the law enforcement agencies that are involved at the first stage will be the focus of this section.
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3.3.2.1. Regional Crime Squads (RCSs)
The Home Affairs Committee in its seventh report (session 1988-89) points out that Regional Crime Squads have been in existence for 25 years. For the purposes of assigning geographical areas to these squads, England and Wales are divided into nine regions (para. 108, p. xxvi). In 1993, the nine regions were also reduced into five regions: (i) the North East Regional Crime Squad; (b) the North West; (c) the Midlands; (d) South East; and (e) the South West Crime Squad (an interview with DS Cole, RCS, NE, dated 7 February 1995).

The Committee indicates that the principal bodies engaged in police action against drug trafficking are the drug wings61 of the Regional Crime Squads. Each RCS have also a Drug Profit Confiscation team or, as many

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61The work of drug wings of the RCSs is quite similar to the work of the drug squads in the forty three police forces in regard to drug trafficking offences.
forces call it, a 'Financial Investigation Unit'\(^{62}\). This unit is linked to the work of the drug wings. The drug wings, according to the three tiers approach, form the top tier of enforcement, the other two tiers being the drug squads of each police force and the enforcement by uniformed officers and detectives at the divisional and sub-divisional level.

Scott (1996)\(^{63}\) indicates that Regional Crime Squads are capable of dealing with threats which were perceived to be beyond the resources of each individual force. They are also able to look at criminal activities and trends with a somewhat broader perspective than an individual police force, and to respond more effectively against them. The Home Office Report *Tackling Drug Misuse: A summary of the government’s strategy* (1988) states:

> 'Regional Crime Squads provide an integrated mobile network of experienced detectives able to investigate drug trafficking networks, often involving elements of national and international organised crime' (p. 16).

These squads are under the control of an executive co-ordinator who is authorised to bring more than one RCS together for a large-scale operation (Hopkinson, 1989, p. 21).

With regard to the similarities with the local financial investigation system, both the RCS and the FIU follow those proceedings, and both have similar duties and assignments. An examination concerning the differences will be highlighted in the following review of the role and function of the local Financial Investigation Units.

### 3.3.2.2. Financial Investigation Units (FIUs) at Police Forces\(^{64}\)

Most local police forces have a Financial Investigation Unit (FIU), or at least, a financial investigation officer dedicated to make enquiries with a view to seizing the assets of drug traffickers. The main function of the FIUs is to identify assets of persons who have benefited from drug trafficking and to furnish the courts with financial statements for

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\(^{62}\)Because the majority of the police forces call it the Financial Investigation Unit (FIU) the study here will follow the same title hereinafter.

\(^{63}\)Internet information

\(^{64}\)Some forces call the financial investigation office the 'Drug Profit Confiscation (DPC)'.

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consideration of confiscation orders. These statements are called 'affidavits' (see Appendix IV, p. 395).

Levi & Osofsky (1995) indicates that FIUs came into existence between 1989 (in the Metropolitan Police) and 1993, when Dyfed-Powys and the City of London police created their first confiscation units and assigned a full-time detective sergeant and a detective constable respectively to those units (p. 31).

Units are normally headed by detective sergeants or constables. Civilian employees with financial or administrative skills are normally integrated into the FIUs. Although the Project Team of 1985 strongly recommended that applying civilian financial analysts would lead to the enhancement of evidence which required professional interpretations and opinion, the majority of police forces had no full-time civilian employers. Levi & Osofsky (1995) assert that only five forces had one civilian employed full-time on asset confiscation duties (p. 29). The Bristol Police force is an exceptional case\(^6\). It has four full-time civilian and one police officer in their FIU.

Moreover, not all forces or drug squads have an FIU. It depends upon the area, the FIU may be attached to a drug or to a fraud squad. Detective Sergeant Philip Marchbank, a financial investigator from Wakefield Fraud Squad (Operational Support Crime Division), points out that the reason some financial investigators remain attached to Fraud Squads is because they are also engaged to work on cases of fraud.

The nature of the financial investigation system as a reception centre for information and inquiries for the subsequent application of confiscation proceedings makes it's performance reliant on the work of other institutions. The information and intelligence from the National Criminal Intelligence Services (NCIS), and the inquiries from local drug squads work as the main triggers for the financial investigations which may lead to the enforcement of the confiscation proceedings. The strategy and application of the financial investigation (under the RCSs or under local forces) follows the general policy and guidelines of the force and in

\(^6\)It is an exception in contrast with other forces. This explains also that police forces are independent, and Chief Constables have full right in forming their policies according to their experiences and resources.
particular the strategy of Drug or Fraud Squads. Accordingly, to determine
the scope and status of the financial investigation system, one must
examine this general strategy if only to find out the rules that direct the
operations in the FIUs.

In contrast with the RCSs, DI Hickman (pers. communication),
emphasised that there is little difference in the structure and functions
between the FIUs operating at police forces and the Regional FIUs. The
only apparent difference is the extent of responsibility. The Regional
Financial Investigation Unit is responsible for dealing with a broader area
which embraces several districts, while the local unit is obliged only to
abide by its own district. This does not necessarily mean that the local unit
cannot trace assets or profits of a local offender extended to other areas or
districts. DI Hickman asserts that the financial investigators with the
powers available to them can trace the assets locally, regionally, nationally
and even internationally, but co-operation with other law enforcement
agencies like the regional squads and the National Criminal Intelligence
Service (NCIS) is essential for successful confiscation proceedings.

He further says, 'that although sometimes the statistics and the figures of
confiscated orders may suggest or reflect an adoption of a particular
strategy, they are in the actual fact not trusted'. He asserts that 'there is no
difference between the FIU that works for the Squad in his force and the
FIU that works for the Regional Crime Squad (RCS). Any differences such
as there are reflect the priority and extent of attention the force is
allocating for drug problems'. This means that drug trafficking offences is
not the only or the major problem in all the forty three provinces. Some
forces, for example, undertake a tremendous amount of work with drug
crimes and in particular drug trafficking offences, while other forces
consider drug crimes not to be a distinctive problem. Accordingly some
other crimes occupy a higher priority. This may partly explain why some
forces have no financial investigation unit at all, but instead entrust at
least one of the drugs or fraud squad officer to do the financial
investigations required for certain drug trafficking cases.

In short, financial investigators are responsible for obtaining evidence on
the benefit derived by offenders from the proceeds of drug trafficking
crimes, they investigate the financial affairs of defendants for the purpose
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Identifying realisable assets which may be made the subject of a restraint order. They also furnish the courts with financial statements for consideration of confiscation orders. They are vested with substantial powers to obtain information about where the suspects have invested their illegal proceeds and profits, to freeze assets with restraint and charging orders, and to confiscate them from convicted defendants. All these powers were examined in detail in the preceding Chapter.

3.3.2.3. The Crown Prosecution Service (CPS)66

This institution was created by the Prosecution Offences Act 1985. It became operational on the 1 October 1986, and it is headed by the Director of Public Prosecutions. There are thirty one CPS areas within England and Wales which correspond to the geographical boundaries of police forces, either individually or in pairs. Each CPS is managed by a Chief Crown Prosecutor. Each area has a number of branches, each of which is managed by a Branch Crown Prosecutor.

When a case having the potential for asset confiscation arrives at the CPS for prosecution the local Chief Crown Prosecutor nominates a lawyer to handle the confiscation side of the case. This lawyer is referred to as the ‘Nominated Confiscation Lawyer (NCL)’. The NCL is required to put together the confiscation case. At first instance this is done by gathering as much information as possible from the prosecution brief and from the Police Financial Investigation Officer. In the event that the NCL considers the need for an application for a restraint order, the police affidavit and other police documents and evidence in support with the opinion of the NCL is sent off to the Central Confiscation Branch (CCB) which is at Headquarters of the CPS in London. The NCL will, if necessary, obtain the assistance of one of the CCB’s accountants if the case is particularly complicated. And if the police financial investigator needs help to determine the amount by which a defendant benefited from his offence or to trace the defendant’s realisable property. The other major responsibility of the NCL is to ensure that a statement under s. 11 of the

66The information stated in this section is mostly extracted from an interview with a Crown Prosecutor/Talbot Kennedy, from the Central Confiscation Branch (CCB), and also from A report of Clive Scott (an internet search, 1996).
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DTA is prepared for presentation at the court upon the conviction of the defendant.

3.3.2.4. Central Confiscation Branch (CCB)

The CCB was set up in April 1989 as a unit within the Fraud Investigation Group at CPS Headquarters. It was called the Central Confiscation Unit (CCU), but in March 1996 the 'Unit' was substituted by 'Branch'. The stated objective of the Branch is to 'deprive drug traffickers from the benefit of their offences' (CPS Journal, September 1989, p. 8). The Fraud Investigation Group was considered to be the best location for the CCB as it was staffed by lawyers who had received experience in criminal bankruptcy cases which was considered useful in the confiscation area. The Branch also has accountants in its staff who are able to provide support in complex cases requiring financial analysis (Scott, 1996).

This Branch controls one of the most important procedures in the confiscation system. In practice, CCB is involved in confiscation proceedings only when appearances in the High Court are necessary, and particularly when the Crown seeks restraint and charging orders from the High Court.

The branch prosecutor (at the local areas), may choose to contact the CCB and follow its advice. He may also choose to allow the CCB to handle the case entirely or to retain control and prosecute the case without help. It is important to note that CCB is based at the Crown Prosecution Service (CPS) headquarters in London. Most officers from the FIUs who have been interviewed asserted that they rarely needed to travel to London, but rather communicated with CCB by fax or by telephone for consultations.

Lastly, CCB is available to assist only on the cases originating from the police forces. This means that CCB comes into the picture when the proceedings involve necessary appearances in the High Court. It has no power to intervene in any of the drug trafficking case under the police control, but it can apply the minimum threshold policy to certain confiscation cases which requires restraint or charging orders. In contrast with the financial investigations of Customs & Excise, the latter operates under it own control. Obtaining restraint or charging orders via CCB (a
different organisation), may lead the police investigations to be described as a decentralised investigation (see Levi & Osofsky, 1995, p. 35).

The existence of an Advisory Unit or Branch for confiscation cases is important and very healthy for successful confiscation proceedings. However, when this Branch stipulates inconsistent conditions for the application of certain provisions of the confiscation system, like for instance the threshold minimum policy for certain confiscation cases, the situation could be different. It is presumed that the legislator intended to disregard the minimum threshold in DTOA 1986. This is also confirmed by the subsequent amendments in the consolidated DTA 1994. Such intention is considered as one of the most distinctive aspect of the DTA 1994 which distinguishes it from the confiscation legislation of the CJA 1988. Moreover, the minimum threshold is clearly stated in the CJA 1988. This means that the legislator wanted the drug traffickers to be deprived of any benefits and proceeds irrespective of their volume and cost. Accordingly, the dominance of CCB upon all applications for restraint and charging orders and the decision of not permitting any order to be applied for from High Court somewhat goes against the main principles of the legislation itself. The perceptions of the police financial investigators concerning this matter will be examined in detail in the following chapter.

3.3.2.5. The National Criminal Intelligence System (NCIS)

Intelligence and information are the life blood of the Financial Investigation Units (Thony, 1996). NCIS is one of the most important sources for information and disclosures for FIUs. In addition to that all financial institutions are obliged to report to NCIS for any suspicious deposits or transfers that may involve a crime. NCIS deals with national and international information and intelligence. Although it describes itself as a law enforcement agency, the NCIS is not an investigative agency but purely an intelligence agency. Once sufficient information is gathered to prove or confirm suspicions arising from an operation or a newly configured network, the actual investigation of the case is entrusted by NCIS to the police and Customs services with territorial jurisdiction to deal with it.

67Some of the information was collected from an interview with DS/John Leek at NCIS which was conducted in 1996.
Most of the aims and objectives of the Drugs Unit and the Financial Intelligence Unit at NCIS are originally derived from a former National Drugs Intelligence Unit (NDIU)\(^68\). The objectives of the two Units in regard to the financial investigation and for the confiscation proceedings are:

(a) to be the focal point for the systematic collection, evaluation and collation of information/intelligence relating to any trafficking at regional, national and international level; and

(b) to provide a central point for the receipt of all disclosures made under the DTOA 1986; the Criminal Justice Act 1988; and the Prevention of Terrorism Act 1989. Such disclosures are developed through the intelligence process and are disseminated to the appropriate agency of the police service or the Customs and Excise for further action. Also, where appropriate, to provide feedback to the disclosing body (Scott, 1996).

NCIS provides an effective linking mechanism between the activities of the various UK police forces and Custom's & Excise's drugs investigation Organisation. DS John Leek from NCIS (1996) says that the former NDIU and the present NCIS aim at preventing any potentially disastrous effects of two different law enforcement agencies targeting the same criminal enterprises but with different approaches (referring to the police forces and Customs and Excise). Scott (1996) indicates that preventing such a problem by the former NDIU is achieved by means of agreements between the participating agencies. The first agency to notify the NDIU of an investigation into a particular target would retain control of that investigation.

Another role of the NCIS is to be a focal point for the reporting of suspicious transactions by financial institutions. This is quite similar to the role played by FinCEN in US\(^69\). In April 1992, the links between Home

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\(^68\) The NCIS is established in 1992. It has been in existence in various forms since 1973 when it was set up under the name of the Central Drugs and Illegal Immigration Unit. In 1984, it was the Central Drugs Intelligence Unit, and in 1985 it turned to be the National Drugs Intelligence Unit (NDIU) (Saltmarsh, 1994).

\(^69\) The Financial Crimes Enforcement Network (FinCEN) was established by the US Department of the Treasury in 1990 as a multi-agency, multi-source financial intelligence and analytical network. The mission is to serve as the US Government's central source for
Chapter Three

The British Confiscation System

Office and Treasury Department, via NDIU were formalised by the amalgamation of customs and police components into the current NCIS. This also means that in 1992 NCIS officially took over from the NDIU.

The Economic Crimes Unit (ECU) and the Intelligence Co-ordination Unit (ICU) at NCIS deal with more specialised missions of handling financial information, having the function of centralising and filtering suspicious reports. They advise the Government and banks on the measures to be taken to prevent criminal use of the financial sector and have recently been developing a capacity for strategic analysis of money-laundering data. They are also in charge of training the professional staff and raising their level of awareness (NCIS Annual Report 1995/6, p. 8-17).

DS John Leek reveals that there is no system in the United Kingdom for automatically reporting specific types of transactions or operations such as cash transactions or international transfers of capital. The only reporting requirement is the one applicable to operations that appear suspicious. But because this obligation is global and not confined to professionals in the banking and financial sector, the number of reports received by the NCIS have always been very large. From the figure of 400 reports registered when the DTOA 1986 was introduced in 1987, it reached the 2,000 mark in 1990 and swelled to 4,000 in 1991. In 1993, an amendment of the Criminal Justice Act rendered 'failure to report any suspicious transactions or deposits' a punishable offence, at which point reports rocketed to 15,000 in 1994 and 13,700 in 1995.

The systematic identification, collation and analysis of financial crimes. The organisation accomplishes this mission by assisting in the detection and investigation of financial crimes as well as aiding in the formulation of enforcement and regulatory policy against such crimes (Annual Report of FinCEN, 1996).
Table (3.6) shows the number of disclosures received by NCIS from financial institutions during the period 1987-1995

<table>
<thead>
<tr>
<th>Year</th>
<th>Number</th>
</tr>
</thead>
<tbody>
<tr>
<td>1987</td>
<td>400</td>
</tr>
<tr>
<td>1988</td>
<td>599</td>
</tr>
<tr>
<td>1989</td>
<td>1,200</td>
</tr>
<tr>
<td>1990</td>
<td>2,000</td>
</tr>
<tr>
<td>1991</td>
<td>4,000</td>
</tr>
<tr>
<td>1992</td>
<td>11,542</td>
</tr>
<tr>
<td>1993</td>
<td>12,736</td>
</tr>
<tr>
<td>1994</td>
<td>15,000</td>
</tr>
<tr>
<td>1995</td>
<td>13,700</td>
</tr>
</tbody>
</table>

Figure (3.5) Number of disclosures, source: NCIS Annual Report (1995/6).

Lastly, although the confiscation system is been dealt by a number of law enforcement agencies (Crown Court, High Court, Magistrates’ Court, CCB, RCS, local police force and NCIS), the country still lacks a national operational system which can deal with certain national and international confiscation cases. However, Thony (1996) points out that more than one regional crime squad can be put together to deal with large-scale operations. NCIS, as mentioned above, can only facilitate the functions of the joint work of the RCSs and in particular the work of their financial investigation units. The views of the police officers and particularly the financial investigators concerning this matter and the impact upon performance will be examined in details in the following chapter. In general, DS John Leek explains that police officers favour an expanded
role for NCIS by giving more operational freedom and responsibility. Condon (1996) points out that the Home Affairs Committee in their 1995 report stated that the present structure of separate regional squads, with no central executive direction, needs to be replaced by a nationally co-ordinated structure.

3.4. SUMMARY

In this chapter, two main aspects of the British confiscation system were discussed. The first section examined the most distinctive powers and provisions of the British confiscation system provided under the consolidated DTA 1994 have been examined. In this examination, the selected powers and procedures have been divided into three main stages: (pre-trial proceedings, trial proceedings, and post-trial proceedings).

This 'three-stages' division has helped to determine the nature and extent of these powers according to their importance. In general, these powers were introduced to make law enforcement agencies deal with the proceeds of drug traffickers which were beyond the reach of the common forfeiture laws provided under the Misuse of Drugs Act 1971 and the Powers of Criminal Courts Act 1973.

The legislation empowered the law enforcement agencies to conduct searches of premises where the occupiers were not suspected of crime (for the first time); to enter premises to search for material; to delay allowing a person in custody to receive legal advice or assistance for up to 36 hours; to compel the defendant to co-operate (abolishing the right to silence); to restrain all the defendant's property (if needed); to presume that all the held, transferred and received property and any expenditure since 6 years are obtained from drug trafficking; to give courts a discretionary power to impose more than one financial penalty; to add to the original prison sentence more terms of imprisonment for defaulters (may reach an additional 10 years imprisonment); and lastly to confiscate legal property (if the defendant did not co-operate in paying the confiscation order) with some other unprecedented powers which make the system a very powerful threat not only to drug traffickers but even to the decent or the law-abiding parties.
These powers and provisions show that the novelty of some parts of the confiscation proceedings for the British criminal justice system was met with an uneasy reception by certain practitioners. This has led to various disputes and differences of judgements especially in the early stages. Subsequent amendments have now been added to the legislation. However, there are still some areas of disputes (e.g. the retrospective aspect, right of confidentiality, restrictions on restraint orders, and the disclosure of the informant's identity) which occupy the current argument about the system.

Moreover, an examination of the confiscation proceedings and the nature and extent of the powers provided show that the system lacks enough guarantees to prevent any injudicious use of these powers supported with discretionary powers. Some of these powers and procedures still also need to be accounted and defined on sensible and situated grounds. The differences in interpreting the 'intentions' of the legislature about certain ambiguous provisions are not in the interest of justice and fairness which are the main principles of the system. The novelty of certain powers and procedures are supposed to be dealt with in a clear and open manner not by a vague outline or hidden intentions.

The second section has focused mainly upon the operational side of the confiscation system. The specific organisation and strategies adopted for the enforcement of the confiscation provisions of DTA 1994 have been examined in detail. The section began by illustrating the developments that accompanied the governmental intentions to introduce the confiscation system, and it then reviewed the subsequent organisational and strategical developments which persisted and supported by the recent government's strategy of 1995-98 'Tackling Drugs Together'.

The three tier approach recommended by the Broome Report (1985) is the common dominator in the implementation of the confiscation system by all law enforcement agencies in England & Wales. The structure and strategies of the financial investigation systems at local and regional forces reflect the policies and management of the forces at each area and particularly the attached drug squads.
An examination of the developments of strategies and relevant literature revealed that confining and restricting confiscation system to only three tiers of enforcement have prevented a greater impact of the system upon other different levels and aspects of drug trafficking crimes. This means that there are certain gaps between the three tiers which let some drug traffickers escape from being under the focus of the law enforcement agencies and in particular, the drug squads of the local police forces and the drug wings of RCSs. Wright et al (1993) allege that there is a misalignment between the perceptions of the practitioners on the practical fronts and the political intentions of the policy-makers. This has caused a defect in containing the actual types and extent of drug trafficking offences and offenders. Wright et al asserted that the three tiers approach has failed to deal with a multifarious aspects of the drugs market.

This section also suggested that confiscation will work better against certain types of enterprises. Accordingly, the drug squads and wings should revise their anti-trafficking strategies to attack the different types of traffickers. For example, as each police force has a different type of distributors, an understanding of local and national drugs market by practitioners will necessarily determine the necessity of confiscation without the need to be obliged to maintain a fixed level of enforcement against certain labelled traffickers.

The confiscation system is designed to be enforced by a set of relationships between a variety of agencies. The financial investigative work of FIUs alone, for example, are not enough for the enforcement of the system. A network of relationships between all the involved law enforcement agencies (between drugs squads and FIUs, FIUs and CPS or CCB, FIUs and courts), a high degree of understanding and co-operation between these agencies, effective enforcement by magistrates (the Clerks' Offices), and the sufficiency of resources, funding and staffing are essential for any successful confiscation proceedings.

Lastly, the confiscation system is seen to operate in a difficult and complicated set of processes. The principles of the system are new to the criminal justice system, but some provisions are described as ambiguous, some provisions have annoyed some practitioners, and the strategies of enforcement are not consistent with the actual drugs market and types of
traffickers. The relationships between the enforcement agencies are based upon chances and temporal circumstances. All these issues could be reflected in the fairness and justice of confiscation procedures. The perceptions of the practitioners concerning these issues will be examined in details in the following chapter.
CHAPTER FOUR

THE VIEWS AND EXPERIENCES OF THE BRITISH POLICE

4.1. INTRODUCTION

In this chapter the second main aim is realised, that is to determine how the British confiscation system works. Particular reference is made to the police financial investigation officers and others who are directly involved in the police proceedings. In determining their relevant views the focus in this chapter is directed toward the following six sub-aims:

1. to determine the perceptions of the police financial investigators about the nature of the confiscation system provided under the DTA 1994;

2. to determine the perceptions of the police financial investigators about the main principles and features of the confiscation legislation;

3. to determine whether or not the chosen enforcement strategies are consistent with the directions, conditions and demands of the main provisions of the system;

4. to determine the major defects and problems which may prevent the system from being enforced and those which could prevent the involved practitioners from achieving the full potential of the powers and provisions against illegal proceeds and profits. This also include the nature and extent of cooperation of other law enforcement agencies;

5. to determine whether the confiscation system is efficient and useful or not; and
(6) to determine the level of resources, funding and support dedicated by government and local forces for the system.

In order to realise these six aims, this chapter relies upon the data collected for this purpose from the police financial investigators and other practitioners. Particular research methods and a special categorisation process were conducted to help in producing the significant information which are relevant to the contents of the above subaims.

More than one method was used in collecting the information needed for this study, namely, personal exploratory interviews, semi-structure mail questionnaire, and telephone interviews. The questionnaire was used only for the British system, with one hundred and seventy two being distributed to all the forty three police Constabularies (four for each one) in England and Wales. The total response received was forty seven (from thirty nine forces). The real number of police financial investigators was unknown, but from the personal visits, telephone calls to several forces and from Professor Levi's Report, it has become apparent that the number of the police financial investigators is limited and may not exceed eighty six. So forty seven responses (more than 54% of the presumed total number of financial investigators at the local police forces) with fifteen personal interviews conducted in England and Wales are to some extent reliable and could maintain credibility in achieving the research aims.
Throughout this chapter two categories of respondents are considered, those completing the questionnaire, 47 in all who were police financial investigators in local police forces -to be called the questionnaire group from now on, and 14 others who were specially selected as high ranking officials who were interviewed personally, some of whom are senior police administrators, financial investigators, a prosecutor from CCB, and two administrators from the NCIS -the interview group hereinafter. Comparisons between these two groups were applicable.

4.2. THE ANALYSIS OF THE PROCESSED DATA

There are two major research categories being considered: (a) legislation: that is the main principles and the features of the British confiscation legislation; and (b) application: which include aspects of how the legislation is being enforced and the kinds of problems and defects which prevent the enforcers from achieving best results.
It is not always possible to be specific about the aims as there is considerable overlap as far as the questionnaire group was concerned. Nonetheless as far as is possible the data will be presented according to the aims noted earlier.

### 4.2.1. Confiscation Legislation:

In this section aims 1 and 2 are considered. Aim 1 is to determine the perceptions of the police financial investigators about the nature of the confiscation system provided under the DTA 1994. Aim 2 is to determine their perceptions about the main principles and features of confiscation legislation. The results are presented as follows:

#### 4.2.1.1. Aim 1 The Nature of Confiscation Order

Two questions were asked about the value-based principle\(^{70}\). The purpose behind this was to determine whether the enforcers were aware of this principle and whether they were in favour of it as it provides new precedent in the British Criminal Justice System. The data collected from the questionnaires group shows that there was a variety of answers, i.e. that 15 participants (32%) agreed with the option of the value-based system, conversely 8 participants (17%) favour the alternative property-based system; and 7 participants (15%) have no knowledge about the principles so could not comment on difference between them; whilst 5 participants (11%) favour both\(^{71}\), and to underline the wide range of answers 3 participants (6%) were against both (Table (4.1)).

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\(^{70}\)The frequent use of the word 'principle' in describing the value-based system in the literature and in the collected data have led the researcher to adopt the same connotation. Talbot Kennedy, the Principal Crown Prosecutor at CCU, for example, considered the value-based system as one of two basic principles beside the reparative aspect of the confiscation system.

\(^{71}\)This variable has been treated exclusively. This means that the responses of those who favoured both principles (11%) have not been included with those who either advocate the property-based (17%) system or the value-based system (32%).
Table (4.1) The value-based system

<table>
<thead>
<tr>
<th>Answer</th>
<th>Questionnaire</th>
<th>Interview</th>
<th>Total Number</th>
<th>Total Percentages</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>N</td>
<td>%</td>
<td>N</td>
<td>%</td>
</tr>
<tr>
<td>Value-base</td>
<td>15</td>
<td>32%</td>
<td>8</td>
<td>57%</td>
</tr>
<tr>
<td>Property-base</td>
<td>8</td>
<td>17%</td>
<td>6</td>
<td>43%</td>
</tr>
<tr>
<td>No Answer</td>
<td>9</td>
<td>19%</td>
<td>-</td>
<td>-</td>
</tr>
<tr>
<td>Don't Know</td>
<td>7</td>
<td>15%</td>
<td>-</td>
<td>-</td>
</tr>
<tr>
<td>Favour both</td>
<td>5</td>
<td>11%</td>
<td>-</td>
<td>-</td>
</tr>
<tr>
<td>Against both</td>
<td>3</td>
<td>6%</td>
<td>-</td>
<td>-</td>
</tr>
<tr>
<td>Total</td>
<td>47</td>
<td>100%</td>
<td>14</td>
<td>100%</td>
</tr>
</tbody>
</table>

The numbers are too small to conduct detailed statistical tests but in the face of it there is a similarity between the two groups in that they were reasonably evenly divided between those aware of the property-based principle and those of the value-based principle. Except that the questionnaire group gave a much wider range of answers, including 'did not know' and 'no answer' (34% between them). This suggests that many of the respondents are either not familiar with the full applications of confiscation concerning the financial investigation processes, or were not able to distinguish any differences between the two main principles as they operate. The same point can be made in a different way. Regarding the perceptions of those others who were the interview group, it is interesting to note that over half advocated the value-based principle, while the remained favoured the property-based principle. All gave answers which were clear cut. This suggests that the second group of interviewees were more aware of the difference between the two principles than those in the questionnaire group. Some of the interview group who advocated the current system provided the following comments:

'any investigation into property would be complex and lengthy'.

'how would the police be able to deal with a situation where the only identified assets was a house?'
These implies that the interview group thought that although the property-based system has certain attractions and would certainly be easier from an investigative point of view, it has certain provisions which are more complicated than the value-based system. Some financial investigators commented on that by indicating that the only solution for such a difficulty is to provide the police with more powers to evict and subsequently sell the house in order to realise the assets.

The complexity of the property-based system, as some participants think, lies in terms of the means whereby the financial investigators are able to deal with property such as a family house. Here, the definition of a 'house' is based upon the 'house' itself and the 'human relationships' which have become part and parcel of the 'house'. This means that one of the problems which associate the enforcement of the property-based system is in the difficulty and also the complexity of the separation process between the 'house' and its owner 'the whole family'.

In spite of some of the comments received, it is difficult to see how such justifications are sufficient for not adopting a property-based system. The value-based system has provided the court with a power to exert a financial claim against the person whom the order is made; but if not paid, it may be realised in any property 'legally or illegally acquired' belongs to that person. Though the defendant has the right to choose which of his properties is to be realised, this does not mean that the family house is not at risk of realisation for a confiscation order.

Another view was put forward by one number of the interview group who was against the property-based system said:

'most of the drug traffickers in Britain keep their proceeds in cash or readily realisable assets. So by making the system property-based, this would help those middle range drug traffickers to avoid confiscation orders. But the value-based system is a 'catch-all' system, rather than being 'more selective' in its targets.

This suggests that the support for the value-based principle is also based upon a new technique which could successfully deal with the convertibility of the proceeds and the assets of drug traffickers. Convertibility is considered to be the main problem in the enforcement of the property-based system, because this system is related only to the so
called tainted properties. The enforcement of a property-based system, as a matter of fact, does not always confine itself to those tainted properties for in most cases, the defendants are ordered to pay an equivalent fine. Convertibility itself, is not an obstacle in enforcing the system.

Moreover, the social context and the class-relations of the drug traffickers could be an essential factor in deciding certain mechanisms and strategies for the enforcement of a special legislation for confiscation. It has been stated by some of the questionnaire group, when they were asked about the usefulness and the affects of relevant provisions, that the majority of drug trafficking cases are of low or middle level of offending. If we consider that Parliament is aware of the level of the majority of the drug dealers in England and Wales, then one can possibly understand the rationale of section 9 (1) of the DTA 1994, which provides that the confiscation orders shall be enforced as fines. This may mean that the levels of drug trafficking offences in the country can provide the legislators with indicators about the best enforcement techniques. But would the awareness of the levels of drug trafficking offences be the only factor to adopt this principle? As one of the questionnaire group said:

'the value-based system requires less expenditure and funding'.

Another, in commenting on the previous statement, referred to the American property-based system stating that 'the Americans needs to be partly self-financing and consequently looks to the property system to supply it with money, cars, etc.' He described it as 'a payment by results system', and pointed out that it is not usually the best.

Most of the practitioners believe that the costs is the underpinning reason to adopt the current system. With the property system, there is the cost of removal, storage and disposal which can place extra demands on the police service, mainly responsible for the application of the system. 'Dealing with property is a headache' one says. 'It requires a great deal of storage, and staff dedicated to it's care'. A final and crucial statement concerning the property-based method is that it 'is difficult to dispose of and once disposed of, it is impossible to retrieve and is always susceptible to damage. The government, therefore, chooses the value-based system because of cost-effectiveness and for convenience of the exchequer'.
On the other hand, those who favoured the property-based system (17% of the questionnaire group) insisted that it saved valuable police time; 'it is much easier and a straight-forward access to the restrained illegal gains and assets'; and 'property-based system would avoid complications and difficulties associated with assessment and valuation processes in the early stages of the confiscation proceedings'.

Some of those who provided the 'don't know' responses in the questionnaire group (15%) indicated that they did not know about the property-based system and would only give a clear answer if they had experienced it or read enough about it. This seems odd coming from officers who are expected to enforce a system. Finally, there were those who thought that 'both systems have major defects, and both have complications and injustices'. Unfortunately, they did not explain what the complications were. However, looking closely at these 6% of responses, one can easily believe that they all support the confiscation principle albeit with some reservations.

However, it is possible that the practical differences between the advantages and the disadvantages of both principles (property or value-based) can be achieved by simply comparing it with the current forfeiture system under the Misuse of Drugs Act 1971, and the Powers of Criminal Courts Act 1973. In addition, there are other jurisdictions adopting the property-based system, and they could be compared with the British value-based system (the American, the French and the Egyptian confiscation system). It was not expected that these respondents should be aware of other confiscation systems, but at least they can differentiate between confiscation and forfeiture provided under the MDA 1971.

4.2.1.2. Aim 2 Principles and Features
This aim is mainly about the link with punishment and reparation. The confiscation system, as explained before, is ambiguous so much so that the system can be punitive or reparative. Accordingly several questions were asked aimed at determining the perceptions of the questionnaire and the interview groups about the features and procedures of the confiscation system.
Chapter Four  
The Views and Experiences of the British Police

The perceptions of the participants regarding the actual nature and impact of the confiscation system are included in the following six sub-categories:

4.2.1.2.1. Punishment or Reparation
The participants (questionnaires and interviews) were asked to give their views about the main feature of the system according to how it was experienced by them (Question No. 2). The responses show the following findings:

Table (4.2) confiscation between punishment and reparation.

<table>
<thead>
<tr>
<th>Character</th>
<th>Questionnaire</th>
<th>Interview</th>
<th>Total Number</th>
<th>Total Percentages</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>N</td>
<td>%</td>
<td>N</td>
<td>%</td>
</tr>
<tr>
<td>Punishment</td>
<td>30</td>
<td>64%</td>
<td>13</td>
<td>93%</td>
</tr>
<tr>
<td>Reparation</td>
<td>5</td>
<td>11%</td>
<td>1</td>
<td>7%</td>
</tr>
<tr>
<td>Don't Know</td>
<td>9</td>
<td>19%</td>
<td>-</td>
<td>-</td>
</tr>
<tr>
<td>No Answer</td>
<td>3</td>
<td>6%</td>
<td>-</td>
<td>-</td>
</tr>
<tr>
<td>Total</td>
<td>47</td>
<td>100%</td>
<td>14</td>
<td>100%</td>
</tr>
</tbody>
</table>
As shown in Table 4.2, apart from the 12 who said they don't know or gave no answers—perhaps due to their lack of experience, the majority of the participants (30 in the questionnaire group and 13 in the interview group 43 or 70%) think that the confiscation system is a punitive one. Most of those who believe it so think it is aimed at redressing the wrongdoing acts of the offenders. This suggests that the participants think that although the system contains aspects of reparation, redress, and deterrence these are minor features when set against its punitive impact. Table (4.2) shows also that 6 participants (10%) believe that the system is reparative in nature. Most of their answers reflect the government view and particularly the CCB written instructions which explain that the confiscation system is merely a means of reparation.

Table 4.2 is interestingly in that whilst the interview group were less certain about the link with punishment the other group were more so. Only 1 saw that the nature of confiscation system is reparative. He stated:

'The ability to restrain and confiscate the assets must not be underestimated as a form of punishment'

'It is not perceived as a formal penalty, but as the recovery of the benefits derived from an illegal act'
Again what seems to be happening is that the questionnaire group, police officers who operate the system had perhaps less knowledge of the existence of conflict in understanding or in classifying confiscation, or rather fewer areas of which of course must affect the way the system operates.

4.2.1.2.2. The General Impact of the legislation
Both groups were asked to express their views about whether they agree or disagree with the allegation that the system has no impact upon drug traffickers. The answers show that:

Table (4.3) The determination of the impact of the system.

<table>
<thead>
<tr>
<th>Answer</th>
<th>Questionnaire</th>
<th>Interview</th>
<th>Total Number</th>
<th>Total Percentages</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>N</td>
<td>%</td>
<td>N</td>
<td>%</td>
</tr>
<tr>
<td>Agree</td>
<td>7</td>
<td>15%</td>
<td>-</td>
<td>-</td>
</tr>
<tr>
<td>Disagree</td>
<td>24</td>
<td>51%</td>
<td>14</td>
<td>100%</td>
</tr>
<tr>
<td>Don't Know</td>
<td>5</td>
<td>11%</td>
<td>-</td>
<td>-</td>
</tr>
<tr>
<td>No Answer</td>
<td>11</td>
<td>23%</td>
<td>-</td>
<td>-</td>
</tr>
<tr>
<td>Total</td>
<td>47</td>
<td>100%</td>
<td>14</td>
<td>100%</td>
</tr>
</tbody>
</table>
All the interview group disagreed that the system had no impact upon drug traffickers, as did 24 of the questionnaire group. This meant thirty eight (63%) of all the participants disagree with the views that confiscation has no impact upon the drug trafficking problem, while only (7 responses, 11%) believe that the system has no impact at all. The questionnaire group provided the following comments:

'The Act is described as being draconian and if the supposition is correct then there was no point in making it that way'

'If some wish to interpret it as such that is a matter for them, however, I believe the confiscation of ill-gotten gains strikes at the root of the problem and directly addresses the criminals' reason for drug trafficking. The removal of benefits is a sever blow to the traffickers'

'I believe that the majority of drug traffickers have a greater fear of losing their assets than losing their liberty'

'It appears to hurt the offender more than the threat of imprisonment'

'Confiscation orders can make even bankruptcy seem generous as a receiver acting under the DTA or Proceeds of Crime Act can take every single asset, down to the clothes the person is wearing. While criminals may roll over quietly and accept a prison sentence, they
will fight tooth and nail to keep their lifestyle sweet for their release'.

'They fight like dogs to avoid losing their assets. They do not mind too much doing five years in prison for drug trafficking, even doing another three years on top for not paying the confiscation order, but if you appoint a receiver to avoid doing the three years to make them pay, they will be instructing lawyers and fighting the receivership order, and the house won't be theirs, it will be wife's, etc. Every excuse and every stop is pulled out to avoid paying the order'.

These statements from the questionnaire group imply that the majority of police financial investigators believe that the confiscation order has a punitive impact upon the convicted drug traffickers. This assertion does not arise out of a vacuum, but as was previously mentioned, it corresponds with a prevailing jurisprudential view derived from certain legal cases.

Those who believe that the system has no impact (15%), from the questionnaire group, said the following: (a) confiscation is not even a formal penalty, it is the recovery of benefits derived from illegal acts; (b) it is an inconvenience rather than a punishment; (c) the actual application suggests that confiscation is not a penalty.

From the interview group, DS from the Financial Investigation Unit in the West-Yorkshire Police, states:

'I don't think a confiscation order as penal. A sentence is penal, but the imposition of confiscation order is not part of the sentence itself. Because what the DTOA 1986 said was, that before you could sentence, you had to impose a confiscation order. In other words the two things are completely different. A confiscation orders merely reparation of profits you have made from the offence'

These comments suggest that they exist either as a result of the awareness of the differences between the two mentioned theories or they are just a comment upon certain adopted applications for the legislation. This suggests that their understanding is based upon those early decisions of some courts that confiscation is reparative. It might be also due to the belief that the government or the police force is not serious enough about showing the strengths of the confiscation provisions. That is that the force, for certain reasons do not favour applying the system in full.
Sixteen or 26 per cent (18% + 8%) of the responses of both groups provided either an unclear or irrelevant answers, or no answer at all. This could be related, as indicated earlier, to the limited experience and knowledge of the newly appointed officers. For example these are some of the comments they made on the interview group;

DS from West Midlands Police, CCB, indicates that confiscation is partly deterrent, it is an extra means of punishment.

DS from Gwent Constabulary and DS from South Yorkshire Police asserted that confiscation is a very powerful law and it is very draconian.

DS (Gwent Police) states that if the money rather than the person is attacked there would perhaps be a deterrent effect to stop the person from being a drug trafficker in the first place.

Others from the interview group gave same measure of agreement but the answers were more considered.

Financial investigator from Customs & Excise Department, FIU, indicates that confiscation is a very strong piece of legislation. It does prevent people from drug trafficking because it impose a severe financial punishment.

DI from (Leicester Police) believed that confiscation has no problem as legislation but the problem is in its adopted machinery. The assumption provision under section 4 of DTA 1994 hurts drug traffickers by taking cash money and by destroying the drugs, and even if they get bail, they are deprived of their stock in the drug and the cash in order to buy some new drugs. It does hurt them.

A prosecutor from CCB, indicates that if the assets of drug traffickers are confiscated then that hits them where it really hurts. Confiscation legislation is a very heavy weapon to use. In small cases, it is a bit of a sledgehammer to crack a nut.

Finally, CI from City of London Police, asserted that confiscation is a deterrent, but it is not a major one because it has not started to bite yet
because currently it is not as effective as it should be for a number of reasons which are mostly related to the ways of its applications and funding. Confiscation is considered as an additional deterrent beside prison.

He also states

Certainly, the way the legislators have viewed it and the way the courts are supposed to view it, it is not a penalty in its own right. The court deals with punishment to be dished out in respect of the prime criminality and then and only then do they look at the confiscation which is all about having proved that a person has benefited from a crime, removing that benefit from him. That's the theory. But, as I said, in practice what we are finding is that some prosecution lawyers, defence lawyers and judges actually view it as punitive and therefore they use it as a bargaining tool for the sentence. The theory is that it is just supposed to remove the benefit from the crime but not as a penalty per se.

While the theory is that it is not punitive, to the criminals it is. They see themselves losing everything they have criminally strived to get. The problems are, the whole system at the moment is not as effective as it should be. So, the efforts put in by police officers and customs officers, to restrain funds aren't going all the way through the criminal justice system so the criminals aren't paying. If we say they should be paying £1,000,000 and, at the end of the day, they are only paying £20,000, it sort of diminishes the effectiveness. Because, elsewhere in the criminal justice systems, our work is being diluted; it is having an effect on us. But, yes, the first part of that statement I support. I think in the eyes of the criminals, it is seen as the most painful area of their sentence, that they lose the money that they have criminally acquired.

One could add by saying that confiscation can be considered as a punitive procedure and it is so not only in the eyes of drug traffickers and some barristers, but also in the eyes of the nine judges at the Strasbourg Court who ruled unanimously in 1995 that a British court acted unlawfully in trying to confiscate £59,000 of Peter Welch's drug profits after he was convicted of a plot to smuggle £4 million of cannabis into the UK72.

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72Peter Welch was arrested in November 1986 and charged with drug offences. He was found guilty in August 1988 and sentenced to 22 years' imprisonment. The judge made a confiscation order for £66,914 under the Act, which came into force in January 1987, two months after his arrest.
4.2.1.2.3. The Sweeping Assumptions

Describing the 'required assumptions' which are provided under section 4 of the DTA 1994 as 'draconian', 'sweeping', 'an extraordinarily wide power' by those who wrote about the system, as explained in previous chapters of this study, would lead us to examine the perceptions of those practitioners of the confiscation provisions in everyday life. This question was addressed mainly to the interview group.

The answers show that all the 14 interviewees believe that these descriptions are correct. Some of the interviewees refer to the wide extent of the provision where it did not exclude any property of any kind. One, for instance, indicates that

'It if appears to the court that the defendant has held property at any time since his conviction, or that property has been transferred to him within the relevant six year period, or that he has made any expenditures within that period the court must assume that the property or expenditure is connected with drug trafficking, unless the assumption is shown to be incorrect in the defendant's case, or the court is satisfied that there would be a serious risk of injustice if the assumption were to be made'

DI from West-Midlands Police indicates that it is 'draconian' and sweeping because section 4 (1) of the DTA 1994 provides that any payment or other rewards received by a person at any time in connection with drug trafficking carried on by him or another person can be considered for confiscation. He referred to the nature of the application or the way these assumptions are applied by the courts. He also indicated that an application required the judge to assume that there is a connection between the property of the person and the drug trafficking offence(s). This provision is mainly based on guesswork not on evidence properly tested before a jury.

DC (Gwent Police Force, S. Wales) pointed out that the extraordinary and the unusual consequences which one expects from implementing the confiscation system explains why some judges are reluctant to apply the provision or even consider the confiscation legislation. CCB attributed such reluctance to a belief that when assessing the worth of a convicted drug dealer's assets all too often one was forced to take 'blind stabs in the dark' and he found it 'impossible to be precise'. 
The majority of the responses did not provide differing views than what have been just indicated by the above mentioned interviewees. Accordingly, the responses provided clear evidence that to apply the confiscation system, the law enforcement agencies need only to assume that there is a relation between the property of any person and certain drug trafficking offence(s). Where the provision cover all the property of the defendant which include the illegal gains, all subsequent investments, and all the gifts which were given to the members of the family or even friends, the punitive impact is the dominant feature of the system.

4.2.1.2.4. Receivership

Another aspect of the legislation which also could support the attempt to determine the link with punishment or reparation is where the enforcement of the system is held by a receiver. In this case where a defendant is not co-operating, a receiver may be appointed by the High Court. The legislature has empowered the receiver to realise properties equivalent to the amount of the confiscation order. This decision embraces properties legally or illegally acquired by the defendant. Here the confiscation system is implicitly extended to include legally gained assets. This means that in the case where the value-based provision did not work due to, for example, the defendant himself not co-operating, the receiver is empowered to apply a property-based system. And this system is applied not against particular illegal gains or assets, but to any assets whether legally or illegally acquired by the defendant. Accordingly, if the property-based system is seen to collide with the European Convention on Human Rights, in particular, article 6, by overriding the defendant's proprietary rights in any specific property, then it follows that the confiscation system by including this particular provision would breach the rights of the defendants. This breaching of the rights could also be considered as promoting a further aspect of the punitive principle of the system.

One respondent from the interview group explained the main function of the receiver by saying:

'If the defendant does not pay the order, his house, for example, may have to be sold and if he does not sell it voluntarily then a receiver may be appointed to sell it.'
Another, CI (City of London Police) when asked about his perception of the extent of powers of the legislation, pointed out that:

> The defendants do not mind an extra 3 years for not paying the confiscation order too much, but if you appoint a receiver to avoid doing the three years to make them pay, they will be instructing lawyers and fighting the receivership order' (CI Thomas, City of London Police).

Appointing a receiver by the High Court means a definite recovery of the confiscation order. The receiver, as explained above, is empowered to realise any available property which can satisfy a confiscation order. The powers vested to the receiver explain the reactions of the defendants as indicated by CI Thomas.

4.2.1.2.5. Default Sentence

One respondent from the interview group stated that 'the receiver would take what he could and, if there is a shortfall, it will be met by additional prison sentence (default sentence) and only if it is worthwhile'. This statement provides that one of the features of the confiscation system is that it includes an additional period of imprisonment which may extend to 10 years in addition to the original sentence for the offence. The system is designed to be enforced as a fine. A fine is considered in the British criminal justice system as a punishment which can be imposed alone.

Another interviewee pointed out that if the defendant has not satisfied the confiscation order during the time-to-pay outlined in it, or when his original prison term has or is about to expire, and no receiver has been appointed, then the enforcing magistrate's court is faced with a decision whether to make the defendant pay or to issue a warrant of commitment to make the defendant serve the sentence of imprisonment in default which was stated by the Crown Court. He added that the subsequent amendments provided under the CJA 1993 (s. 6 (7)) are, inter alia, meant to strengthen such cases by ensuring that the magistrates' courts consider or try all measures to enforce payment before issuing a warrant of commitment. He explained that although the amended provision provides that a defendant who serves a term of imprisonment in default does not escape the confiscation order, which may mean that the confiscation order continues in effect and may be enforced by other means,
jail sentence, as a main option. Accordingly, and because no one can argue that imprisonment is not penal, and the default sentence is actually inclusive in the provisions of the confiscation system, this in consequence establishes and strengthens the added punitive feature of the system. Moreover, measuring the size of the default sentence compared with the amount of the confiscation order may indicate that both the confiscation order and imprisonment have the same effect upon drug traffickers. This means that if imprisonment is a punishment then the confiscation order must be the same.

The responses of the other interviewees did not provide any different views than these mentioned perceptions concerning the punitive feature of the default provision provided under the confiscation system.

4.2.1.2.6. Retrospectivity of Confiscation
Finally there is the question of confiscation which was made retrospectively. This question was addressed to both groups. For the first time in any English statute, the retrospective provision under section 4 (3) requires the court, for the purpose of determining what the benefits are, to make a confiscation order which is to reflect activity carried out by the defendant of which he has not been convicted.

There was considerable unanimity of view- in fact more so here than anywhere else. The questionnaire group provided that 43 out of the 47 participants (91%) think that this is the right approach, whilst only one participant (2%) disagreed with it and he did not say why he thought so. Most of the respondents in this group who supported the system thought that the time limit addressed in the legislation was not enough, and the prosecution should be allowed to go back any number of years they thought fit.
Table (4.4) Shows the support of the retrospective effect of the system.

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<td>100%</td>
<td>14</td>
<td>100%</td>
</tr>
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</table>

![Pie chart showing percentages]

Figure (4.4) The percentage of those advocating the retrospective provision in the DTA 1994.

It is interesting that of the interview group all 14 advocated the importance of the retrospective effect in the confiscation system, and in particular in serving the assumption provision. One pointed out:

"The English and Wales Domestic Drug Trafficking Offences Act requires the court to determine what the benefit is from drug trafficking of the convicted defendant at any time since the defendant was born. It is not restricted to six years at all. And it also requires the court to determine the drug trafficking carried out by the defendant anywhere in the world, not just in England and Wales."

He also added

"I do not know why a six year period was chosen. I do not think there is any significance in six years. I have never heard it said that there..."
is. I think it was just an arbitrary time period. How long should we go back? Three years, may be not long enough, seven years, that is a bit long. Shall we make it 6? why not?'

He went on to indicate

The significance of the six year period is purely a practical one to help the court conclude what that benefit might be and is only for the operation of the assumptions and also the gift provisions which also relate to six years prior to when he was charged. So, in other words, if the prosecution is compiling a section 3 statement for the assessment of the court, and it wants to show what the benefits are. It can look at any transfers to the defendant over the last six years and set this out. It can also look at any expenditure incurred by the defendant over the last six years or a period longer than that because the six years is six years prior to when he was charged and that just signifies the starting point and it runs all the way through to when he is convicted. So if he is convicted, say, a year after he is charged, then in effect, you have a seven year period, not just the six year period. But it can look at transfers to the defendant, it can look at expenditure incurred by the defendant and you can just set those out and the prosecution do not have to show a direct link between this expenditure and the drug trafficker. The court can assume there is a link under the assumptions in Section 2. So Section 3 statement might say over the last six years, he had £300,000 transferred to his bank account, he has got a very expensive house, he has an expensive car bought for him and the cost of that has been £20,000, therefore, using these assumptions, there is £320,000. The burden then shifts to the defendant to prove that expenditure and those transfers were not received by him or incurred by him from drugs trafficking. The Section 3 statement may also say ‘... and when he was interviewed, the defendant admitted that, say, in 1963, he sold a consignment of heroin for £100,000 and that was obviously prior to the six year period but the prosecution is relying on positive proof that he has benefited from drug trafficking. It does not have to be an admission from the defendant. It might be other evidence which the prosecution might have about trafficking carried on by him. He might say I have been doing it for fifteen years and what I got last year is about what I got fifteen years ago, and in those circumstances, the prosecution would not be relying on the assumptions in which case they can only look at six years, but would be providing positive evidence of its own’

Customs & Excise Department (interview group ) indicates that it is not a new phenomena in the Criminal Justice System. 'The Inland Revenue has a general rule of six years', she believes that the law has been drawn up in line with that.

Finally, CI from City of London Police, asserted that the benefit of the legislation lies in its retrospective effect. 'Once we catch somebody, we can
go back for a long time and catch up all those other offences, all those importation which we think he has done, if we can make a good case'.

When the ruling of Strasbourg Court in Welch's case in 1995 was mentioned, the Chief Inspector commented 'I am convinced that the laws we have are just and appropriate for dealing with drug dealers. The ruling of Strasbourg Court asserted what I just said that in practice many people in Britain and particularly those work in the drug squads and the financial investigation business believe that the legislation is punitive, and the retrospective effect is one of the main tools of the punitive part of the confiscation legislation'.

4.2.1.3. Summary
The aims in this section were to determine the nature, features and the main principles of the confiscation legislation as viewed by the questionnaire and the interview groups. The results show that although the perceptions (by percentages) of the interview group were almost similar to the police financial investigators (the questionnaire group), the high ranking and the administrative officials show that they were more aware about the issues discussed in this section concerning the content of the first two aims of this chapter. e.g. all of the relevant questions in this section were completely answered by the interview group while there were some financial investigators who provided no answer or did not know enough information about the system they were applying. In general, this section provided that the majority of the participants from both groups advocate the adopted value-based system and believe that the confiscation order is an additional punishment to imprisonment.

4.2.2. The Application Aspect of the System
This section include the data that are relevant to the issues of aims 3 and 4. These aims are about the perceptions of the participants of both groups in relation to the application and methods of enforcement and the demands of the legislation. It has been indicated previously that the execution of confiscation provisions by the police varies among the 43 constabularies in England and Wales. This variation is mainly a consequence of two main issues: (a) the nature of the relationship between
the government and the police forces (For example, CI from the interview group indicated that there are forty three autonomous chief constable who 'nobody can tell them what to do').

and (b) variations in priorities of each police force. Each police force has a different 'agenda' which depends upon the problems likely to be encountered in each police district. This variation is reflected in the way the financial investigations are conducted by each of these police forces.

A group of questions were presented to the participants in an attempt to explore their views about the above two aims. A detailed analysis of the relevant data for each of these two aims is provided. Five questions were asked in an attempt to determine aim 3 (the extent of consistency between the powers provided in the legislation and the way enforcement is adopted by the police forces). The first question is about the general consistency between the provisions of law and the policies of enforcement. The second is about the problem of disclosure of the identity of informants (directed only to the interview group). The third is about the level of enforcement. The fourth is about the shortcomings in enforcement and if any their main causes. And the last is about the perception of the participants concerning the current government policy with the recovered proceeds.

4.2.2.1. Aim 3 Consistency
The responses to the first question by both groups show that 36 or 59% of them think that the current enforcement strategies correspond well with the provisions of the legislation, while 18 or 30% believe to the contrary as illustrated in table (4.5).
Table (4.5) The perceptions of the participant about the consistency of the system.

<table>
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<th>Interview</th>
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<th>Total Percentages</th>
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<td>Total</td>
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</table>

Figure (4.5) the perception of the participants about the consistency between the law and its enforcement (theory and practice)

The responses show that the high majority at the interview group (12 out of 14) provided similar answers while the results of the questionnaire group were divided to four different responses. The similarity between the two groups show those who operate the legislation correspond well with its provisions.

When pressed further the 30% of the participants from both groups who believe that there is no consistency between the law and its practice said so for two main reasons: (a) the financial support and training courses needed for achieving the purposes of the legislation are not sufficient; (b)
the enforcement of provisions is restricted to certain conditions. One of these is, for example, the so called minimum threshold policy where an application for a restrain order is restricted by regulating a minimum threshold policy. This means that the value of assets which is less that the minimum amount provided by CCB will not be allowed to be restrained. More details to follow:

4.2.2.1.1. The Minimum Threshold Policy

One of the questionnaire group who believes that the enforcement system provided by the legislation must be restricted to certain level of drug trafficking cases, says:

'I think there should be a minimum amount for a confiscation order to apply. I believe the legislation was intended for serious drug suppliers who make many thousands of pounds from their dealings. As it is at the moment someone making just five pounds from a deal is included in the legislation. A minimum figure would allow us to concentrate on dealing with the type of person the legislation was intended for'

This statement implies that the powers provided for the enforcement of the confiscation system were designed to be enforced against serious drug trafficking cases. The seriousness of the cases, of course, depend upon the amount or the value of the proceeds and profits each drug trafficker has. So the impact of the system may be more obvious when it is directed to high level criminals. The statement also indicates that the enforcement of confiscation orders for all kinds of drug trafficking offences could negatively affect the investigation process, and so result in dispersing the efforts which would otherwise be directed to serious drug trafficking cases.

Another said:

'At the moment the level we look at is £5,000 plus. If it is not more than that, we won't touch it because it is not financially viable to do so. Less than that is not worth the effort. So we try to do it but in forfeiture law, or we won't take it at all'

Here the point is made that some police forces advocate a minimum threshold policies. That is some police forces apply a minimum of £2000, whilst others only consider a confiscation order when the assets or the proceeds exceeds £10,000.
'In the cases where offenders have realisable assets of £10,000 or more, the law works well. In cases where the defendants have less than that in assets, the law does not allow for a restraint order. CPS and CCB will not apply for a restraint order at the High Court for amounts less than £10,000.'

'If the proceeds or the profits are under certain amounts, they are not interested in this Act at all. It is because it is designed for 10,000 pounds plus, and there aren't many drug traffickers at street and middle level that are ever going to reach that.'

Another, this time from the interview group pointed out that financial investigation officers welcome the fact that the new provisions of the CJA 1993 enabled them to avoid wasting time making detailed reports to the court on offenders whom they 'know' have no assets, but he expressed concerns about a high 'minimum threshold figure' for confiscation applications by the CPS.

The new discretionary power vested in the prosecution and the courts regarding a confiscation order has indeed, as many officers confirmed, met with a great satisfaction and appreciation from most of the enforcement agencies (s. 2 (1) (a) (b), DTA 1994). However, these provisions are quite irrelevant. The minimum threshold policy is required if the police force applied for restraint order. Parliament has not included such a condition in the DTOA 1986 and even in the DTA 1994 but it is provided in the confiscation system.

In justifying the minimum policy, the interviewed prosecutor asserted that the CCB normal minimum threshold for drugs trafficking cases was already set at £5,000 in 1986, and by statute is £10,000 in fraud and other cases under the CJA 1988, and has not changed since. This is meant to be a way of rationing scarce resources to deal with the more complex cases where restraint is seen as 'worthwhile' and as 'cost-effective'.

One may inquire, in this respect, why Parliament has stated the limit in the CJA 1988 while this is not the case in the subsequent amended DTA 1994? It is suspected that Parliament intended to confine such provisions only to drug trafficking offences, and did not want to impose any such restrictions on enforcing them in confiscation proceedings.
The financial investigators and all those involved in the enforcement of the confiscation system, have the right to suggest a restriction(s) on the imposition of confiscation or even on an extension of confiscation powers. However, irrespective of any such justifications, adopting a policy that has no base or is against certain principles in the legislation, would be considered, of course, a breach in the supremacy of law.

The other view, however, embraces the complaints by some respondents from the questionnaire group about this particular inconsistency which they say is mainly caused by some enforcement agencies. The following statements were extracted from the answers of the questionnaire group to a similar question:

'The current CCB policy of not going for restraint and confiscation below £10,000 has prevented us from confiscating the working capital of street-level dealers, which is an important objective, irrespective of whether or not it is financially cost-effective to make and enforce the order. Traffickers who do small deals over an extended period of time generate considerable cash flows'

'The DTOA is probably the easiest English statute to understand, yet the courts would appear not to take sufficient cognisance of it which can sometimes be quite disappointing after a protracted investigation'

'It is a lengthy process, but once the court have determined that a person has benefited from drug trafficking, that person's assets should be immediately made known to the court and a confiscation order invoked there and then, to recover the person's assets, whether they be monetary or realisable property. The trafficker should not benefit, however little, from the trade'

4.2.2.1.2. Conviction and Disclosure
The conviction of suspects - a logical prerequisite of confiscation provisions - is affected profoundly by the issue of informant disclosure (the second question). DI from the interview group (West-Midlands Police) provided the following statement

'The big problem we have at the moment is disclosure. Disclosure to the defence of unused material or the identity of the informants. The pendulum has swung far too far one way and we were having to abandon a lot of cases because the defence were trying to discover the identity of informants. In a few cases, it was reasonable for their defence to say that we need to know the identity of informants but, in many cases, it was just a ploy for them to get the case pulled. And
it was not uncommon for us to reach a position in a prosecution where we would have to make a decision, do we sacrifice the informant or do we pull the plug?. We have lobbied Parliament significantly and there is a new Act of Parliament about to come out where it makes the disclosure issues, in theory at least, more manageable. The pendulum is starting to swing back. But it is still a major problem. With every investigation, now, before we start the investigation, we look at what the disclosure issues are'

He also added

'There are mechanisms for us to protect sensitive information and we can. Ultimately, we can have a secret hearing (ex party hearing) with the judge, where we can put information before the judge and we can say this is not only sensitive but, if the defence were to learn that we were before you, it could cause problems. If the judge rules in our favour, the defence never knows the issue has ever been raised. So there are mechanisms to deal with it, but it is a major problem. A major operational and practical problem. One with which I struggle with almost daily.'

Accordingly, he suggested the following

'The only possibility to which I would give some consideration, but I would have to think about it carefully, is whether we really need to have a criminal conviction to pursue drug traffickers at all. At the moment, the conviction is only a trigger, in any event, and, as I said earlier, a person can be made the subject of a confiscation order, taking into account trafficking of which he has not been convicted. So what is the point or the object of having a conviction in advance. I suppose it makes the confiscation legislation a little bit more parliamentary palatable. But that is about all'

This issue is rarely questioned or mentioned, but it was briefly referred to in the literature by Levi & Osofsky 1995 report. The issue, as the report indicates, is often neglected but and was dealt with to a certain extent in the Report of the Royal Commission (p. 1). The point of inconsistency, is not whether there is agreement about having conviction as a prerequisite condition for confiscation, but about the subsequent problem in confiscation proceedings which could be solved from within the legislation itself.

4.2.2.1.3. Level of Enforcement
Two main issues dominated the argument about level of enforcement (the third question). The first is about the minimum threshold policy which has been discussed above, and the second, is related to the three
Chapter Four  The Views and Experiences of the British Police

tiers strategy in dealing with drug trafficking offences. These two issues are interconnected. The following, is a detailed analysis of the perceptions of the participants about the second issue.

4.2.2.1.3.1. The Three Tier Strategy
It has been shown above that there is a strategy in dealing with drug trafficking cases. This strategy is based upon a structure which consists of three tiers (Broome Committee, see chapter one). In practice, DI from the interview group (West-Midlands Police) says:

'The strategy of the force is mainly based on the national programme for the nation. The governmental policy made most police forces adopt similar strategies in combating Drugs Crime. They are basically the same. The way they go about collecting revenue may be different. That depends on the courts. It depends on the procedures. But, at the end of the day, it is a national policy which they should adhere to.  

Accordingly, most police forces deal with drug trafficking offences by following a similar structure to that suggested by the Broome Committee. The DI indicates that there are variation in the structure but generally speaking there are three levels of drug dealers: (a) level one: the ones at the bottom of the pyramid, who are the street dealers, they're supposed to be dealt with by the Divisional Crime Support Unit; (b) level two: the next one up on the pyramid are those who actually distribute the drugs to the street dealers, and they are designated to the Force Drug Squads; and (c) level three: the people at the apex of the pyramid, who are distributing the drugs country-wide to dealers who are dealing at street level (people who are importing). They have been dealt with by the RCS, drugs wings in conjunction with customs (West Midlands Police, FIU).

He also states that:

'RCS have to target the life-style drugs dealer, they do that through technical aids, through facilities and technical means which we don't tend to do. We tend to operate purely on a local base within a 25 miles of the centre of Birmingham. We are obligated as a drugs Squad to go to the RCS if we want to go nation-wide, or to go to Customs if we think it is an importation'.

73The interviewee here referring to the three tiers suggested by Broome Committee and adopted by the Government and police forces.
The inconsistency here concerns the relationship among: the level of the majority of drug traffickers in the areas under the control of police forces; the minimum threshold policy; and the restraint order. The function of financial investigation units in the local police forces, according to this structure, is confined to the level of drug traffickers in their areas. If the majority of the dealers and even distributors in their areas do not have assets which can reach the minimum threshold policy of CCB, which most of the time is £10,000 or as some claim £15,000, then the restraint order will not take place. The FIUs (whom they involve in the proceedings where assets have to be restrained through the High Court in London), will not be able or allowed to apply for a restraint order even for cases with amounts near the minimum, in order to be consistent with the provisions under the legislation or any related rules and regulations. It seems then that the rules and regulations aim to simplify and clarify any vague or ambiguous provisions, but, at the same time, they should not stipulate or restrict the application of certain intended principles in the legislation.

Furthermore DS from Greater Manchester Police in the interview group states:

'The problem we have is that the people who we are picking on on a street level have no assets. So at the end of the day it doesn't work on those. The people it does work on are at the top'

'We deal with street dealers, the middle management dealer type. They don't have assets, so you don't seize the assets. They don't have anything'.

Compare this to one respondent from the questionnaire group who asserts that:

'The vast majority of drug offenders are at the bottom end of the social scale and accordingly have little or no assets to make confiscation a viable option'

'The majority of persons caught by the Act are on the lower end of drugs network'

'Too much time was being spent on low level dealers. It was fairly obvious that they had few assets'

'We are not allowed to use the full force of the legislation'
In answering the question about the desired changes the participants said they would like to add to the current applications. One of the respondents from the questionnaire group indicates:

'I would like to recommend a way to restrain assets under £10,000. One new aspect which may cause problems in the future, is the CCB decision to limit the cases where the courts will be obliged to consider a confiscation order or where the amount of the restraint order is over £ 10,000'

Another respondent from the same group suggests:

'The majority of cases involve suspected proceeds below that figure, but are nevertheless major cases in their particular area. It will be interesting to see whether the judges use their prerogative and continue to consider confiscation orders for all convicted drug dealers as a matter of course'

One last perception is

'I feel that any serious case should be judged on its merits, without the £10,000 bar'

These quotations offer evidence to suggest that a large part of the participants understand the way the confiscation system works. More often the participants attribute any problems to the law; e.g. 'the law does not allow', although, in fact, this is not quite true. Here one can envisage how the application of the legislation is affected by these policies, so that for example certain law enforcement agencies may restrict the execution of particular provisions of the law. The policy of the CCB, for example, restricts the application for restraint orders to a limited amount (not less than £10,000). This restriction is not provided in the legislation.

4.2.2.1.4. Restraint Order
In addition to that above, there are two other related controversial issues. These are: (a) the variation of the restraint order; and (b) the fees for the receiver. The following is a brief analysis of how these two issues are relevant.
4.2.2.1.4.1. Variation
Restraint orders under this legislation can be varied by the High Court. Sub-section 26 (6) provides that 'an application for the discharge or variation of a restraint order may be made by any person affected by it'. This is the source of complaints from some of the participants who observe that the proceeds and benefits which are restrained by a High Court order, are always dissipated by allowing the defendant, his family, or his lawyers to be able to apply to vary the restraint order. This leads them taking up the money that should go to the central funds. Although defendants are entitled to maintain their innocence, some participants question the appropriateness of allowing the defendants' families to continue spending money proven to be proceeds of drug trafficking.

One respondent from the questionnaire group expresses that

'I fail to understand a system which permits a drug trafficker to draw on assets that are pending confiscation'

Compare this to comments from a member from the interview group, DS from Gwent Constabulary indicates:

'The system allows offenders or defendants to spend the seized money just prior to the confiscation order. It just seems a little unusual and ironic that they allow them to do that beforehand (in advance). By allowing the variation, the legislation will lose its main purpose'

DS from Dyfed & Powys Police Force says

'I don't understand why there is any problem when there is a restraint order. The only problem is when the defendant is allowed to take part of the money for certain needs (living expenses and cost of lawyers...etc.)'

Accordingly, the restraining powers were described under this legislation as 'toothless'. This implies that some participants believe that if a restraining power is not strict or inalterable, the confiscation legislation will not achieve its purposes. It would become useless, and this is where inconsistency occurs.

The financial investigator of the interview group in Custom & Excise Department, on the other hand, indicates that in the restraint order the
offender can indeed use his properties but he cannot sell them. All legal expenses are taxed before payment. This may mean that although the restraint orders could be varied, and the law did not provide any conditions for that, the court would allow it only for certain indispensable necessities and obligations like for instance, the legal fees and school fees for children.

4.2.2.1.4.2. Cost-effectiveness and The Economical Viability

Once a restraint order has been issued, the legislation vests in the High Court the power to appoint a receiver 'to take possession of any realisable property, and in accordance with the court's direction, to manage or otherwise deal with any property...'. Application for appointment of a receiver under this provision may be made only by a prosecutor, and the prosecutor generally pays the costs of the receiver. If the receiver is appointed after the confiscation order is made, the costs are paid from the proceeds recovered. However, if the receiver is appointed before the order is made, the costs are paid by the Crown Prosecution Service (CPS). Charges to the department which are not recoverable from assets are avoided wherever possible by the prosecution and even by Customs & Excise.

Two members of the interview group believe that the current application in regard to appointing a receiver by the police force is described as not cost-effective and that receivership costs a lot of money. An officer from West-Midland Police, explained that by saying:

"To appoint a receivership wouldn't be economically viable. I mean, they cost something like £200 a day. So if a person only had £2,000 worth of assets, it would take a receiver something like 10 days to put it into practice. By that time it is more than the confiscation order is worth. It is not common sense to layout £2,000 or £5,000 chasing £1,000 only £1,000. It becomes a matter of economic viability."

CCB asserts that it would be irrational to spend public money in pursuing restraint cases if the defendant would not be able to retain the proceeds. The courts are willing to permit the restrained proceeds to be spent on those purposes. So the main effect is by preventing assets from being restrained and receivers from being appointed. This implies that the development of confiscation cases and in particular, those which entail a
need for a restraint order, relies heavily upon whether the prosecutor believes it is liable or not. Any preconceived suspicion of any expenditures may put the whole case at risk of revocation.

4.2.2.1.5. The Politics of Proceeds

Section 9 (1) of the DTA 1994 postulates that:

'Where the Crown Court orders the defendant to pay any amount under section 2 of this Act, sections 31, 32 of the Powers of Criminal Courts Act 1973 shall have effect as if the amount were a fine imposed on him by the Crown Court'.

This section deals with the regulations concerned with the collected amounts of fine under the MDA 1973 Act used with the amounts of confiscation orders. These regulations provide that the amounts of the fine and subsequently the amounts of the confiscation orders go straight to the Treasury Department. The legislation did not provide any indication that the proceeds or part of the proceeds can be returned to the appropriate police force or to Customs & Excise or to any other relevant agency. This issue was the central objective of several studies which helped the police in their clash with the government about the recovered property and cash money (Feldman, 1988, Zander, 1989, Levi & Osofsky 1995). Accordingly, the perceptions of the practitioners is one of the main aims of the field work. A question is addressed to the participants and the interviewees to determine their perceptions about this issue, especially when other jurisdictions, for example, the American system, empowers the courts to order the return of all or part of the proceeds to those who initiated the case.

The numbers and the percentages shown in table (4.6) reveals that 50 out of 61 or 81% of all the participants disagree with the existing regulations. This means that the great majority of the responses are against the current policy of disposing the recovered proceeds and assets of drug trafficking offences by transferring them to the Consolidated Treasury Fund, where all the proceeds go to Treasury Department, while only (7%) of the responses do agree with the current governmental policy. There were differences between the two groups.
Table (4.6) The attitude of the participants from the government policy in dealing with the recovered proceeds

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<th>Interview</th>
<th>Total Number</th>
<th>Total Percentages</th>
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<td>Total</td>
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<td>100%</td>
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Figure (4.6) The proceeds between Law enforcement agencies and Treasury

The analysis of this data reveals that there is also disagreement amongst the respondents about who should benefit from the proceeds? Some respondents from the questionnaire group want the proceeds to be allocated to the police force:

'The investigation of drug trafficking offences is usually a lengthy and complex process, which is inevitably a great expense to any police force and therefore, a proportion of all the funds realised and recovered should be paid to the police force dealing with the case'.

Some of the police officers who were interviewed from the questionnaire group believe that it should be allocated to the drug squads:
The British legislation regarding confiscation is based on the American and Canadian systems. It is worth noting that those countries have built in a provision whereby a certain amount of the funds realised are used by the relevant police forces to finance their anti-drug activities. In the UK, all funds are directed straight to the Treasury. Every police force in the country is starved of finance and each has to make cuts in their services according to their local circumstances. Law enforcement does not come cheap and this is particularly true of drug law enforcement, with a necessary emphasis on informant payments, test purchases and team surveillance. I feel that if the confiscated funds were awarded to the drug squads of the respective police force (as they are under section 27 of the Misuse of Drugs Act 1971) it would significantly enhance the ability of that force to carry out its responsibilities in the field of drug law enforcement.

Others suggest that the benefits should go straight to the financial investigation units who are the first in initiating the confiscation cases:

'It must go to units because more officers are required to fully investigate more of the information we receive from several sources'.

'The UK should adopt the US system where the agencies involved benefit directly. We should have the same system used in America. That funds realised should be returned to the particular department that recovered the drugs and money'.

Another suggested that the proceeds must be allocated to police and customs for their mutual efforts against drug trafficking crimes.

On the other hand, few respondents also from the questionnaire group suggested that all proceeds should go to a central fund:

'All funds realised should be allocated to a central fund for use by police only to increase resources to aid further investigation'.

'a separate national fund to be used in drug related problems'.

Regarding the perceptions of the interviewees, they are divided into two groups. Each advocate different perception: the first group strongly advocate that proceeds should go back to the force without pinpointing any part of that force. DS from Greater Manchester, DS from Lincolnshire Police and DS from the Regional Crime Squad (3) (interview group), for example, have described the current system as the negative part of the legislation and as the main defect where the confiscated funds all go to the
government and can't be utilised by the actual police force. The Lincolnshire police financial investigator states:

'My bosses think I am an additional tax man, collecting money for the government not for them. There is a question of why should the chief constable pay such an office which just collects money for the government'

Another from the same group added:

'Senior police officers at present regard confiscation as a method case collection for the government and do not wish to use adequate resources in such investigations'.

On the other hand, DI (West-Midlands) also from the interview group pointed out that the forces use section 27 of the MDA 1971, to take amounts of £5 and above. If the value of the proceeds is higher than the minimum amount required by the CCB then the force will apply the DTOA. He states:

'Our prime objective as far as this is concerned is section 27 because our force will then get the money. The money we got can be utilised to combat drug trafficking in the West-Midlands. It buys our cars, it buys our computers, give us our equipment and that is our prime objective. DTOA is important, because the evidential barrier is very tight on section 27. On DTOA, the judge can basically give it on a balance of probabilities. He can presume that he has been a drug dealer for 6 years. The problem with DTOA, is that money goes to the Treasury as opposed to section 27, which comes to us'.

He also reveals that they can now make, under the DTA (1994), a dual application. The judge, as the DI explains, can combine the two (DTOA 1986 and Section 27 of the MDA 1971) which they could not do before. This is true, but only for exceptional cases74, and not in any drug trafficking case. Section 43 (1) of the DTA provides that:

A magistrates court may order the forfeiture of any cash which has been seized under section 42 of this Act if satisfied, on an application made while the cash is detained under that section, that the cash directly or indirectly represents any person's proceeds of drug trafficking, or is intended by any person for use in drug trafficking.

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74Section 2 (5) (b) of DTA 1994 provides that the court shall take account of the confiscation order before imposing any fine on the defendant and before making any order involving any payment by him; or before making forfeiture orders or deprivation orders. This provision does not implicitly imply that the courts are empowered to make dual applications (forfeiture order and confiscation order at the same time).
The other view advocates the current system where proceeds go straight to Treasury. This view emphasises that if you divide the amount of money confiscated to all the 50 odd police forces (England & Wales and Scotland), it will not make a great impact on the budgets of the police service.

Lastly, CI from London Police (the interview group) provides a clear description of the current system and his opinion about it by saying:

'Each force is funded 51% by central government, and 49% by local government and the funding for financial investigation units just comes out of that. We don't have a scenario where, if we get a confiscation order for £100,000, that goes back to the force. Anything that is confiscated in the courts goes to central government'.

He points out that:

'There is £1m but it is restricted for international drugs investigations and it is to provide assistance in international travel or major informants. I think that is really so, it is only drugs and it is only one million and it is not enough. I think it is a sop to the police to say well, you are getting some money back'.

He also attributes the current system to a 'political' and to a structural policy which the police forces usually follow. He stated:

'One of the very good things about the police service in the United Kingdom is that they are not political. As I said earlier, there's forty-three, in theory, autonomous chief officers and nobody can tell them what to do. I think its a good thing because otherwise we would lose the support of a vast majority of the public, if they thought we were being manipulated or directed for political reasons. Policing in the United Kingdom is very much driven by local demands, local responsibilities and not by policy. And we have all seen politicians. I mean, at the moment, in the run-up to the General Election, if we were a political body, then the government would be getting us to do things which would show them in a good light, not that which is necessarily needed for the people out there. I don't think this country would welcome, and I support that position, political interference in the police'.

Regarding the conflict between the financial and the moral factors in the enforcement, he explains that:

'If we had a regime where the fruits of my investigation were fed back into my unit, it wouldn't be too many years down the line when my decisions for my finite resources, would be driven by what was likely to result in the financial outcome of my investigations. So let me give you a scenario of a local drugs squad. You've got limited resources and you've got two operations and you've got to choose. One
Chapter Four

The Views and Experiences of the British Police

of them is somebody who is trafficking heroin, crack cocaine and cannabis throughout your divisional area and is probably making in the region of £20,000 per week. So, he has been doing it for some time and you've got in the region of £1,000,000 salted away which you can restrain if you attack that operation. The other operation, you've got a choice of is, somebody who is not earning a lot of money at all, and everything they earn they spend on their own drugs but they are selling the drugs in local schools. So they are selling crack cocaine and cannabis and heroin and Ecstasy in the local schools but not earning a lot of money. So, if you go for that one, you're not going to get a lot of financial resources back but if you go for the other you are going to get a million pound. There's your dilemma. Financially driven, you're going to go for the million dollar one. Morally, there is a big case for going for the people who are getting the children. The problem with the funds going back to the force is that we would end up being driven by money. We would have to get cases which would keep our funding level up. Because what would happen, either directly or indirectly, is that our direct funding from government would be reduced, so we would have to keep our indirect funding going. So it's not an easy question.

Accordingly, He asserts that he does not support totally that the force get everything back. But he also mentions that he support an argument for a bigger pot, which would be more easily accessible. In this he states:

'T'm crying out upstairs for good computers which we can't afford. If I get a successful case and see the money go off to the government, I should be able to say, well, I can put a forward to this central fund that I need three lap-top computers, two stand-alone computers and this software and that should be a reasonable bid'.

Moreover, the prosecutor of the CCB agreed with what the CI has declared by saying:

'I am very unhappy about people who are involved in the system of administering justice being paid out of it, if they are involved in the assessment of collection money. I think that is shifty and presented to the wrong place. I don't suggest that public bodies like the police and the courts and the prosecutors shouldn't be required to perform to a higher standard that shouldn't be measured, that there shouldn't be rewards for doing well, and that there shouldn't be sanctions for doing badly. I think it is wrong for people to take decisions about what should be pursued and how orders should be enforced, which are influenced by the amount of money which can be recovered. You have to get it right in principle.

4.2.2.2. Aim 4 Defects (Difficulties and Deficiencies)

A combination of questions were addressed to the participants in order to determine the defects and shortcomings in the confiscation system. Some are intended to highlight the basic defects, while others concentrated upon
specific problematic issues that have been revealed in previous chapters. In what follows, is a detailed analysis of the main findings.

In a direct question about whether there are any defects in the application of the legislation the participants provided the following responses.

Table (4.7) Defects in the system.

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<tr>
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<tr>
<td>Total</td>
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The above table and figure shows that altogether 28 participants or 46% believe that the system does not encounter any major defect, 26 participants or 43% believe otherwise. In general, the responses again show that the interview group were more aware of certain defects in the confiscation system. More details about the main difficulties and deficiencies in the confiscation system as they have been viewed by the 43% of participants are discussed in the following. Differences occur between the two groups when comparing their responses.

4.2.2.2.1. Awareness and Understanding

The awareness about all the powers provided under the legislation and all relevant laws, regulations, court's rules and even relevant precedents, and the understanding of what, when, why and how this awareness could serve the actual application of the legislation, and by all the involved enforcement agencies, are crucial factors in achieving a successful execution of the confiscation system. The participants have referred to several elements and features concerning this matter. Some of these issues are related to courts, while others are related to prosecutors and police officers.
Some members of the interview group made these points clear. The DS from South Wales, indicates that some judges and barristers lack sufficient degree of understanding which greatly effects their decisions. He claims that:

'Some judges are afraid that people will appeal to the higher courts and the judges will be criticised. So every trial judge now is trying to ensure that no appeal goes through. They are afraid to use the legislation. There are very few judges who will use the legislation to the full. If they did, it would certainly have a lot of effect on drug trafficking. So the main reason behind failure in some cases is the lack of understanding on the legislation by barristers and some judges, and there are quite a lot in the legal system'.

DS from West Yorkshire police, adds

'Some courts are not very aware of the new rules of the assumptions of the burden of proof or the standard of proof'.

The Financial Investigation Unit at Customs & Excise, comments on this by saying:

'One of the biggest problems has been the judiciary of the courts which has not understood the system or not been interested in it because it is post-conviction. They are not so aware of the financial side. In fact, we have had problems with some judges who actually disagree with it. Magistrates generally are not trained in the law. The only people who seem to understand it are actually the people who prepare the cases. So, whether you are a police officer or a custom officer, I think everybody tends to run a mile when they see a financial case coming. They say, it is your decision because it is complicated and people don’t seem to understand it'.

Moreover, the DI from West Midlands Police, states that:

'Some judges are quite weak. They can say, well, I’ve heard the story, it seems acceptable, I’m not going to make an order. It depends on the judge'.

But the DI from Leicestershire Police, pointed out that:

'There are instances where judges don’t understand the legislation. That is not criticism of the judges, that’s a criticism of the system whereby certain people should form an expertise group in the legislation. We need to have people that are fully conversant with work practices'.

The Principal Crown Prosecutor from CCB, has commented:
'Judges do not like making confiscation orders. That is a generalisation, some do, some don't. But they find some of the concepts either difficult to understand, or they have never turned their mind to trying to understand them, or they are trying their best to avoid the consequences of them.'

But he also points out that:

'We must accept that DTOA does introduce concepts which are somewhat alien to traditional criminal law, and that judges are required to carry out a function of the Crown Court after a conviction for a criminal offence which is not very familiar to them. They do not like making orders which have the effect of making defendants homeless, although they are obliged to do that if the defendant has that asset and has an interest in the matrimonial home, and it has to be calculated for the purpose of making a confiscation order which reflects the value of the house as well'.

He also referred to judges who do not understand the basics of the confiscation system by revealing that:

'Many judges, as for not being keen to make the order, not being keen to turn people out of their family homes, not being keen to make an order relying on reverse burden of proof, they also do not understand many of the basics of confiscation orders. They understand that a confiscation order does not confiscate assets. We have got so many orders where a judge has made a confiscation order, a house, a car or a bank account. He does not understand that is not what he is doing, he is just looking at those assets to determine whether or not the defendant could pay the confiscation order. That is the significance of the assets. To be valued to see if the defendant can pay it. So the courts do get into a terrible mess about it'.

CI from City of London Police, supported that by saying:

'Many of the prosecutors and, indeed, many of the judges and magistrates, don't really understand the confiscation law. And because they don't understand it, they don't apply it properly'.

On the other hand, and where most of the problems of understanding are often related to courts, some participants indicate that there is also a lack of awareness and understanding within the police forces. Some Head officers in the drug squads and those officers who work in the divisions are not well informed about the legislation and its applications. DS from Greater Manchester, for example, points out that:

'Education and awareness about the new legislation is almost nil at drug squad officers'
Interestingly, one respondent from the questionnaire group provided that:

'The drug squad find that solicitors of the CPS, some of whom appear to have only limited knowledge of drug offences, are reducing charges of supplying and possession with intent down to simple possession, even though the evidence could well convict on the greater charge'.

Another from the same group respondent said:

'There is a general lack of knowledge of the confiscation units work amongst managers and there follows a failure to recognise the needs of such a unit'.

Compare this with DS from the interview group from West Yorkshire Police who declared:

'I don't think that CPS are particularly aware of confiscation law. No, they are not as aware as they should be. It is a lack of knowledge on their court that causes that problem. But, as I say, the answer to it seems to be get yourself someone from the CCB and you are more likely to get a good confiscation order. Simply because they know what they are doing. This action may save the cost of trial, but presents a false picture of the accused actions'.

These are mainly self-explanatory statements. The majority of the participants believed that the applications correspond well with the provisions of the legislation. This seems difficult to understand, and suggests that the confiscation system suffers from serious defects in its own construction. If these are not immediately resolved, unexpected negative and unjustifiable consequences are inevitable.

4.2.2.2.2. Difficulties
Taken altogether table (4.8) shows that 37 participants or 61% believe that the most difficult aspects in the confiscation proceedings encountered by the financial investigators are related to the enforcement strategies and applications adopted by police forces and other enforcement agencies involved in the process. 13 participants or 21% believe that some difficulties do exist in the provisions of the legislation itself. The percentage of those who provided no answers is relatively high (18%) if compared with previous responses. It was confined only within the
questionnaire group. Other differences between the two groups show the following:

Table (4.8) The location of defects.

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Some of the difficulties provided by the participants are a direct or indirect consequence of certain adopted principles and applications which have already been highlighted. Difficulties concerning understanding, conviction and restraint orders have already been analysed in detail, but it is important here to indicate, in brief, the difficult aspects which are relevant to this category. CCB's prosecutor from the interview group states that:

'The most difficult bit is education of the practitioners, of prosecutors, of police officers, particularly senior police officers, of courts and of magistrates courts, and magistrate's fines enforcement departments and of the Bar, who at the moment at least are the only people with rights of audience in the Crown Court where confiscation orders are made. The standard of competence, of understanding, of these people are (by these people I mean the courts, the Bar, senior police officerism and prosecutors generally) is very low. They are competent at what they do, but because the Drug Trafficking Offences Act introduces new and different concepts, because terminology is obscure and confusing, like confiscation, what they actually mean, they frequently get it wrong, they get it wrong all the time. And that causes major problems but the problem is an educational one, education and understanding'.

The point here is that educating, training, and making all those involved in the confiscation proceedings well informed and proactive in confiscation law is not a difficult process but it needs effort and funding. It is quite clear that without solving this difficulty, major problems are inevitable.
The difficulty in disclosing the identity of informants and its relation with the pre-requisite conviction was discussed in a previous section concerning difficulties associated with the application for restrain order. One respondent from the questionnaire group states:

'I wish the crown court were able to issue some sort of temporary or interim restraint order that could be ratified or overturned by the High court say within 7 days. The present procedures are cumbersome particularly for provincial forces and often do not work fast enough to prevent assets being removed'

Comparing this with the comments of CI (city of London police) from the interview group who pointed out in detail the difficulty in the current restraining system by saying:

'We should be able to go before a court at whatever level, whether it be civil, High Court or magistrate, and say to them, here's our evidence. This is why we think it is drugs money or criminal money. We would like an interim restraint order. And then it would be for the court to say, yes, we will grant you one for seven days, three months, and we would have to make our case to meet every occasion. But we can't do that. We can get a restraint order provided if we only can satisfy the Central Confiscation Unit that we can get a charge in 28 days. What's happening is we are seeing money in accounts that we haven't got sufficient evidence to convince CCB we are going to get a restraint order on, so therefore, you've just got to let the money go. That is the biggest single problem'

Though section 31 of the DTA 1994 provides new powers which allow the prosecution to apply to appoint a receiver from a county court, the application of a restraint order cannot be obtained except by the High Court via CCB in London. The participants, therefore, referred to the need for interim restraint orders because they believe that the current system is responsible for the deficiencies arising in the early stages of the confiscation proceedings. For instance, some forces, as implicitly stated, do not follow the threshold minimum policy or the 28 days period for the charge, which are the conditions ruled by the CCB. Accordingly, though a restraint order is needed, they do not wish to apply for it via CCB due to these conditions. So without empowering the county court or any other enforcement agencies to issue a restraint order or a so called temporary interim restraint order, the financial investigation officers will encounter unnecessary difficulties and complications in dealing with their cases. This may entail, in the end, an inevitable risk of revocation of protracted investigations.
Difficulties related to a lack of funding, resources and deficiencies in recovering the confiscation orders will be examined in the later part of this section. The remaining difficulties which are highlighted by the participants are expressed by the following issues:

4.2.2.2.1. Valuation, Assessment, Tracing And Proving

Most of the difficulties involved under this category are related to certain aspects in the financial investigation process. The following selected statements, expressed by the participants, explain the main aspects of the difficulties in the confiscation proceedings.

Two comments from members of the interview group are interesting. DS from Gwent police force, indicates that 'all the financial investigation proceedings are a difficult problem'. DI of West-Midlands Police adds on that by saying:

'It sounds easy but it is very difficult to relate the money to drugs. The system in force is far too complicated when dealing with assets other than money'.

DS from West Midlands Police, states that:

'The preparation of 'Affidavits' is the most difficult one. Because the requisite of information is not readily available and can only be obtained by using the production orders and protracted inquiries. When speed is of the essence to prevent possible dissipation of assets, it seems that time turns against the investigators, as unfortunately the procedure of obtaining the restraint order is a lengthy one'.

This statement implies that the core of the financial investigations depends, to a considerable extent, upon the involvement or the relationship with other relevant procedures (ex. production order and the stipulated period for the restraint order), and other agencies or financial institutions who follow a different set of regulations and policies.

Some respondents specified the difficulties in tracing assets to discover concealed assets, and in linking the assets to the defendant and then in proving the ownership of these assets (assets of the offender held in the name of other persons). False names or giving that of a girlfriend who is a prostitute, for example, are difficult to prove or disapprove.
Some respondents, this here from the questionnaire group related the difficulties to the assessment of the assets or the proceeds of the defendants to the difficulty inherited in the process itself.

'Assessing and calculating are not simple processes'

'The actual analysis of accounts, income, expenditure and assets in order to reach a figure to put to the court is a very difficult and complicated process'

'With those whose drug proceeds are relatively modest. It is difficult if not impossible to pinpoint drug related assets. The accused usually gets the benefit of the doubt in the form of a low confiscation order'

'Determining the benefits, knowing what to include and how far to go'

Finally, other respondents from the same group have highlighted the difficulties in the valuation of properties:

'The prime difficulty lies in the valuation of property, where the value may be less than thought'.

4.2.2.2.2. Lengthiness and Complexity

In examining the perceptions of the participants about the nature of the confiscation proceedings and the credibility of describing these proceedings as lengthy and complex, a question was included which was once expressed in Parliament to the former Home Office Minister Mr. Stephen Jack. The Minister then replied that 'the realisation of confiscation orders is often necessarily a lengthy and complex process' (Hansard, Written Answers, House of Common, 20th October 1992, col. 262).

The majority of the responses of the participants, excluding the new officers, agree with the former Minister that the realisation of confiscation orders, in particular, is a lengthy and complex process. But is it the only lengthy and complex part in the confiscation proceedings? The following statements explicitly show what other aspects in the proceedings cause such difficulties, and why lengthiness is considered a difficulty.

Some respondents as set out below from the questionnaire group believe that the nature of the process in assessing and calculating assets and in
distinguishing the benefits and proceeds of drug trafficking from other legal properties is the main cause of lengthiness and complications. The following statements explain that:

'When the assets have passed through several avenues, it is difficult to assess. Assessing and calculations, for instance, are not simple processes'.

'The law may be adequate, but the system in force is far too complicated when dealing with assets other than money'.

Some respondents this time from the same group attribute these difficulties to the non-cooperative defendants or their defence attorneys:

'The reason for it is that the defendant remains the owner of the property until he chooses to relinquish that ownership. If he does not co-operate, the process of getting the property from him can be long and expensive'.

'The defence use all kinds of figures to undermine the prosecution case, usually in court, when adjournments have to be made to re-calculate the application. In the majority of the cases they are unsuccessful, but it takes sometime to be resolved. Such practices are due to their lack of understanding of the law'.

Magistrates' courts and clerk's offices also bear a responsibility in making the realisation of confiscation orders very difficult to obtain, which implies the need for appointing a specialised personnel:

'In many cases, magistrate's clerks were insufficient in obtaining liquid assets to satisfy the order, and the procedure to be followed to realise property, is, in itself time-consuming, as it is based on civil law'.

'Because realisation is mainly left in the hands of magistrate's clerks officers, rather than appointing someone with specialist powers. Perhaps the appointments of a court's recovery officers may be worthy of development'.

'The realisation of assets can involve official receivers and civil litigation. It is sometimes unavoidable that these matters take times to resolve'.

Co-operation of other financial institutions forms an important element in the confiscation proceedings. Respondents from the questionnaire group believe that obtaining assistance from co-operative financial institutions is also a reason for lengthiness
'Obtaining details from financial houses takes a long time, where inquiries are necessary within a short period'.

'Partly because of the inherent secrecy within the banking systems'.

'Understanding' is also referred to in this matter by pointing out that:

'Legislation and the implementation are not always fully understood by either police, lawyers or judges'.

Some respondents asserted again upon the negative consequences of the current application for the restraint order. One of the responses, for example, states that

'When speed is of the essence to prevent possible dissipation of assets, it seems that time turns against the investigators, as unfortunately the procedure in obtaining the restraint orders is a lengthy one'.

Some respondents attributed the lengthiness and complexity to the sophistication in concealing assets gained from drug trafficking:

'Traffickers use even more sophisticated methods to conceal assets and launder money. It is only by better training and extra resources that financial investigators can keep pace.'

On the other hand, some respondents believe that it should not be considered as a distinctive problem. One, for example, has stated that:

'Any kind of investigation into property whether for the sake of confiscation orders or for any other systems, would be complex and lengthy'.

Finally, one respondent pointed out that the legislation and implementation are not too complex especially for dedicated financial investigation units. He stated 'as long as the end justify the means, it matters little to me how lengthy and complex the process takes, as long as we able to seize all assets and to leave the person with nothing'.

4.2.2.2.3. Cooperation of Courts (Judiciary)
The judiciary is one of the main pillars in the application of the confiscation system. A question was addressed to the respondents to
determine their perceptions of the way the judiciary operates and deals with the dedicated financial investigations work which exploited the efforts and money of the force.

Table 4.9 shows that 38 (63%) of the 61 participants were not satisfied with the way the courts deal with the provisions of confiscation legislation under the DTA 1994, yet (26%) of the respondents were satisfied with the way the courts handled the confiscation proceedings. There were differences between the two groups. Their responses centred around the following issues:

Table (4.9) Relations with other law enforcement agency (courts).

<table>
<thead>
<tr>
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<th>Interview</th>
<th>Total Number</th>
<th>Total Percentages</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>N</td>
<td>%</td>
<td>N</td>
<td>%</td>
</tr>
<tr>
<td>Satisfied</td>
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<td>28%</td>
<td>3</td>
<td>21%</td>
</tr>
<tr>
<td>Not Satisfied</td>
<td>27</td>
<td>57%</td>
<td>11</td>
<td>79%</td>
</tr>
<tr>
<td>Don't Know</td>
<td>5</td>
<td>11%</td>
<td>-</td>
<td>-</td>
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<tr>
<td>No Answer</td>
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<td>4%</td>
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<tr>
<td>Total</td>
<td>47</td>
<td>100%</td>
<td>14</td>
<td>100%</td>
</tr>
</tbody>
</table>
Some respondents -these taken from the interview group- believe that confiscation system will not effectively work unless it is accompanied by severe imprisonment. They believe that the sentencing policy adopted by courts is not sensible and is unsatisfactory:

'The problem is that the criminal justice system is more relaxing rather than increasing the penalties of the law. Drug traffickers should get a severe sentence and confiscation. Confiscation may work but only when its accompanied with a severe sentence. The problem that people in this country know that when they go to court, they will get a lenient sentence on the first occasion, the second occasion they’re caught they might get a bit more of a severe sentence. Some sentences were very lenient (e.g. 200 hours community service for 8000 pounds worth of amphetamine, and a guilty plea to possess with intent to supply).'

In this regard, the financial investigator from Greater Manchester elaborates:

'There doesn't seem to be any consistency between some cases. Some offenders go to court for the possession of a small amount of drugs and they end up getting a three year sentence. Some other offenders who get caught with a large amount of drugs come out with a community service order'.

He also pointed at the sentencing policy and its effects on the enforcement of the confiscation orders by saying:
The problem is that the man still has his own brain, he is still the boss. Unless he has had a severe sentence as well, he could come right out again and commence where he left off. The sentencing policy requires us to go to court twelve times. It starts with a caution by a senior police officer, then the defendant will be eligible for another caution after 6 months, and then because he is on his first occasion at court, he will get absolute discharge, the next time before court, he will get a conditional discharge with sub-conditions placed on that discharge. If he goes a third time condition B means he pays a fine (which is normally less than 50 pounds). This time he is eligible for a bigger fine because he has still not learned his lesson, £1,000, but usually ends up paying only £150–£200 at most. If he goes sixth time, he gets a probation order and a fine (for two years). The seventh time, the court would consider a prison sentence. But because of a probation report, they would give him a deferred sentence (which could be six month for two years). The final time they would send him to prison, but because it is the first time in prison he may get 3 months, if he behaves he could get his sentence halved (six weeks). During prison he can get access to drugs and even hard drugs, so he comes out probably more addicted than when he went in. That is the defects we find within the sentencing guidelines. The custody officer has a responsibility either to bail him or send him to the next available court. We know from past experience that unless the money concerned is £5,000 plus or even 10,000 plus, depending on the type of drugs, he will get bail in court.

This kind of sentencing reflects what has been said by one of the questionnaire group who indicated that:

'The sentence still does not fit the crime, when they appear at court the suspect is not deterred from stopping his activities'.

Some respondents reveal that the difficulty in making the required assumptions by courts could negatively reflect upon the intact execution of the confiscation provisions. One respondent from the questionnaire group, for example, indicated that:

'Judges do not use the assumptions given to them by the DTOA especially in the more complex cases (6–8 weeks)'.

Compare this to DS from the interview group from West Yorkshire Police blames the Court when:

'Courts don't automatically adopt the assumptions. It seems to us that, on occasions, they don't adopt them when they should adopt them'.
Others from the same group like the DS from the Regional Crime Squad (3), North East, Wakefield, attributes the problem to the reluctance of some judges and he justifies that by saying:

'The judges are reluctant to make presumptions they are entitled to make under the Act. The basis for that being that the judiciary are brought up in this country on a matter of criminal proof that there has always been an element of criminal proof in this country, and the judges find it somewhat alien to their nature'.

According to DS of West Yorkshire Police:

'The judicial system in regard to sentencing is frustrating. Sentencing rarely satisfies officers in the case. It seems that the courts have their own constraints as far as sentencing is concerned'.

He also mentions:

'We haven't even got the right to appeal only in a very few circumstances. The only time is when the CPS think that the sentence is too lenient. They will not appeal on confiscation if the confiscation order is too low'.

Of course it is commonplace for police officers to complain about too lenient sentencing and this is not new in itself. What is important here however, is that the perceptions of over lenient sentencing alter the way police officers think about and operate the confiscation process. As a result the confiscation system itself is sometimes felt to be restrictive or insufficient when in fact it is sentencing policy which creates this perception.

Beside a reluctance and inconsistency in the sentencing policy, some participants ask for the need for a minimum sentence in drug trafficking cases, while others did not agree with any minimum threshold in sentencing. DS from Manchester Police, from the interview group for example, stated:

'there should be a minimum sentence, depending on the amounts, that you are caught in possession of, (amounts, quality, and the content).

While others from the same groups such as DS from South Yorkshire, believes:
Chapter Four The Views and Experiences of the British Police

The problem with the minimum sentence is that it doesn't allow for the exceptional cases where the guy has unusual circumstances, and the judge is given no choice but to record the sentence without the proportional defence.

Some participants reveal that the main problem lies in the awareness and the understanding within courts and the crown prosecution service which form an important part in any confiscation case. One respondent from the questionnaire group has stated:

'Both CPS, and the courts have a lack of knowledge of how drugs are used and fail to understand some of the evidence put before them'.

Another respondent from the same group says:

'Judiciary, barristers and solicitors have little understanding of the Act'

CCB's prosecutor from the same group introduces the :

'Judges do not like making confiscation orders. That is a generalisation, some do, some don't. But they find some of the concepts either difficult to understand, or they have never turned their mind to trying to understand them, or they are trying their best to avoid the consequences of them. I think as a starting point, you have to accept that the DTOA does introduce concepts which are somewhat alien to traditional criminal law, and that judges are required to carry out a function of the Crown Court after a conviction for a criminal office which is not very familiar to them'.

Finally, CI of city of London Police raised two sensitive issues quite relevant to the subject under examination here. These two issues are the credibility of the police to the judiciary and public, and the relationship with the European Court of Justice. Regarding the first issue he states:

'There was a time, fifteen, twenty years ago, if a policeman said it, it was true. There was a time, not too many years ago, that if a policeman said it, it was not true. Again, I think the pendulum is starting to swing back. We are usually subjected to the most energetic and robust challenges to our evidence by the defence. And the charges can form many parts. Suggestions that we are mistaken, suggestions that we haven't done our job properly, suggestions that we have missed obvious evidence deliberately or through inefficiency. Suggestions that we have planted evidence, suggestion that we have beaten up and tortured. I have been accused of just about every offence, in my time. In short, our courts don't accept as true our evidence just because we are police officers. In fact, we are more likely to be subjected to strong challenge by the defence than any other witnesses. It can be quite uncomfortable sometimes'.
He also discloses the following:

'We are suffering in the United Kingdom at the moment on a whole range of legal issues. There is this additional court which people have the use of which is the European court, the European Court of Human Rights. It is a problem. It is a problem on a political sphere which I really haven't got either the information or the wherewithal to comment on, other than it is another obstacle and if it continues to be an obstacle, it is going to significantly dilute the effectiveness of our legislation in this country'.

This is perhaps related to Welch's case, which was discussed earlier in chapters two and three, regarding the retrospective effect of the confiscation system.

### 4.2.2.3. Summary

This section covered the issues of aims 3 and 4 stated in the Introduction of this chapter i.e. to determine the perceptions of the participants of both groups about how consistent the chosen application and methods of enforcement with the directions, conditions and demands of the legislation and to determine the major defects and problems in the enforcement of the legislation. The results show that despite the restrictions and the unnecessary governmental policies, the majority of the participants from both groups (59%) believe that the enforcement of confiscation system is consistent with the provisions of the DTA 1994. The perceptions about the existence of defects in the system show that the participants were divided into two opposite groups. One hold the opinion that the system has defects (46%) whilst the second see no major defects at all (43%). Awareness, lengthy of process, complexity, difficulty and the lack of cooperation and understanding of other law enforcement agencies are the major points of defects.

### 4.2.3. Aim 5 Efficiency and Usefulness of the System

In determining how efficient and useful are the confiscation system (aim 5), two questions were addressed to the participants to determine the general perceptions about the efficiency of the enforcement of the confiscation system and the usefulness of the confiscation provisions. The first question showed that 44 responses or 72% of all the 61 participants believe that the legislation and its applications are efficient in dealing with
drug trafficking problem in general and individual drug traffickers in particular, while 8 or 13% think that the system is not efficient.

Table (4.10) the efficiency of the system

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<td></td>
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<td>%</td>
<td>N</td>
<td>%</td>
</tr>
<tr>
<td>Efficient</td>
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<td>68%</td>
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</tr>
<tr>
<td>Not-Efficient</td>
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<td>13%</td>
<td>2</td>
<td>14%</td>
</tr>
<tr>
<td>Don't Know</td>
<td>5</td>
<td>11%</td>
<td>-</td>
<td>-</td>
</tr>
<tr>
<td>No Answer</td>
<td>4</td>
<td>8%</td>
<td>-</td>
<td>-</td>
</tr>
<tr>
<td>Total</td>
<td>47</td>
<td>100%</td>
<td>14</td>
<td>100%</td>
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</table>

Figure (4.8) The perceptions of the respondents about the efficiency of the confiscation system.

The results here show that both groups produce similar results to those of an earlier question about the general impact of the confiscation system where the number of those who believe that the system has an impact upon the drug trafficking problem was 38 or 63% of all the members of the two groups. The difference or the increase in the number of those who
believe that the system is efficient may be due to the decreased in the number of those who provided no answers i.e. from 11 in this question to 4 in the efficiency question.

On how useful the legislation is; (72%) of the respondents believe that it is useful while only 2 out of 61 or 3% did not think so. Strikingly, the percentage of those who provided 'Don't Know' answer in the second question is four times more than those who denied the usefulness of the system (3% compared with 15%, see Tables 4.11 & 4.3). However, it is fair to say that those who said they 'don't know' seem not to have enough knowledge and practical experience to enable them to provide a clear comment, while other respondents consider that it is too early to comment upon crucial confiscation provisions that only came into force in 1995.

Table (4.11) The usefulness of the system.

<table>
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<th>Total Percentages</th>
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</thead>
<tbody>
<tr>
<td></td>
<td>N</td>
<td>%</td>
<td>N</td>
<td>%</td>
</tr>
<tr>
<td>Useful</td>
<td>30</td>
<td>64%</td>
<td>14</td>
<td>100%</td>
</tr>
<tr>
<td>Not-Useful</td>
<td>2</td>
<td>4%</td>
<td>-</td>
<td>-</td>
</tr>
<tr>
<td>Don't Know</td>
<td>9</td>
<td>19%</td>
<td>-</td>
<td>-</td>
</tr>
<tr>
<td>No Answer</td>
<td>6</td>
<td>13%</td>
<td>-</td>
<td>-</td>
</tr>
<tr>
<td>Total</td>
<td>47</td>
<td>100%</td>
<td>14</td>
<td>100%</td>
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</tbody>
</table>

A close look at the responses of those who believe that the system is not useful revealed that this is mainly due to their perceptions concerning consistency and defects. Most of the responses are concerned with the following issues (questionnaire group):

'Due to the large profits that can be made by a drug dealer, it is unlikely that the legislation deters people from dealing'  

'The vast majority of drug offenders are at the bottom end of the social scale and accordingly have little or no assets to make confiscation a viable option'
'The drug problem will never go away, and DTOA was intended to deal with the upper levels of trafficking organisation'

'Long-term problems will not be influenced as long as there is a market for drugs there will always be a supply'

'New laws do not deter traffickers, but merely make them more secretive and careful about how to conceal their proceeds'

'Accomplished traffickers are devising other methods of disguising the money derived from their illegal activities.'

Regarding the interviewees, the analysis shows that all the answers concerning this issue unanimously coincide with the perceptions of the majority of the 47 respondents of the questionnaire. This means that the efficiency and the usefulness in the system is supported unanimously by the interviewees. The following is some of their views:

'I think confiscation is a very valuable weapon. People who think that it is a waste of time are naive and I don't agree with them. I wonder if they comment out of pure opinion or lack of knowledge. Judges and courts do not use confiscation to the full potential. If they did it would have a lot of effect'.

'It is a very powerful law. It is so draconian. It is the only law I know of in this country where the defendant has to prove his innocence to a certain extent'.

'The required presumption provides that the proceeds are related to drug trafficking unless the defendant can prove to the contrary. This presumption is the real significance of this legislation-It hurts drug traffickers by taking cash and by destroying the drugs. And even if they get bail, they are deprived of their stock in the drugs and the cash in order to buy some new drugs. It does hurt them'.

On the other hand a statement by the CCB's prosecutor, from the interview group which was previously referred to in explaining the impact of the system, shows some indications about the usefulness of the system. The prosecutor asserted in his statement that:

'If you take their assets away from them, they will be very upset indeed and I suppose there are a number of reasons for that. But they fight like dogs to avoid losing their assets. They do not mind too much doing five years in prison for drug trafficking, even doing another three years on top for not paying the confiscation order. But if you appoint a Receiver which would mean they avoided doing the 3 years., they would be instructing lawyers and fighting the receivership order, and the house wouldn't be theirs, it would be their wife's, etc. Every reason and every stop would be pulled out to
avoid paying the order. We proceed to ensure that the order is paid because that is the intention of the legislation. So, if the defendants reaction to the Act is any indication, then it is a very useful piece of legislation.'

Some of the interviewees, though supporting the system and agreeing with its usefulness and efficiency, have pointed out that there are certain issues missing that would make the system more efficient and useful.

Others anticipates that:

'If judges and courts use confiscation to the full potential, it would have a lot of effect'.

Another adds that the system would be more effective and efficient if there is a 'national ideology'. This means that a national operational agency is essential for the confiscation system.

Finally, CI from city of London Police (interview group) has emphasised the importance of international co-operation:

'Drug traffickers are very sophisticated. They work internationally. These laws are just starting to become effective and it is very difficult persuading people from other jurisdictions to come together and assist in a common task'.

4.2.4. **Aim 6 Funding**

The level of resources, funding and support dedicated by government and the police forces for the confiscation system are here realised. Funding plays a vital role. If we examine closely the programmes of some individual police forces their focus of action depends on budget provisions. The following analysis is directed at finding out how funding affect financial investigations. This is mainly related to aim 3 which asked whether or not the chosen enforcement strategies are consistent with the directions, conditions and demands of the main provisions of the system.

Three questions were addressed to the participants concerning the funding of the confiscation system. To find out whether the system is sufficiently funded by the government or not, the general funding allocated for pursuing drug offences in England and Wales, the funding allotted for the
financial investigations by the head of the police forces (chief constables) and the causes of deficiency in recovering the confiscation orders are questioned. It should be noted here that when the researcher addressed the former question to the interviewees, most of them had included it in their responses.

4.2.4.1. Resources Allocated For Combating Drug Trafficking Crimes

The responses show that 39 respondents or 64% of all the respondents from both groups think that the resources allocated by the government for the enforcement of anti-drugs legislation are not enough, and only 13 or 21% believe they are quite sufficient (see table (4.12)). This may imply that if the majority of the respondents believe that drug enforcement agencies lack sufficient resources to deal properly with drugs problems, then one can presume that this defect will be reflected in the efficiency of the financial investigation system and of the enforcement agencies. The following are selected statements of the respondents from the two groups revealing why the government is not providing sufficient funding for the anti-drugs legislation and implementations.

Table (4.12) the sufficiency of funding and resources.

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<td></td>
<td>N</td>
<td>%</td>
<td>N</td>
<td>%</td>
</tr>
<tr>
<td>Sufficient</td>
<td>10</td>
<td>21%</td>
<td>3</td>
<td>21%</td>
</tr>
<tr>
<td>Not-Sufficient</td>
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<td>11</td>
<td>79%</td>
</tr>
<tr>
<td>No Answer</td>
<td>9</td>
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<td>-</td>
</tr>
<tr>
<td>Total</td>
<td>47</td>
<td>100%</td>
<td>14</td>
<td>100%</td>
</tr>
</tbody>
</table>

Some respondents from the questionnaire group lay the responsibility on the government. One participant, for example, states that:

'Government is not serious in enforcing the legislation'
Other respondents from the same group refer to the nature and extent of the drug-related crimes. Some other respondents wrote about the proportionality between the continuous expansion of the size of the drugs' problem and the appointed allocations:

'A large proportion of crimes committed are drugs related, which has not been fully expected by the government'.

'A remarkable 50% increase in drug seizures and the number of drug offenders' (Lincolnshire Constabulary Police).

'Drug problems and all crimes related to drugs are much larger than any allocations. Drugs problems are much larger than how they are currently represented by statistics'

'Most drug related offences are prolonged and require a higher concentration of money and resources'

Compare this to those from the interview group who reveal that the policy of the force, which is mainly designed by the Chief Constable (the head of the district's police force or the Constabulary) bears a great part of the responsibility

'Any lack of resources is due to 'inadequate funding policies', the reason is financial or economic restraints placed on police forces by the government in which they believe that 'most forces have a system of devolved budgeting even at department level. This has a knock on effect in the drug squads which have to prioritise their operations in order to make the best use of limited manpower and equipment'

Lastly, DI from the West-Midlands Police imputed the cause of insufficiency upon a legislative provision which provides that money or properties seized as proceeds of drug trafficking convicted offences is not returned to the force.

In this concern CI from City of London Police illustrates the situation by saying:

'I don't know if you are aware that the Home Affairs Selection Committee on Organised Crime recommended to the Home Secretary that money laundering enquiries, financial investigation units, should become one of the Home Secretary's policing objectives. Therefore, causing police officers to pay more attention to it, to put more resources into it. The Home Secretary, for whatever reason, chose not to adopt that recommendation. What he did do was to
'You can understand chief officers of the county force. They've got burglaries and car theft and assaults and rapes and so the public can't identify the benefit of financial investigations because they are never going to be directly victimised by money laundering. So, it is a very difficult issue but you are actually right, in an awful lot of forces, it is a very low priority, an extremely low priority. Forty three police forces, each with an autonomous chief officer exist. In theory, nobody can tell chief officers how to police their areas. However, through the now bi-annual inspectors by Her Majesty's Chief of Constabulary, and through the distribution of Home Office circulars, there are certain things which chief officers are encouraged very strongly to do. Added to that, more recently, from the Police and Magistrates Court Act, the Home Secretary, every year, gives his policing objectives, on which chief officers should structure their own forces' policing plans'.

On the other hand, CCB's prosecutor believed that there is enough funding and resources allocated for the police forces. He clarifies that by saying:

'There are probably enough resources, but there is a multi-agency involvement. With confiscation for instance, a senior police officer has to decide out of say £10 million budget, how much of it goes on drug prevention, drug squads, financial investigations, police officers, as opposed to money which is set aside for anti-burglary schemes, and any other policing responsibilities which they have. And the important thing is that the police officer makes decision where to channel his budget, how important is drugs. He's got enough money to be able to channel it all into it, but it is a matter of relative importance. And of course the people who run these organisations always say they don't have enough money. Have you ever heard one who says that he has got too much? They always say they don't have enough money, and perhaps they don't, but public spending always has to be kept under control because otherwise it just runs riot. But generally I don't think there is a real problem with funding for it'.

4.2.4.2. Resources Allocated For The Financial Investigations Unit
The numerical analysis of the responses concerning funding and resources allocated for the financial investigation systems are almost identical with those related to the general funding for anti-drugs legislation and implementations.
Chapter Four  The Views and Experiences of the British Police

Table (4.13) the availability of enough resources for the financial investigations

<table>
<thead>
<tr>
<th>Answer</th>
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<th>Total Percentages</th>
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<td>%</td>
<td>N</td>
<td>%</td>
</tr>
<tr>
<td>Yes</td>
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</tr>
<tr>
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<tr>
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Regarding the sufficiency of funds and the resources devoted for the enforcement of confiscation proceedings and for police financial investigations, the majority of all the respondents 42 (68%) mentioned that the system lacked appropriate funding and resources. On the other hand, 15 participants or 25% of all the respondents believe that the financial investigation systems are sufficiently well funded to deal with drug trafficking cases. There were differences between the two groups. As there were, however, other concerns. These are included in the following.

Some of the respondents—these from the interview group, called attention to the lack of funding and the lack of awareness and understanding of senior officers (mostly, the chief constables).

'There is a general lack of knowledge of the confiscation work and proceedings amongst managers or senior police officers. This could lead to a failure to recognise the needs of the financial investigators'.

'The misunderstanding of the role of the financial investigators by chief officers and those responsible in planning the strategies of the force'.

'Some chief constables do not consider the requirements of intelligence and investigation, beside that, the police service does not fully accept the true level of drug abuse and as a consequence, fails to allocate appropriate resources at an early stage in the development of the problem effectively to combat its growth'.

DS from Gwent Constabulary, states:

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'It is not for the government to increase the staff, it is for the Chief Officer who decides the needs'.

DS from West Yorkshire Police says:

'It is a question of money and resources. But at the end of the day, the operational decision is with the Chief Constable'.

One of the respondents refers to the impact of the Home Office Statistics upon Chief Constables by stating:

'In a world dominated by Home Office Statistics, how tempting it must be for a Chief Constable to keep his Drug Squad to a minimum size, and on a low budget. Not only does he save money for other cash starved departments, but he can claim to have a low drug problem in his force area'.

DS from Derbyshire Constabulary pointed out that financial investigation units have only 2 officers since 1987 (the interview conducted in Nov. 1995).

Lastly, DS from West Yorkshire Police indicated that the work generated by the Drugs Squad and the Drugs Divisional Units falls on the financial investigation unit which consist also of two detective inspectors, who must conduct an inquiry in respect of most of the individuals charged with a drug trafficking offence. He also states:

'This has increased the workload by some 150% although no additional manpower has been provided to assist in many forces. So because of the volume of work undertaken by the units investigations are 'less thorough' than perhaps they should be'.

These responses reveal clearly the role of funding when determining the efficiency of enforcement of confiscation. The lack of funding may lead the financial investigators to be unable to use the full power of the provisions of the system. It may also lead them to neglect many drug trafficking cases especially those cases which require expenses for tracing and seizing. As was mentioned earlier by some interviewees, the units are forced to select and this lets off some drug traffickers. There is also the ethical problem; when all drug offences are to be treated equally, in reality some police forces concentrate on the big cases and have very few resources to attend to the small timers.
4.2.4.3. Deficiency
The study has shown that the confiscation system encounters difficulties in recovering confiscation orders imposed by the Crown Courts and enforced by magistrates' courts. While certain causes and justifications are identified in chapter two, the focus here will be upon the participants' relevant views. But before listing the main causes, a brief illustration of the extent of recovered confiscated orders is necessary.

Data collected from Home Office Statistical Bulletin and the National Criminal Intelligence Service (NCIS) suggest that in the period January 1987 (when DTOA 1986 start being in force) to December 1995 a total of £95.4 million are ordered to be confiscated in England and Wales. However, the same resources suggest that only 27 million are either obtained or written off as a result of offenders serving imprisonment in default (for the purpose of the relevant provisions under the DTOA 1986). The distribution, as Levi & Osofsky mentioned, between these latter categories is unknown.

The responses of the participants from the questionnaire group and the interview group to a direct question concerning the defects in the recovery of confiscation orders reveals that there are certain issues which have dominated the views of the participants.
Table (4.14) the causes of defects. The answers of the participants were multiple

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<td>Courts</td>
<td>37</td>
<td>79%</td>
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<td>Market</td>
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<td>2%</td>
<td>4</td>
<td>29%</td>
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<td>Proceedings</td>
<td>25</td>
<td>53%</td>
<td>10</td>
<td>71%</td>
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<tr>
<td>Specialists</td>
<td>2</td>
<td>4%</td>
<td>8</td>
<td>57%</td>
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<tr>
<td>No Answer</td>
<td>11</td>
<td>23%</td>
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In addition to the official justifications and certain findings of a few studies in this area which are identified in chapter two, the respondents have provided the following additional views:

Forty nine or 80% of all respondents think that the clerk's offices in the magistrates bear most of the responsibility of this problem. This include 12 or 86% of the interview group and 37 or 79% of the questionnaire group. Some of the responses from the later group explained that:

'Magistrate's clerk office failing to take action to recover amounts stated in orders'

'Weak courts who lack the resources and commitment to pursue assets subject to a confiscation order'

'Unfortunately the magistrate's clerk offices appear unable to effect recovery'

'Lack of urgency and commitment by magistrate's clerk offices'

'Because the magistrate court is fairly toothless in enforcing the small amounts'.

75 Multiple answer means that most of the participants provided several different causes for defects. Accordingly, this table include the highest percentages of each of the mentioned causes of defects in the confiscation system.
Another respondent from the same group referred to a communication between the Crown Prosecution Service (CPS) and magistrates’ courts by saying:

'A break down in communication between the crown prosecution service and collecting courts led to such deficiencies in the amounts of the recovered confiscation orders'

The responses also shows that 35 or 57% of the questionnaire group and 25 or 53% of the interview group attribute the problem of recovery to the nature of the confiscation proceedings, and mostly about how lengthy and complicated the applications of certain procedures in the system have to be. The prosecutor from the interview group points out that:

'the recovery of assets ordered to be or calculated for the purposes of confiscation, and the realisation of them, is a lengthy process. The amounts recovered may be accounted for as far as the statistics which are returned to the Home Office by the Magistrate’s Courts in more than one fiscal year. So it is very misleading to draw the conclusion that simply because £54 million pounds has been ordered to be recovered and only £14m is recovered that there is only a 30% recovery rate. That is simply not true. Of that £54 million it is likely that 60% to 70% of that will be recovered ultimately, but it would be very difficult to calculate precisely because if you’re going to have to look at the amounts recovered in, say, 1990. The amount ordered to be paid in 1990 was £20 million, you’ll find that the amounts paid pursuant of 1990 orders will be accounted for in 1990, 1991, 1992, 1993, and 1994. Small amounts throughout. If you aggregate them, they might come to £15 million which will be quite a high proportion of the amount which has been ordered to be recovered'.

Some respondents from the questionnaire group attributed the problem to the convicted drug traffickers themselves. The table shows that 40 or 66% of the questionnaire group and 31 or 66% of the interview group believe that the defendants are not co-operating in the enforcement of the order. Obstructive and delaying tactics by the defendant and his legal representations are a normal action or reaction to prevent paying the order or even part of it as one of the respondents from the former group put it:

'The convicted person will do everything in his power to evade meeting the order'.

Others from the same group clarifies that the expenses of a receiver which originally due to a lack of co-operation of the defendant could reach
£200.00 per a day. These fees are mostly deducted from the recovered confiscation orders to the extent that may cause a great difference between the estimated value of the realisable properties and the amount of confiscation order.

A proportion of 29% of all the participants refer to the fluctuations of the market values, where the sudden reduction in the property values, or the depreciation of vehicle value could affect an old valuation processes conducted by the financial investigators. The CCB’s prosecutor (interview group) says:

'It if a house is valued at £100,000 and he is ordered to pay £100,000 and you sell the house and only realise £70,000 the whole house is gone. The defendant has lost his house. It doesn’t matter whether it is assessed at £100,000 or £70,000. In the same way that, if you were sitting in your house, during the course of the 1970s and the 1980s, and the house rocketed in value, and then came back down and stabilised as a result of a recession and of a drop in house prices, it didn’t mean you were any poorer, or any richer during the course of that whole period. You are still in your house and you still enjoy it. It is just paper wealth or paper property and it is the same with confiscation. You are ordered to pay a certain sum, and you lose the asset which is calculated to represent that sum. then you have lost it all. It has gone, it doesn’t matter which way you cut it'.

Two respondents or 4% of the questionnaire group and 8 or 57% of the interview group (a total of 16% of all participants) attributed the problem to the lack of professional people in accountancy. On this regard, the CCB’s prosecutor mentioned that:

'The amount ordered to be paid, of course, only reflects what the Crown Court assessed to be the value of the benefit or the value of the defendant’s realisable property if it is less. And the fact of the matter is that, the amount which is assessed from a house or a car by the Crown Court is often very much higher than is in fact realised. What appears to be a failing in the confiscation legislation is that people are being deprived of their assets because £50 million has been ordered to be paid but only £40 million has been paid. It is a mere accountancy failing because if you recover all the assets which were calculated for the purposes of the £50 million originally, and all the assets only realise of £40m, then in fact you have a 100% recovery rate and not only an 80% recovery rate. So that is also misleading'.

Finally, the lack of sophisticated training and understanding about how the system could be improved is also one of the essential reasons of
overstatements about certain miscalculations. On this regard, the CCB's prosecutor states:

'I don't think it is the recovery that is difficult. It is, however, understanding the principles. It comes back to education and understanding. People don't understand how the system works and how it is intended to work and a lot of it is theoretical amounts which have been ordered to be paid'.

4.2.4.4. Summary
The above aims 5 and 6 were realised. i.e. to determine the perceptions of the two groups concerning the efficiency and the usefulness of the confiscation system and to determine what they think about the extent of funding and the allocated resources. The results show that the majority from the two groups think that the confiscation system is efficient and useful in dealing with drug trafficking crimes or with individual drug traffickers. On the other hand, this section shows that the majority of both groups (interview group and the questionnaire group) think that the funding and the available resources are not sufficient and that most of the defects of the current application and enforcement are mainly due to the lack of proper funding and support.

4.3. SUMMARY AND CONCLUSIONS OF MAJOR FINDINGS
Negatively or positively the analysis of the data shows that the participants provided responses to most of the inquiries stated in the general aims of the analysis. The major findings from the above detailed analysis concern two important aspects of confiscation system: (a) the text of the legislation (powers and procedures); and (b) the application of the legislation by the law enforcement agencies (strategies and resources) are summarised in this final section of the chapter.

The CCB has indicated that the British confiscation system, as it is provided under the DTA 1994, has two basic principles: (a) a new reparative confiscation procedure; and (b) the value-based principle. These two principles were never questioned. The perceptions of the police financial investigators and other officers who are involved in the enforcement of these two principles were never examined too. It has been found that questioning these two principles was the most important
process in determining the actual nature of the confiscation system. That will reveal how consistent are the implementation strategies adopted by the law enforcement agencies.

A clear understanding of the actual nature of any confiscation system is essential in determining its extent and impact as a criminal procedure issued by a criminal court. The confiscation order, as DTA 1994 provides, is an additional procedure to imprisonment and has priority over imposing any fine or any other financial orders. However, neither the DTOA 1986 nor the DTA 1994 have provided a clear explanation about its nature and theoretical assumptions. The analysis of relevant material in this chapter exposes a necessity for a legislative declaration and intervention to prevent certain differences in interpretations of the legislation which have no legislative grounds.

As was shown by those questioned, the lack of a clearly stated rationale is bound to cause ambiguities, and not surprising these have led to differences among the decisions of different courts. These differences were similar to those who wrote about the system (as shown in chapters two and four). Attempts to solve such differences have already occurred, e.g. the government in the early 1990s frequently announced that the intention of the confiscation system was to be considered as a reparative system. However, because of the special nature of the British criminal justice system, in which discretionary powers are given to the courts, and more specifically to judges in dealing with undefined or ambiguous legislative provisions, the governmental declaration is not binding to judges. This study shows that different interpretations about the nature of the confiscation order exist throughout the system. Some judges, for example, have dealt with confiscation proceedings by regarding confiscation order as an additional punishment, while others have considered it exclusively a reparative procedure. Each of these parties have their own rationale for adopting a specific theory of confiscation, but which one represents the true one?

Apart from the differences between the two majority views-those in the literature and those of the police financial investigators- the data in this chapter shows that differences and conflicts also occur among the police financial investigators themselves. When just 10% of them perceive the
confiscation order as a reparative option, this implies that the practitioners are in a state of confusion and even frustration especially when faced with different viewpoints by some judges who believe in a different rationale for the system. The problems which Parliament has created still exist as far as law enforcers are concerned and all attempts to solve them are neither useful nor helpful when a judge can hold an opposite interpretation. This may lead the British confiscation system to be in danger of being in a continuous state of confusion and conflict to the point where it might affect its overall character.

It has been found from the data related to aim 3 that some police forces chose to exclude seeking a confiscation order in many drug trafficking cases which demand the application of confiscation system. Moreover, many applications for restraint orders and confiscation orders have been rejected or disapproved by some judges only because the judges hold a different perspective that demands different procedural systems. One of the negative consequences of the differences in interpretations by courts, is where some police forces, in order to escape the difficulties in providing evidence and in proving that there is a positive relationship between certain property and drug trafficking offence(s) they will bypass (disregard) the confiscation law by applying the less powerful provisions of forfeiture law under the MDA 1971. If the judge, as in many cases (i.e. R.v. Dickens, 1990) believe that the underpinning intention of a confiscation order is to be an additional punishment that requires the same standards (i.e. the normal criminal burden of proof, namely, proof beyond reasonable doubt), then this, as the data shows, will be very difficult for the financial investigators to apply so they go for a forfeiture order instead.

These consequences expose another problem. As shown in this chapter there is a lack of any mandatory character in the confiscation system that would oblige law enforcement agencies to apply the system when all the basic elements for confiscation are available against illegal proceeds of drug trafficking offences. It also indicates that the system lacks consistency where enforcement does not reflect the main goal for which the legislation was designed (as the only statute that deals with the recovery of proceeds and profits of drug trafficking offences). This does not mean that the confiscation system has failed to reflect the needs of the law enforcement agencies in their desire to trace, seize and confiscate the
proceeds of local drug traffickers, but there are difficulties which need to be dealt with by new techniques.

Resorting to unusual theories which do not reflect actual effects and consequences is in fact an easy solution to complex problems. To provide the obligatory appearance of 'doing something' by just considering the whole system, for example, as part of a reparative policy is inadequate. This does not mean that the system include no reparative character. Confiscation can be considered as a reparative system but this is not its dominant character. An insistence that confiscation is just a reparative procedure had actually led the system into further confusion and ambiguity. One of the consequences of this confusion is the 'Walch case' in 1995 which has exposed the direction of enforcement in the system.

The responses to several questions about relevant provisions in the system indicate that the majority of the participants believe that the adopted confiscation system, which includes a variety of pre-trial powers, new and far-reaching powers for trial and post-trial powers is an additional punishment to imprisonment. Many participants, while expressing their views about the nature and the impact of the system, have considered the system to be extraordinary and draconian.

A financial investigator pointed out that the extraordinary and unusual consequences which one expects from implementing the required assumptions explains why some judges are reluctant to apply the provision or even consider the application of the confiscation legislation. The CCB attributed such reluctance to the belief that assessing the worth of a convicted drug dealer's assets all too often involves taking 'blind stabs in the dark' and is 'impossible to be precise'. Accordingly, these kind of descriptions and expectations of possible overestimations could lead sometimes to unacceptable consequences with important penal effects. One can also infer that early attempts to give the principle of personal reparation a more prominent place in the penal system, did not think of applying a system which even those who recommended it (the Hodgson Committee) had later denied. Those who suggested reparation theory and wanted it to be included in the penal system explained that their main concern was with monetary compensation, restitution of stolen property and community services. Lady Ralphs (1989) indicated that the objectives
of sentencing lie in one of the following theories (retribution, denunciation, deterrence, protection, rehabilitation and lastly reparation). She pointed out that reparation seeks to recompensate the victim to some degree and underlies compensation and restitution orders and various mediation initiatives. She asserted that the objectives of reparation accord with the rehabilitation of offenders so that their behaviour begins to conform to societal norms. This kind of reparative objective does not reflect the main purposes of confiscation as they were determined by Parliament in the early stage of the legislation.

Furthermore, the principle of making good the damage the offenders have caused was built on the desire to support compensation and restitution systems only. Forfeiture orders and fines can serve the same principles, but most of the studies about reparation theory since 1966 when the government started to think about the principle of personal reparation by the offenders did not mention how, for instance, the fine or the forfeiture order (which include deprivation powers similar to confiscation), could be used as one of the reparative means.

The powers vested to a receiver shows another aspect of the system which can add more evidence to this argument of the nature of the system. One of the financial investigators described, graphically, the extent convicted drug dealers will go to avoid confiscation measures preferring to serve lengthy prison sentences. This is clear evidence that the confiscation system includes powers and procedures which, if they are used in full will cause very strong effects upon drug trafficking sentencing. The receiver is authorised to realise the proceeds of the offence(s). If the property which was determined to be the proceeds of drug trafficking offence(s) is not available, the receiver is also authorised to realise any other property irrespective of their legality or their relation to the offence. This means that the receiver is empowered to recover even legal property by selling them to satisfy the confiscation order. These powers, indeed, justify the reaction of the offenders once they know that the police or magistrate's court will call for a receiver. One of the interviewees in describing the reaction of drug traffickers said that they will fight like dogs to avoid losing their assets.
Another important principle in the British confiscation system which has been considered is the value-based principle. It is this value-based principle which Parliament chose for recovering the amounts of the confiscation orders by ordering a convicted drug trafficker to pay a sum of money (cash) and not a deprivation of certain illegal proceeds which is the most common form of confiscation procedure. This method of recovery is considered as a new precedent in the Criminal Justice System, and the main reason for questioning it, is because it is accused of being one of the major deficiencies in the recovery processes. In the assessments made by the judges (Crown Courts) to establish the value of a convicted drug trafficker's assets, for example, it has been mentioned that judges have too often been forced to undertake unsubstantiated guess-work. This means that the value-based system can cause defendants to be tried and sentenced to years in jail based on little more than guesswork and not on evidence properly tested before a jury.

The analysis of the perceptions provided that although the participants are aware that most of the defects originally resulted from this new principle, the data shows that the majority (38%) favoured the value-based system mostly because the value-based method is much easier and less costly than the common property-based one.

The analysis also shows that the responses of the participants from the two groups (concerning the value-based method) extended also to six different views: 15% provided no answers; 23% favoured the property-based system; 11% provided 'Don't Know' answers; 8% favoured the use of both methods, and 5% against both. This means that the responses are extensive and in a way which indicates that confusion and uncertainty tend to dominate.

To determine whether a property-based system is better or worse is difficult since there is no equivalent property-based method with which one could compare. Moreover, a comparison using rough indicators between the British value-based method and the American property-based method can also be misleading. The important issue here is that property-based systems do not lead law enforcement agencies (judges and the police financial investigators) to undertake wild guesswork or blind stabs in the dark.
Several responses have given clear indications about the current status of the confiscation system by the law enforcement agencies (police, courts, prosecutors). How the police financial investigators and other involved participants have perceived the way the confiscation system is being implemented, the nature of defects, and the limits of resources and funding allocated for the enforcement of the provisions of the legislation are a major finding. To overview these matters and other relevant issues, several points are noted:

First, the responses, in general, show that most of the problems of the confiscation system are more related to certain applications and to the strategies of enforcement chosen by individual police forces rather than to the existence of certain legislative defects. This is mainly due to the many amendments which affected major provisions of the original DTOA 1986 (e.g. the compulsory provision of the confiscation order in section 1 of the DTOA 1986).

The analysis of the data shows particular perceptions concerning inconsistencies between theory and practice, lack of individual and organisational incentives, lack of resources, lack of awareness and in sufficient training. These reveal that the full use of the powers of the confiscation legislation is not a central aim in the government agenda or most of the police forces. The perceptions show that the confiscation system is greatly affected by political and economical factors. The Explanatory and Financial Memorandum accompanying the Bill of the original DTOA 1986, for example, stated that the Government anticipated that there would be of the order of one hundred cases a year involving additional costs of £5.5m, plus £1.1m in respect of extra staff costs for customs and excise. However, this sum, it was stated, was 'likely to be more than off-set by the revenue from confiscated assets'. This study indicated that the total amount of the confiscation orders which were imposed during the period 1987-1995 is £95.4m. The actual amount of the recovered orders is not clear but the data collected from different sources indicated that the amount did not exceed £25m. In addition to that the current governmental policy in regard to the use of the recovered amounts prevents any 'off-set' for the police forces who have a discretionary power and right to choose to support the system or to neglect it. In such situations police forces want to benefit from the recovered
proceeds but the government does not co-operate. This leads to a sense of resentment among police officers, expressed a number of times in this research.

Other senior police officers at higher management levels in one of the Drug Squads expressed, in greater details, an obvious preference for a system which affords them the financial gain rather than deposited in the Treasury. This enables them to deal with some of the effects of perceived under funding. In addition, one of the police explained that the financial investigation system is not a major policing objective for the government.

An important reason for the low priority assigned to financial investigations was expressed in the interviews. It is that the general public do not perceive money laundering as a threat on a par with offences such as burglary, theft, assault and rape. Resourcing for financial investigations was described as very poor and largely restricted for international drugs investigations. Any financial investigation is likely to be particularly costly, for example, in terms of informant payments and surveillance costs. This fuelled the view that confiscation funds should be awarded to the relevant drug squad in order to enhance their law enforcement abilities.

This provides clear indications of the actual enforcement status of the confiscation system. It also demonstrated the nature of the problems and the causes of some of these problems. A relevant proverb says 'If the cause is defined, the wonder becomes invalid'. But is this the last finding? There are, other important issues which indicate that law enforcement agencies themselves also bear a large part of responsibility for the way the system has been perceived by the participants.

The minimum threshold policy provided by the CCB introduced a restriction upon the application of one of the most important provisions in the confiscation proceedings. The analysis shows that the majority of the police financial investigators are against this particular restriction. It has been mentioned that the government was aware that this is a serious infringement of individual rights that property should be so restrained. Mr. Mellor, the former Parliamentary Under-Secretary of State for the Home Office indicated that 'this power cannot be given lightly because it is
an interference with the liberty of the subject. Because this is a serious matter, we have given the power to a High Court judge, not to lesser judges. It will require the judge to take a balanced view as to whether it would be proper to make the order. Plainly, the only basis on which he can determine that it would be proper if he is satisfied, on the merits, that there is evidence that the individual concerned has been involved in drug trafficking and has benefited from it' (HC., 18/2/1986, col. 197 & 198). Accordingly, the restraint order can only be applied for from a High Court and the High Court judge is supposed to be the only one to decide whether to issue such an order.

The current application stipulates that all restraining applications must be examined first by the CCB of the CPS. In short, the CCB, created a minimum threshold policy for any restraining applications. This policy, as mentioned by the majority of the participants, prevents the financial investigators to consider necessary confiscation proceedings for many drug trafficking cases. Interview material revealed that it is CCB policy not to pursue confiscation proceedings of a value of less than £10,000. This means that many 'street-level' dealers are not prosecuted and acted upon.

The rigidity about authorisation for restraint which is primarily due to the sanctity attached to the right to privacy of the individual, property rights and certain economical reasons merits great respect. However, Parliament has distinguished the DTOA from the CJA 1988 by providing a clear minimum restriction in the latter statute only. The inability to use the powerful confiscation provisions against drug trafficking cases of less than £10,000 or sometimes £15,000, which is against the intention of the Parliament, led to 'disappointments' among those dedicated officers who are very well aware of the provisions and the differences with the provisions of the CJA 1988. Disappointment, frustration, loss of credibility, and feelings of unjustified discriminations are some of the reactions which were resulted from such unnecessary restriction.

The analysis shows that the cost-effectiveness in enforcing the confiscation system is occupying great concern by several police forces. This means that some forces consider any additional costs in enforcing the provisions of the DTOA as a major burden and an obstacle which may prevent them from initiating the confiscation proceedings. Appointing a
professional receiver (i.e. accountant) and a barrister to represent the prosecution demands cumbersome charges. The legislation allows them to deduct from the recovered payments, and where these payments are insufficient or the defendant is acquitted, the cost will be paid from the Crown Prosecution Service (CPS). However, the analysis shows that fear of repeal or reversal of decisions and the expectation of no returns or any compensation make such demands a reasonable justification for avoiding spending money on enforcing the system.

This issue is a prevailing problem among many police forces. It leads to a suggestion that the adopted strategy of enforcement for the confiscation system is experiencing a serious defect on a national scale. It is for the law enforcement agencies to motivate staff and to find solutions for conflicting priorities if they are willing to combat local and national drug trafficking offences.

The lack of awareness and understanding is one of the major findings in this study. The analysis shows that there are certain major problems which result from a lack of awareness and understanding among financial investigators themselves. The analysis shows that a proportion of the police financial investigators lack proper understanding or sufficient professional training concerning financial investigations. Lack of understanding is common among officers at upper management level too. Those who appeared to have no real idea of what financial investigations entail and the importance of these investigations. Moreover, lack of awareness and understanding is common among many of the drug squads' officers who are supposed to initiate confiscation cases. Lastly, the analysis shows that the financial investigators believe that there is also a lack of awareness and understanding among prosecutors, judges, clerks and even the public.

These indicators reveal that the causes of allegations of ambiguities, difficulties and deficiencies are justified. This means that no one can doubt that a lack of awareness and understanding can prevent the occurrence of these problems or any other shortcomings and defects. The lack of understanding and the possession of little knowledge concerning all aspects of the confiscation proceedings and their impact upon investigations and individual defendants is very dangerous. Confiscation
law is like a sword which can cut many ways. If the system did not cut or at least deter people from involvement in drug trafficking offences, it would be inefficient, yet its ambiguities at present can lead to regrettable consequences.
Chapter Five

The American Forfeiture System

CHAPTER FIVE

THE AMERICAN FORFEITURE SYSTEM

5.1. INTRODUCTION

The aim in this chapter is as set in the Introduction, i.e. aim 4 seek to determine the link between the American system and the development of the British system. In this chapter and also in chapter six attempts are made to examine the particular features of the British system by identifying any convergences and divergences which may exist with other system; a perspective so far absent from the British literature (Ruggiero & South, 1995). However, the situation is changing, some studies have begun to examine different aspects of the developments of law enforcement in different countries (see Albrecht & van Kalmthout 1989, Dorn & South 1991, Flood 1991, Savona et al. 1994), but even so, they have still not gone far enough especially in examining the actual nature of the confiscation system.

In addition to that stated in the introduction regarding the link between the American system and the development of the British confiscation system, the other reason for choosing the American system is that it is ahead in terms of its definition and methods of application. Furthermore, the American system has helped to determine the conditions under which different types of confiscation systems have developed in other countries so the questions about the extent of that system provide a critical understanding of the British confiscation system. There are two studies which provided a comparative account of the American and the British asset confiscation systems. The first was conducted by Michael Zander in 1989 and the second study was introduced by Clive Scott in 1996. These

76 For further information about the theory of confiscation and its applications see also the Notes of Decisions collected from the Library of the American Embassy in London; Asset Forfeiture: Law, Practice, Policy, a Manual by Asset Forfeiture Office, Criminal Division, US Department of Justice; and the Drug Agents Guide to Forfeiture of Assets (1987 Revision), from the Department of Justice, Drug Enforcement Administration, written by Harry I. Myers and Joseph P. Brzostowski. Distinctively, the latter resource includes notes, bibliography, court cases, history of forfeiture law and enforcement in the US, and describes (with examples) how drug agents should proceed.
two studies provide indications that there are close links between the two systems.

Accordingly, one of the features of this chapter is that by looking at how lawmakers and law enforcement agencies in a country like the United States have responded to drug trafficking crimes, one may learn about the nature of the sanctions a society has at its disposal, how they work, what advantages and disadvantages they may have, and what costs they entail on the administration of justice. In sum, how far and to what extent do the legislative instruments developed in a particular country may serve as models for lawmakers in other countries. The American forfeiture system has been the main reference in the debate about a British confiscation system. The British lawmakers, those who wrote about the system and the law enforcement agencies always refer to certain differences with the American forfeiture system. They implicitly suggest that the American system has been influential and helped to determine provisions of the British confiscation system (e.g. Hodgson Committee 1984, Home Affairs Committee 1985, Zander 1989, Levi & Osofsky 1995 and Scott 1996).

5.2. THE AMERICAN FORFEITURE SYSTEM77

While 'enterprise crime' and its control has gained currency in the United States, it is a concept that remains alien to the European situation (Martens, 1991, p. 1). This is quite obvious with the new concepts of control that accompanied the development of drug trafficking offences. Forfeiture law(s) aimed at depriving the proceeds and the illegal gains of drug traffickers in particular, was first enacted in 1970 as an instrument to deal with the 'continuing criminal enterprise' activity in the area of drug trafficking78.

77Due to the limited material about the American forfeiture laws circulated in the UK, this has prompted the researcher to go to Washington DC., USA, seeking for updated information about laws and regulations and views of major law enforcement agencies. However, this study confined only to the main available forfeiture laws and provisions which are under consideration in United States until October, 1996. Accordingly, any subsequent changes or amendments which might occur after this date are not covered in this study.

78The term 'forfeiture', as mentioned before, has different meanings in Britain and the United States. In the British context it refers to the seizure of the material tools of crime
Apart from one statute after the Civil War when Congress authorised the seizure of the estates of various rebels, the government's right to seize a drug offender's assets was first codified with Congress's passage of the Comprehensive Drug Abuse Prevention and Control Act of 1970 (the Controlled Substances Act (CSA)). In this Act, the Congress of the United States included civil forfeiture provisions as part of a broad effort to reduce the trade of illicit drugs in the United States (Snider, 1996, p. 2).

Before examining and discussing the main American forfeiture provisions, it is essential to determine in more detail the definition of 'forfeiture', because definitions have become central to the parameters of the law. That is to say, 'definitions enforces the legal justifications for government to intervene in and punish what is labelled 'deviant behaviour', and without a definition, there can be no crime' (Martens, 1991, p. 1).

The American legislature defines forfeiture as 'the taking by the Government of property illegally used or acquired, without compensating the owner" (Brad et al, 1986; cf., US v Eight Rhodesian Statutes, 449 F. Supp. 193 [CD CAL. 1978]). This definition implies a general principle which reflects accredited authority granted by the legislature to the government or certain law enforcement agencies dealing with illegal acts by taking certain things without compensation. This principle has been adopted not only by the American legislator, but by many other legislators, who preceded America in applying the forfeiture system. It seems that the main difference, which will be determined later in this section, lies not in the principle itself but in the scope of the 'taking'. A closer look at this definition, for instance, reveals why the American legislator has said 'taking by government' and not as normally stated by most other legislations 'taking by court'. It seems that the original intention to apply a new forfeiture system with a civil and criminal application has led the legislators to draft a general definition.

(e.g. a car, a crowbar), seizure of money actually used in the carrying out of crime, or of the money that is shown to be the proceeds of crime where such money can be shown to directly relate to the offence before the court. Provision for such forfeiture is made under s. 27 of the MDA 1971. Courts have also had recourse to a general forfeiture measures under the PCCA 1973, s. 43, which makes provision for forfeiture of money or other property intended to facilitate the commission of future offences. However, in the American context, the term 'forfeiture' has roughly the same legal meaning as has confiscation in Britain.
Furthermore, the Americans have been using the term 'forfeiture' for all confiscation procedures provided by the criminal and the civil laws. Any subsequent amendments to those procedures would be contained within the same terminology, unlike that of the British system. The difference between forfeiture laws is based upon the extent of each forfeiture system and the powers provided for enforcement. This means that not all the American forfeiture laws use the same powers. The powers of drug trafficking-related forfeiture, for example, are more wide and exceptional in certain situations.

As originally enacted, the American forfeiture provisions under CSA are limited primarily to vehicles, certain types of equipment, and raw materials that are used in drug trafficking. This is quite similar in scope to the current British concept of forfeiture, because it did not include the power to forfeit or confiscate the proceeds of drug trafficking.

In 1970, for the first time in American history, two criminal forfeiture statutes were enacted by the United States Congress (Ibid., p. 2). They are the Racketeer Influenced and Corrupt Organisations Act (RICO) (18 U. S. C. § 1963) and the Controlled Substances Act, Continuing Criminal Enterprise Offence (CCE) (21 U. S. C. § 848 which at present located at 21 U. S. C. § 853). These two forfeiture statutes, together with the criminal forfeiture provisions in the later-enacted Money Laundering Control Act 1986 (MLCA), remain the basis for the present American forfeiture law (Snider, p. 3).

5.2.1. Methods of Forfeiture

Once someone has violated a statute that confers forfeiture power upon the government, the government has two immediate actions from which...
to choose\textsuperscript{81}. It can either proceed with a forfeiture action in a civil proceeding or do so in a criminal proceeding.

5.2.1.1. Criminal Forfeiture

The first recognition of criminal forfeiture in American law came in 1970 when Congress passed the RICO and CCE statutes. The objective of both statutes was to strike at the economic base of two of the main problems faced by law enforcement. RICO was aimed at organised crime (which also includes narcotics related offences), and CCE was aimed at major drug trafficking offences. Both statutes had similar forfeiture provisions (Zander, 1989, p. 19).

Criminal forfeiture proceeding is part of the criminal prosecution, because a criminal forfeiture action is 'in personam' (against the person). It may not occur unless there is a conviction of the person charged with the criminal activities (Snider, 1996: 12). Hyde (1995) in his critique of American civil forfeiture, indicates that criminal forfeiture occurs only after a trial of the defendant at which full constitutional and procedural safeguards of due process apply. 'No conviction; no forfeiture. No proven wrongdoing; no property confiscation'. The issue at trial is the individual's misconduct, not the fictional guilt of an inanimate object, as in civil forfeiture cases (p. 26).

Where it is noticeable that RICO and CCE have embraced provisions that are related to drug trafficking offences or narcotics related offences, it is necessary for the purpose of this section to examine both statutes to determine their most distinctive features and the way they apply to criminal forfeiture provisions.

\textsuperscript{81}It is worth to note here that the mere fact that property has been used illegally, however, does not automatically give the government the right to confiscate and condemn it. Property may be forfeited only if its forfeiture is specifically authorised by statute (see Brad, et al, 1986).
5.2.1.1.1. Racketeer Influenced and Corrupt Organization Act 1971 (RICO)

5.2.1.1.1. Categories of property subject to criminal forfeiture under RICO

The Senate Report No. 91-617, (1st Session, Congress, 1969) indicates that the main purpose of RICO is the elimination of the infiltration of organised crime and racketeering into legitimate organisations operating in interstate commerce (USC. Title. 18, Ch. 96, sect. 1961-1968). Robert Blakey (1982) the Chief Counsel of the Senate Subcommittee on Criminal Laws and Procedures (1969-1970) indicates that the goals are to eliminate organised crime by concentrating on the illegal monies through the use of new criminal and civil forfeiture, rather than by the old means of attempting to dismantle the mob by imprisoning gang bosses. Moreover, the United States Code Annotated, under title 18 subs. (a) of s. 1963 provides that RICO is designed to impose forfeiture upon defendant's entire interest in enterprise, so as to sever his connection with it (see US. v. Walsh, D. C. Fla. 1981).

To accomplish this, RICO establishes four separate criminal offences (see 18 U. S. C. s. 1962), and provides for fines and imprisonment and mandatory criminal forfeiture (18 U. S. C. s. 1963). Section 1961 provides that:

'Any person who commits a 'predicate' or triggering offences as part of a pattern of racketeering from which he acquires dirty money or acquires by illegal acts or by illegal uses an interest in an

82 "Racketeering" refers to the activities of organised criminal who extort money from legitimate business by violence or other forms of threats or intimidation or conduct of illegal enterprises such as gambling, narcotics traffic, or prostitution (Black's Law Dictionary 1258, 6th ed., 1990)
83 "Interstate commerce" refers to any business (including an illegal business) whose transactions cross the borders between states within the United States. It often serves as justification to enact national (Federal) legislation (Snider, 1996, Notes, p. 38)
84 The definition of "pattern of racketeering activity" as used in this Act requires at least two acts of racketeering activity, one of which occurs after the effective date of this Act and the last of which occurs within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity (s. 1961 (5)). Zander (p. 19) described the forfeiture provisions under the extent of the definition of the patterns of racketeering as comprehensive in its scope. He also thinks that it covers not simply the ill-gotten proceeds of crime but even perfectly legitimate assets.
85 A close look at the Notes of Decisions and in regard to the definition of "interest" or "any interest" one can observe how complicated and controversial the situation is in interpreting the meaning of those two terms by courts. For example, in US. v. McManigal (1983) the term "any interest" interpreted as it does not include income, proceeds, or profits derived from a pattern of racketeering activity. In US. v. Martino (1982), the term "interest" as used in
 enterprise affecting interstate commerce shall forfeit upon conviction (s. 1961 & 1962, RICO, 1970).

The predicate offence may be any one of more than three dozen listed State or Federal felonies\textsuperscript{86}, including drug trafficking offences (18 U. S. C. s. 1961 (1)).

The offence of racketeering must be connected to an enterprise in one of three ways: first, the acquisition of an enterprise with money which represents illicit proceeds of the specified criminal acts (18 U.S.C. s. 1962 (a)) second, the acquirement of interest in, or control of, an enterprise by illegal acts (e.g., by murder, kidnapping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, and dealing in narcotic or other dangerous drugs) (s. 1962 (b)), and third, using an enterprise to commit acts of racketeering (s. 1962 (c)). In addition to these, RICO makes it a criminal offence to conspire to violate any of the three substantive offences (s. 1962 (d)). In effect, it makes a new crime of an agreement to participate in an enterprise by engaging in any pattern of racketeering activity (Snider, p. 14).

The RICO defines enterprise as:

\textquote{any individual, partnership, corporation, association, or other legal entity, and union or group of individuals associated in fact although not a legal entity} (s. 1961(4)).

Snider points out that although Congress viewed the RICO statute as a response to organised crime's infiltration of legitimate enterprises, it has been expansively interpreted by the courts to reach wholly illegitimate 'enterprises' that are essentially loosely defined criminal conspiracies. Therefore, the term 'enterprise' as used in RICO encompasses both legitimate and illegitimate enterprises. Snider suggests that this concept is important in determining the reach of the forfeiture provisions to property, the use of which contributes to the illegitimate enterprise (p. 14).

\textsuperscript{86}Felonies in the American system divided into state felonies and federal felonies. RICO deals with various state and federal felonies. Dealing in narcotics or other dangerous drugs are considered 'racketeering activity under state law, and considered as state and federal felonies (see Zander, 1989: 20). Lombardo (1991) indicates that each of the fifty states has its own laws and system of jurisprudence.
Conviction of a RICO offence mandates the forfeiture of the defendant's interest in the enterprise; i.e. everything affording a source of influence over the enterprise, and any property or proceeds directly or indirectly derived from the racketeering activities (s. 1963 (a)). This includes real property, and tangible and intangible personal property, in other words, everything (s. 1963 (b)). Subs. (I) note (4) of the same latter section, i.e., the second paragraph provides very clearly that forfeiture of property involved in violation of this chapter is mandatory rather than discretionary.

5.2.1.1.2. Continuing Criminal Enterprise Offence statute (CCE): Part of the Controlled Substances Act (CSA)

Lombardo (1991) suggests that most police officers outside the United State believe that all the American forfeitures are RICO forfeitures. In fact, they are not. The Controlled Substances Act has a forfeiture section too.

CCE statute under the Controlled Substances Act, was passed in 1970, eight days after RICO and sixteen years before enactment of the British DTOA 1986. This statute is enacted to deal, inter alia, with suppression of illicit traffic in drugs. It contains a mandatory minimum sentencing provision of not less than 10 years and up to life imprisonment following conviction. It also contains a provision to seek forfeiture of the profits obtained by the defendant from the criminal enterprise and the defendant's interest in the enterprise (21 U. S. C. s. 848 (a)).

This Statute is considered to be the most important federal criminal statute in the United States directed at illegal drug traffickers and their organisations (Corcorn & Carlson, 1983). Section 848 is directed at any person who 'occupies a position of organiser, a supervisory position, or any other position of management' in a drug-producing and drug-distributing enterprise, and provides for one of the most severe penalties of any federal criminal statute was then in force (Ibid., p. 78).

Corcorn and Carlson designate that Congress had two purposes in mind when it adopted s. 848, which are to punish severely major traffickers of illegal drugs who have conducted their activities through an organised group of individuals; and to deter prospective criminal entrepreneurs (p.
Moreover, Corcoran and Carlson illustrates that the authors of the CCE Act explained:

This section . . . is the only provision of the bill providing minimum mandatory sentences, and is intended to serve as a strong deterrent to those otherwise might wish to engage in the illicit traffic, while also providing a means for keeping those found guilty of violations out of circulation' (p. 79).

In this sense, Congress intended to create a powerful deterrence against large-scale drug trafficking and to provide prosecutors with a multi-faceted tool for proceeding against drug distribution networks. Congress attempts to achieve these goals by providing s. 848 with a punitive scheme directed against both the criminal enterprise and its individual participants. By arming this Act with severe penalties, including extended terms of imprisonment, heavy fines and a prohibition on parole, Congress aims to punish and to deter individuals engaged in drug trafficking (Ibid., p. 93).

5.2.1.1.2.1. Categories of property subject to criminal forfeiture under CSA

The criminal forfeiture provisions of the CSA require mandatory criminal forfeiture for all felony drug offences. The property subject to criminal forfeiture within the CSA consists of: (a) any property representing the proceeds of a defendant's drug trafficking activities (21 U. S. C. § 853 (a) (1)); (b) any of the defendant's property used or intended to be used to facilitate his drug trafficking activities (21 U. S. C. § 853 (a) (2)); and (c) any property that affords a defendant a source of control over a continuing criminal enterprise (21 U. S. C. § 853 (a) (3)).

The first two categories (proceeds and facilitating property) apply to any felony drug offence. The third category covers the property of major drug traffickers which provides them with a source of control over a significant drug trafficking organisation.

For a person to be subject to this third category, the government must prove the following: that the person must be an organiser, supervisor or manager of a CCE; he must be involved in a continuing criminal enterprise composed of at least five other persons (21 U. S. C. § 848 (c) (2) (A)). CCE must be involved in a continuing series of drug crimes, which
are classified as felonies under United States Law (21 U. S. C. § 848 (c) (2)), and finally, the government must also prove that the defendant obtained substantial income or resources from the CCE (21 U. S. C. § 848 (c) (2) (B)).

5.2.1.1.3. Criminal Forfeiture Proceedings

5.2.1.1.3.1. Criminal Trial
The prosecution begins with an indictment87 or information88, which states the criminal charges against the person. Any property that the Government seeks to forfeit must be named within the indictment or information (Federal Rules of Criminal Procedure, Rule 7 (c) (2)). If the defendant is found guilty of a crime, then the property named in the indictment or information is subject to forfeiture.

Upon the completion of the criminal trial, if the jury finds the defendant guilty, then it may return a verdict specifying the property to be forfeited (Fed. R. Crim. P. 32 (e)). The special verdict authorises the Attorney General to seize the property named under the terms and conditions fixed by the court's order (Fed. R. Crim. P. 32 (b) (2)). A court may enter a wide variety of orders to preserve the value of the said property (appropriate restraining orders or injunctions, require the execution of satisfactory performance bonds, appoint receivers, conservators, appraisers, accountants, or trustees, or take any other action to protect the interest of the United States in the property ordered forfeited) (18 U. S. C. § 1963).

5.2.1.1.3.2. Ancillary hearings to dispose of third party interests
The special verdict only forfeits the interest of the defendant (Snider, p. 15). In order for the government to have complete title to the property, it is necessary to resolve the interests that any third party may have. This is done through ancillary proceedings following the criminal trial. After notice is published, any party asserting an interest in the property must petition the court for a hearing to adjudicate the validity of his/her

87"indictment" is a formal written accusation originating with a prosecutor and issued by a grand jury against a party charged with a crime (Black's Law Dictionary 772 (6th ed. 1990); cf. Snider, 1996, p. 39).
88"information" is an accusation in the nature of an indictment, from which it differs only in being presented by a competent public officer on his oath of office, instead of a grand jury on their oath. (Black's Law Dictionary 779 (6th ed. 1990).
interest in the property. The judge then conducts a hearing which is basically civil in nature. The petitioner must establish by a preponderance of the evidence that he/she is the legitimate owner of the property. Such ownership interest may include loans and mortgages on the forfeited property. After the hearing, the judge will issue a final order of forfeiture which will resolve and dispose of the interests of any third party (21 U. S. C. § 853 (n); 18 U. S. C. § 1963 (1)). This can include rejecting the third party's interest, or providing satisfaction of that interest.

5.2.1.1.3.3. Pre-trial seizure of property subject to criminal forfeiture
The RICO and the CSA each include three pre-trial restraining options whereby the Government can seek to prevent the property from being removed from the court's jurisdiction or otherwise disposed of (18 U. S. C. § 982 (b) (1) (A)).

First, the Government may seek a restraining order or injunction to preserve the availability of the property upon the filing of the indictment or information (18 U. S. C. §. 1963 (d) (1) (A); 21 U. S. C. § 853 (e) (1) (A)). The second alternative, before the indictment or information is filed, and after giving notice to the apparent property owner and announcing the opportunity for a hearing, the Government may request such a restraining order or injunction. Under this alternative, the court will issue the order or injunction if it determines that there is a 'substantial probability' that the property will be subject to forfeiture and that 'failure to enter the order will result in the property being destroyed, removed from the jurisdiction of the court, or otherwise made unavailable for forfeiture'. Such orders are effective for only ninety days unless 'extended by the court for good cause shown' (18 U. S. C. § 1963 (d) (1) (B); 21 U. S. C. § 853 (e) (1) (B)).

The third alternative provides that a pre-indictment temporary restraining order may be issued without notice and opportunity for a hearing if the Government demonstrates that there is 'probable cause to believe the property would, in the event of conviction, be subject to forfeiture and that provision of notice will jeopardise the availability of the property for forfeiture' (18 U. S. C. § 1963 (d) (2); 21 U. S. C. § 853 (e) (2)). This type of restraining order is valid for only ten days unless good cause for an extension is demonstrated.
In addition to these pre-trial options, the CSA provides that the Government may request the issuance of a seizure warrant, if the court determines that there is 'a probable cause to believe the property will be forfeited, and if a restraining order may not be sufficient to assure the property's availability for forfeiture' (21 U. S. C. § 853 (f)).

5.2.1.3.4. Substitute Assets
In 1986, both the RICO and the CSA were amended to provide for forfeiture substitute assets. This means that upon conviction and in consequence of a special forfeiture verdict (when the property subject to forfeiture cannot be located, has been transferred to a third party, has been placed beyond the jurisdiction of the court, or has diminished in value or commingled with other property as a result of any act or omission of the defendant), the court has authority to 'order the forfeiture of any other property of the defendant up to the value of any property subject to forfeiture' (18 U. S. C. § 1963 (m); 21 U. S. C. § 853 (p)).

5.2.1.2. Civil Forfeiture
Criminal forfeiture has an even more potent companion in the form of civil forfeiture. There are many similarities between the two in regard to what may be forfeited and in what circumstances. The crucial difference is that civil forfeiture proceedings are much easier to bring for two main reasons: (a) they do not require a criminal conviction and (b) they take place without any form of hearing. This may be partly a justification as to why most law enforcement agencies would favour a civil forfeiture action.

The critical result of such favouring for the civil forfeiture is best described by Lombardo's (1991) commentary. He mentions that 'we not only sue individuals for the proceeds of their illicit activity, we also sue to obtain property that has been misused, by creating a legal fiction that the property has committed a crime. Quite often our court complaints will read 'United States v. One Mercedes Automobile', or 'United States v. Five Thousands Dollars'. We charge property with committing a crime, just as we charge individuals with committing different types of offences' (p. 45).

Because the burden of proof is lower than criminal cases, and the innocence of the property owner is not a defence, the criminal who
escapes conviction can be punished through a civil forfeiture action. Such an action can even be brought against property owned by a defendant who is acquitted in criminal proceedings. The acquittal does not debar subsequent civil forfeiture proceedings (Zander, p. 26).

Whereas criminal forfeiture laws in the United States date back only to 1970, civil forfeiture has been a significant feature of United States law for years. Its use, as in England, is mainly in relation to seizures by customs and Inland Revenue authorities, in relation to all forms of contraband. It seems, as will be illustrated, that civil forfeiture has a role to play in the future as American law enforcement agencies favour the civil aspects over the criminal one.

Scott (1996) asserts that it may be due to the origin or the history of the concept of the asset forfeiture which is linked to a specific statement of verse 28 in Chapter 21 of Exodus in the Old Testament:

'If an ox gore a man or a woman, that they die: then the ox shall be stoned, and his flesh shall not be eaten; but the owner of the ox shall be quit'.

Hyde (1995) maintains that civil forfeiture is premised on an archaic and curious legal fiction that personifies property. This 'personification theory' holds that an 'object' can commit a wrong and be held guilty for 'its' misdeeds (p. 17). In contrasting this old theory with the present forfeiture system, Kessler (1996) indicates that the sovereign does not get the offending property or its value, nor does society benefit by eating the ox, rather, this is a social justice, probably to discourage revenge from the deceased's family (p. 1).

Such type of forfeiture is quite similar to the English common law where it is known as the law of deodand (see Hodgson's Report, 1984). Kessler describes the English deodand as the spiritual predecessors of forfeiture statutes. Derived from the Latin phrase 'Deo Dandum', meaning 'to be given to God', which held that when an inanimate object or an animal caused the death of a person, say, a domestic animal killed a child, that

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89 It has been observed that most writers in this subject referred to this verse as the origin of the modern civil, criminal or quasi-criminal in rem forfeiture systems.

90 An article of three parts obtained from the Internet system 'Crime and Punishment', 'Punishment: Civil Forfeiture', and the Double Jeopardy Clause.'
object is automatically forfeited to the Crown as a deodand (p. 1). Hyde comments that this response is a superstition where a dead soul will not rest until its death is avenged. The deodand is to be disposed of by the sovereign for the good of the deceased person's soul. It might be sold and the proceeds are then used as Church offerings, to have a Mass said for the victim. Hyde continues saying that the deodand rapidly took on the double purpose of religious expiation and forfeiture, or 'amercement', similar to other exactions of the Crown aimed at raising revenues rather than at saving souls (p.18).

For the royal deodand collectors, the guilt or innocence of the object's owner in relation to the accident has little or no relevance to the forfeiture of the property. In effect, the English tradition views the property itself as 'guilty' of the crime and the royal forfeiture is tantamount to an 'arrest' of the object. In English common law, the procedure used by the Court of the Exchequer on behalf of the Crown against the object come to be known as an in rem proceeding (literally, in Latin, 'against the thing'). The object is personified and is declared 'tainted' or evil, a continuing stigma the property can not evade, regardless of subsequent ownership (p. 18)

Snider (1996) draws attention to the 1787 United States Constitution. He clarifies that the Constitution has banned the harsh English Common law of forfeiture of estate, and in 1790 this constitutional law has been supplemented by a specific statute which provides that a criminal conviction can not lead to corruption of the blood or any forfeiture of estate. From that time, until 1970, there is virtually no use made of criminal forfeiture laws in the United States (p. 1). In this regard, Scott (1996) points out that the unpopularity of these laws, which were sometimes used against political prisoners and dissenters caused the virtual disappearance of criminal asset forfeiture legislation for more than two centuries

However, in rem civil forfeiture against property continued unobtrusively in traditionally accepted areas of use, such as the forfeiture which is related to maritime and customs laws. Hyde points out that English admiralty law is the immediate wellspring of American civil asset forfeiture law and procedure (p. 20). Such forfeitures are in rem which have become as legal actions directly against the 'thing' or the property
itself, which is the defendant before the court. Snider justified such type of action by saying that it is perceived to be necessary because the owners of smuggling ships, pirate ships and slave ships would often hire crews who were expendable. The ships may have been caught and the crews punished, but the courts would not be able to reach the owners. The owners can be beyond the jurisdiction of the court, or will assert that the ships are merely leased by them. Without direct evidence of their wrong-doing, the owners can not be convicted of a crime. Thus, without in rem forfeitures, the ships could be put back into their illegal trade with new crews. Therefore, the new American Republic has in rem forfeitures to attack such activities (Snider, 1996, p. 2).

Hyde asserts that 'it is not an overstatement to say that the pernicious and eccentric doctrines of deodand, outlawry, and in rem personification of property are the direct ancestors of modern American civil forfeiture'. Thus, the revival of such type of action in the early seventies and against similar kind of offences, where the courts would not be able to reach the major criminals in drug trafficking crimes has encountered no opposition. But it has continued to be implemented and strengthened by some subsequent amendments in 1978 and 1984\(^1\). Currently, civil forfeiture is one of the main features of the American laws and provisions that accompanying the inception of the war on drugs.

5.2.1.2.1. Categories of property subject to civil forfeiture under CSA

Anything within the jurisdiction can be made the subject of civil forfeiture proceedings (Zander, p. 26). Snider (1996) indicates that until recently, the Government's right to take possession of property stems from the misuse of the property itself. Further, the property must fall within the provisions of a forfeiture statute, and there can be no forfeiture without a forfeiture statute. Consequently, when the CSA was enacted in 1970, the civil forfeiture provisions covered only five specific types of property that are used to facilitate drug trafficking crimes. The original five provisions of this statute [set forth in paragraphs (a) (1) through (a) (5) of s. 881, Title 21, United States Code (U. S. C.)] closely parallel the early statutes used to enforce customs laws, piracy laws and revenue laws (p. 4).

In 1978, Congress added a new category to the Psychotropic Controlled Substances Act 1970 (CSA) which provided that all proceeds of illegal drug sales and of money intended to be used to purchase prohibited drugs could be forfeited (21 U. S. C. 881 (a) (6)). This is considered to be the first American statute that allows the civil forfeiture of the accumulated profits of criminal activity.

The CSA 1970\(^\text{92}\) (CSA/ 21 U. S. C. 881) allows the federal government to forfeit five categories of property connected with drug offences. These correspond approximately to the types of property that are commonly forfeited in the UK under s. 27 of the Misuse of Drugs Act 1971 (Hodgson' Report, p. 32). Those five categories include (i) the illicit drugs themselves; (ii) the raw materials and equipment that are used, or intended for use, in illegally manufacturing, compounding, processing, delivering, importing, or exporting any controlled substance; (iii) containers used, or intended to be used for illegal drugs or their associated raw materials or equipment; (iv) any conveyances\(^\text{93}\) used or intended for use in or facilitating the transportation, sale, receipt, possession or concealment of forfeitable drugs and (v) records kept by drug violators, including research, formulas, microfilm, tapes, and data (21 U. S. C. 881 (a) (1,3,4,5), (f), (g) (2)). In 1978, as mentioned above, Congress added a sixth category; the proceeds of illegal drug sales and of money intended to be used to purchase prohibited drugs (21 U. S. C. 881 (a) (6)).

The 21 U. S. C. 881 (a) (6) provides that all monies negotiable instruments, securities or other things of value furnished or intended to be furnished by any person in exchange for a controlled substance in violation of CSA; all proceeds traceable to such an exchange; and all moneys, negotiable instruments and securities used or intended to be used to facilitate any violation of the CSA could be forfeited.

\(^{92}\)The unpopularity of the traditional forfeiture laws, which are sometimes used against political prisoners and dissenters have caused the virtual disappearance of criminal asset forfeiture legislation for more than two centuries. The in rem civil forfeiture against property continues unobtrusively in traditionally accepted areas of use, such as in the enforcement of customs law (see Clive Scott, 1996).

\(^{93}\)Snider (Ibid., p. 5) clarified that "conveyance" is any mobile thing capable of transporting objects or people. While it applies to vehicles, vessels or aircraft, the term suggests a broader meaning. Mobility is at the heart of any definition of "conveyance".
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The Hodgson Report mentions that the first and third paragraphs correspond approximately to the types of property that can be forfeited by the UK criminal court under the Misuse of Drugs Act 1971 or under s. 43 of the powers of Criminal Courts Act 1973. The second paragraph, however, has no equivalent in English law, but it corresponds well with the definition of the proposed power of 'confiscation' in the Report, which is now under the DTA 1994.

Between 1978 and 1984, real property could be forfeited only if it could be traced to the proceeds of drug trafficking. In 1984, Congress amended the civil forfeiture provisions to allow forfeiture of real property that is used to facilitate drug violations (21 USC, s. 853 (a) (7))\(^94\). The statute allows forfeiture where 'facilitation' takes place 'in any manner', but the courts have generally required some form of 'sufficient nexus' between the illicit act and the property (Zander, 1989). The power to forfeit real property has been used against laboratory sites, growing fields, airstrip locations and drug storage facilities. The courts have held that a whole tract of land can be forfeited even when the violation only took place on a small portion of it (see US v Real Property, 1986).

5.2.1.2.2. Civil forfeiture procedure
It starts with seizure of that which is to be forfeited. If the property is in or on private property this requires a warrant issued by an appropriate judicial authority on a showing of probable cause (equivalent to the English requirement of reasonable grounds to suspect). There must be probable cause to believe that the property is forfeitable. Seizure of lands and buildings, large vessels, cargo, accounts etc. is often done by means of an 'admiralty' warrant under USC, s. 881 (b).

If the property is in a public place, there appears to be no requirement for a warrant. This applies especially to vehicles. Once the property has been lawfully seized, with or without a warrant, it can be searched. If the matter is uncontested, the forfeiture will then take place without further requirement of proof. If it is contested, the court has to decide on a balance of probabilities. Moreover the scales are tipped heavily in favour of the

\(^94\)21 U. S. C. § 881 (a) (7) states that it covers drug trafficking violations "punishable by more than one year's imprisonment. ...".

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government by the rule that once probable cause has been established, it is for the owner to show that the property is not forfeitable. Zander affirms that this burden of proof has been laid on the owner in American civil forfeiture cases for nearly two hundred years (p. 29).

In federal law, neither an owner's innocence nor his ignorance is a defence. The Supreme Court has held that it is constitutional to forfeit illegally-used property regardless of the innocence of the owner. The action is against the property, and the state of mind of the owner is generally regarded as irrelevant. The leading case in this respect is of a rented yacht forfeited because of a single marijuana cigarette found abroad. The Supreme Court upheld the forfeiture even though the owners had no knowledge of the illegal use made of the yacht and were not negligent in that regard (the Calero-Toledo v Pearson Yacht Leasing Co, 1974).

Under the US Constitution a person must be given an advance notice and an opportunity of being heard before his property is taken. Civil forfeiture is an exception to this hallowed principle. But notice has to be given after the seizure. Such notice is given normally by certified or registered mail. If the person affected is missing or unknown, notice can be given through publication in a newspaper of general circulation (Zander, p. 30).

These harsh rules do not necessarily apply under State law. In virtually all the states mere possession is not enough on its own; it must have been for the purpose of trafficking. In some of the States the position is different and persons who are innocent of any criminal involvement and who are totally ignorant of the illegal use made of their property are protected from forfeiture. The applications of forfeiture by States will be discussed in detail in later part of this Chapter.

5.2.1.2.3. Types of the civil forfeitures
Whether there is a right to a hearing will depend on the type of forfeiture being made. There are three types: summary, judicial, and administrative forfeiture.
5.2.1.2.3.1. **Summary forfeiture**

Such forfeiture is exclusively for possession of illegal drugs. Schedule I and II drugs\(^95\) and certain hazardous materials are subject to summary forfeiture (21 U. S. C. § 881 (f)). This type of material is considered contraband, and as such there is no right to possess it. No proceedings are required, and the material is peremptorily forfeited upon seizure. This simply means that the drugs are seized and that is the end of the matter. It is rare for such seizures to be contested.

5.2.1.2.3.2. **Administrative forfeiture**

This forfeiture applies to something like 80 per cent of all civil forfeitures by the Drugs Enforcement Agency (Zander, p. 30). It is half-way between summary and judicial forfeiture but in practice it is closer to the summary procedure.

Administrative forfeiture proceedings are established as a means to keep uncontested forfeiture actions out of the courts (Snider, p. 10). Also, it provides an alternative administrative remedy for property owners who are not involved in drug trafficking, even though their property may have be used to facilitate such trafficking. The concept of administrative forfeiture is not new in the United States. It dates back to 1844 when Congress authorised the administrative forfeiture in cases where the value of the seized property was $100 or less. The monetary limit was gradually raised over the next 140 years. In 1984, the limit was $10,000 or less (Snider, p. 10).

Currently, the Government may commence administrative forfeiture proceedings against property valued at $500,000 or less; except that real property of any value must be judicial forfeited. Additionally, money in any amount is subject to administrative forfeiture (Ibid., p. 10), as is any conveyance (vehicle, vessel or aircraft) that is used to import, export, transport, or store illicit drugs (19 U. S. C. § 1607 (a)).

In an administrative forfeiture proceeding, the Government is required to publish notice of the seizure and of its intention to forfeit (19 U. S. C. § 1607). The Government sends notice by mail to all persons who may have

\(^95\)Determining the list of the drugs under each of these two schedules is not the focus in this particular study, therefore, it will not be discussed thoroughly.
an interest in the property. Also, it must publish notice of the seizure in a newspaper of general circulation in the judicial district in which the seizure was made. Following the publication of the notice, anyone who has an interest in the seized property can elect to demand a judicial proceeding in Federal Court, or to seek administrative relief from the seizing Federal investigative agency. A person cannot avoid an administrative forfeiture by merely alleging that he did not receive the notice of the forfeiture\textsuperscript{96}. On the other hand, failure by the Government to send notice to a proper address when it knows of a person's interest in the seized property will void an administrative forfeiture (Snider, p. 10).

If the person chooses to have the forfeiture action adjudicated in Federal Court he must notify the Government (file a 'claim'). This notification (claim) must be filed within twenty days of the first date of publication of notice (if the notice is mailed late for any reason, additional time is normally granted for the filing of a claim). Together with the claim, the person seeking to contest the forfeiture must post a cost bond (the cost bond is generally ten percent of the value of the seized property, but no less than $250 and no more than $5,000 (19 U. S. C. § 1608)).

If no claim is filed within twenty days of the first date of publication, the property may be declared forfeit. The decision to forfeit is made by a Department of Justice Attorney, based upon information in the investigative file (Ibid., p. 11).

5.2.1.2.3.3. Judicial forfeiture
It is of civil character, a full civil trial, where the plaintiff is the government and the forfeitable property is the defendant. For real property (land, buildings, residences), for property valued in excess of the administrative forfeiture limits, and when a claim is filed against property undergoing administrative forfeiture, the Government must institute judicial proceedings to secure forfeiture. The judicial proceeding is normally initiated in the Federal Court for the judicial district in which the property was seized by the United States Attorney's Office (28 U. S. C. 1395), or in the judicial district in which the defendant owning the

\textsuperscript{96}see Sarit v. US. Drug Enforcement Administration, 987 F. 2nd 10, 14 (1st Cir. 1993). For more details see the Report of the Office of Chief Counsel Drug Enforcement Administration (1996).
property is found or in the judicial district in which the criminal prosecution against the owner is brought (21 U. S. C. § 881 (j)).

The judicial forfeiture action begins when the Government files a pleading called a 'verified complaint'. Generally, the complaint must contain: (i) A verification on oath by the Assistant United States Attorney prosecuting the forfeiture action attesting to the truth of the contents of the complaint; (ii) a description of the property to be subject to forfeiture; (iii) a statement that the property seized or to be seized is within the jurisdiction of the court; and (iv) a statement of the facts of the offence justifying forfeiture.

The statements in the complaint must be sufficiently detailed that anyone wishing to contest the forfeiture will be able to file an answer responding to the complaint. Once the complaint is filed, the court issues a 'warrant of arrest in rem' which gives the court jurisdiction to act on the forfeiture (Admiralty Rule C (3)). The property is placed in the custody of the United States Marshal for that judicial district, who provides notice of the forfeiture action to all persons having an interest in the property (Admiralty Rule C (4)). Any person who contests a judicial forfeiture is called a 'claimant'. Claimants are entitled to file an answer to the forfeiture complaint, to 'discover' the Government's evidence and to demand a jury trial (Admiralty Rule C (6)).

The burden of proof is on the Government to produce enough evidence to persuade the judge that 'probable cause' exists to believe the seized property is forfeitable. 'Probable cause' is the reasonable grounds for belief of the guilt of the seized property supported by less than prima facie proof but more than mere suspicion. Once the Government demonstrates probable cause, the burden shifts to the claimant to show, by a preponderance of the evidence, that the property should not be forfeited. This means that the claimant to the property must produce some evidence in defence of the forfeiture of the property. If he does not, the

97"Pleadings" are the formal written statements containing the claims and defences of the parties to a lawsuit.
98Rule C (2) of the Supplemental Rules of Certain Admiralty and Maritime Claims (Admiralty Rules). Snider (1996) explains that because civil forfeitures in the United States evolved out of the Customs laws against smuggling, the procedures used are those relating to admiralty and maritime matters. The application of these rules in lieu of normal civil procedure rules is merely a matter of historical accident (p. 36).
judge must direct a verdict in favour of the Government. Snider believes that although this placing of the burden of proof on the claimant has been criticised by commentators, it has been upheld by the United States Supreme Court for almost 150 years. Generally, however, if the claimant desires, the trial will takes place before a jury to consider any contested issue of fact (Snider, 1996, p. 12).

5.2.1.2.4. Civil RICO
In addition to the mentioned civil and criminal forfeiture provisions under both statutes, there is also what is so called 'Civil RICO'. It is a civil forfeiture which comes under the RICO statute. The provisions here are predicated on the general RICO provisions already described above (18 USC ss 1964-1968). The civil RICO provisions have been used mainly by private parties rather than by government prosecutors. Private parties can bring actions under civil RICO to treble damages and attorneys' fees and large numbers of such cases have been brought.

If the action is successful the defendant also faces being divested of all the alleged proceeds of his racketeering activity. Federal government prosecutors have only very recently started to use civil RICO, mainly in cases involving trades unions. The heart of civil RICO is s. 1964 which gives federal courts jurisdiction to grant injunctive and other equitable relief to prevent and restrain violations of s. 1962 (dealt with under Criminal RICO above).

Civil RICO cannot result in uncompensated forfeiture as can criminal RICO. But it can result in equitable relief including divestiture in the form of sale of the enterprise. It can remove individuals from the management of an enterprise and put it under a trusteeship so as to prevent the criminal elements from simply being replaced by others. Criminal RICO could not necessarily achieve this result. Private parties can claim treble damages and attorney fees if they can show injury to their business or property by racketeering activity as defined in RICO (Ibid., p. 10)
5.2.2. Innocent - Owner Defence

Within English and American legal tradition, 'the innocence of the owner of property subject to forfeiture has almost uniformly been rejected as a defence'. Forfeiture of property used in violation of the narcotics laws fosters the purposes served by the criminal statutes, both by preventing further illicit use, and by imposing an economic penalty, thereby rendering illegal behaviour unprofitable. And that could happen to the extent that such forfeiture provisions are applied to lessors, bailors, or secured creditors who are innocent of any wrongdoing. Snider justifies this 'legal principle' by indicating that confiscation may have the desirable effect of inducing those innocent people to exercise greater care in transferring possession of their property (p. 12).

5.2.3. Exemptions

Section 881 (a) (4) (b) provide that common carriers are exempt unless it can be shown that 'the owner or person in charge of such conveyance was a consenting party or privy to' a violation of the drug control laws. There is also statutory exemption where the owner of the conveyance can show that the illegal use occurs while it is stolen (Ibid.). But the person claiming the benefit of either exemption has the burden of establishing that it applies.

5.2.4. Remission / Pardon

The power of granting remission can only be exercised by executive action through the office of the Attorney General. The courts have no function in this regard.

5.2.5. Rewards

The person or agency making the seizure, or the one who provides information which leads to the seizure, can be paid an award or reward of up to $150,000. Amendments passed in 1984 and 1986 permit the sharing of assets forfeited with other law enforcement agencies which participated in the seizure or forfeiture (s. 881 (e)). Zander asserts that this power has
been used very extensively and, as has been seen, has resulted in additions of millions of dollars to the budgets of local police and other law enforcement agencies. If the property is valued at under $750,000, it is delegated by the Attorney General to the head of the department of the investigative bureau responsible for the processing of the forfeiture.

5.3. STRUCTURE AND ORGANISATION OF LAW ENFORCEMENT AGENCIES

5.3.1. The Department of Justice Asset Forfeiture Program

The preceding argument contains a detailed examination of the main asset forfeiture legislations in the United States. This provides a backdrop to a discussion of the structures and practices of the main law enforcement agencies. Within the Departments of Justice, Treasury, Transportation, Defence, State, and the U. S. Postal Service, there are numerous agencies with operational and law enforcement responsibilities for drug control. This reflects the magnitude and complexity of asset forfeiture structures in the United States. The Department of Justice system (the Department of Justice Asset Forfeiture Program (hereinafter referred to as 'Program')) is equivalent to another existing system under the control of Treasury Department. This system involves the US Customs Service, the Internal Revenue Service and other Treasury Department agencies and offices. However, the Program has been chosen in this study mainly because it is the largest and best organised and has a considerable degree of overlap with other asset forfeiture programs.

The primary purpose of the Program is law enforcement, that is to deprive criminals of the proceeds and profits of their illegal activities and to weaken criminal enterprises by removing the instrumentalities of their crime. There are six main agencies responsible for identifying and seizing forfeitable property under the Program. These six agencies are: the Drug Enforcement Administration (DEA); the Federal Bureau of Investigation (FBI); and the Immigration and Naturalization Service (INS) of the Department of Justice; the US. Postal Inspections Service (USPP) of the Department of the Interior; and the Office of Criminal Investigations of the Food and Drug Administration (FDA).
In addition to these six agencies, other institutions perform vital and unique functions in accomplishing the Program's mission. The US Marshals Service (USMS) maintains and disposes the vast majority of properties seized for forfeiture. The 94 Attorneys' Offices (USAOs) are primarily responsible for the litigation of forfeiture cases that proceed judicially. The Asset Forfeiture Office (AFO) of the Criminal Division of the Department of Justice provides legal advice and litigation support to the Attorneys' Offices nation-wide and serves as general counsel to the Program. This office is almost similar to the function of the Central Confiscation Branch (CCB) of UK.

5.3.1.1. Executive Office for Asset Forfeiture (EOAF)
EOAF, part of the Office of the Deputy Attorney General, was established in 1989 to provide central management, direction, and control for the Program and to achieve the full law enforcement potential of the Asset Forfeiture Program. Throughout the financial year 1994, EOAF continued to be responsible for the establishment and implementation of uniform forfeiture program procedures and operations, the establishment and promulgation of forfeiture policy, the coordination of financial policy and analysis, the execution and formulation of the Assets Forfeiture Fund budget, the oversight and coordination of internal controls, the development and implementation of the Consolidated Asset Tracking System (CATS), and the coordination of communication and participation among the various components. The Annual Report of the Department of Justice, FY 1994 indicates that with the assistance of the various Program participants, EOAF is responsible for fulfilling the Program's mission of deterring crime through the effective use of forfeiture.

In December 1994, EOAF was reorganised. The Office of the Deputy Attorney General transferred Program direction, policy, and general oversight responsibilities to the Asset Forfeiture Office (AFO) of the Criminal Division.

5.3.1.2. Asset Forfeiture Office (AFO)
This office handles both civil and criminal forfeiture litigation, provides legal support to the US. Attorneys' Office, develops and coordinates with federal components legislation to improve and enhance forfeiture procedures, advises the Appellate Section and the Solicitor General's
Office on appellate forfeiture litigation, and coordinates multi-district asset seizures and related litigation, as well as the international forfeiture and sharing of assets. AFO is responsible for developing and implementing a wide variety of forfeiture training courses for the Criminal Division and law enforcement personnel, including the US. Attorneys' Offices, as well as the prosecution and law enforcement personnel in various foreign countries.

5.3.1.3. Drug Enforcement Administration (DEA)
The responsibility of the DEA is to enforce all federal laws relating to the manufacture, sale, prescription, possession, and use of drugs. The largest and best known area of operations of this agency is in the area of illegal trafficking in narcotics and other drugs of dependence (D'Oranzo, pers. communication, in an interview, 1996).

As drug trafficking generates phenomenal amounts of cash, all of which is subject to seizure under federal law, the DEA has become highly organised in its management of its asset forfeiture functions. In the field, there are 19 Divisional Asset Removal Teams (DARTs). These teams work in conjunction with other operational investigation teams and assist in the identification and seizure of forfeitable property. In 1993, the DEA issued a Strategic Management System, outlining the agency's policies and priorities for the upcoming year. These priorities are: (1) incapacitating leaders and important players in major international and interstate drug trafficking organisations; (2) disrupting the production of illegal drugs; (3) preventing the diversion of controlled substances; (4) controlling the chemicals used to manufacture illegal drugs; (5) supporting interdiction efforts; and (6) seizing and forfeiting assets derived from drug trafficking.

To achieve these goals, the Strategic Management System delineates three specific responsibilities for DEA. First, to lead federal drug law enforcement by conducting, managing, and coordinating major investigations and international operations. As part of this responsibility, DEA has implemented the Kingpin Strategy, where the primary enforcement effort focusing on the identification and targeting of drug Kingpins and their supporting infrastructure. Second, to coordinate and disseminate drug intelligence, for example, DEA manages the National Narcotics Intelligence System, collecting, analysing, and disseminating
drug-related intelligence. And third, to share its experience and to provide investigative support to state and local enforcement agencies. DEA's State and Local Task Force Program is the primary vehicle by which DEA provides a federal presence at the state and local law enforcement levels (United States Sentencing Commission, 1996).

5.3.1.4. The Federal Bureau of Investigation (FBI)
The investigative responsibilities of the FBI are very broad, including not only the 'forfeiture rich' of drug trafficking, but also other classes of investigation such as wire fraud, kidnapping, child pornography, motor vehicle theft and etc., (Schroeder, 1996). As a result of its resources being spread over a wide area of law enforcement, the FBI has less asset forfeiture experience than the DEA, and has developed an interest in the area later than DEA. However, one advantage of its relatively late entry into asset forfeiture is the fact that it has been able to learn from the mistakes of the DEA and has developed what has been described as 'an outstanding program' that has served as a model for other federal agencies (JDAFP Annual Report 1990, p. 9).

The FBI equivalent of the DEA's DART are Forfeited Asset Seizure Teams (FASTs). These are located in 14 of the FBI's field offices. Like the DART, FASTs specialises in asset forfeiture legislation and technique and provide assistance on this subject to other investigative teams within the field office concerned (Schroeder, 1996).

5.3.2. The Financial Crimes Enforcement Network (FinCEN)
The U.S. Department of the Treasury also plays a major role in implementing and directing efforts devoted to combating international organised crime. It strives to advance counter-money laundering measures through prevention, detection and enforcement of financial crime, as well as other international criminal activity (Charlotte Hatfield, 1996, an interview)99.

FinCEN is a key component of the U.S. international strategy to combat organised crime. The Department of the Treasury has designated FinCEN

99An interview held in the Department of Treasury, FinCEN, Washington DC, U.S.A in October, 5, 1996.
as one of the primary agencies to formulate, oversee and implement policies to prevent and detect money laundering, serving as the link between the law enforcement, financial and regulatory communities. Its mission is to provide world leadership in the prevention and detection of the movement of illegally derived money and to empower others by providing them with the tools and expertise needed to combat financial crime.

As the British NCIS, FinCEN consist of intelligence analysts and criminal investigators as well as specialists in the financial industry and computer field. Forty per cent of long-term detailees are assigned to FinCEN from 21 different regulatory and law enforcement agencies (FinCen facts, Department of Treasury, 1996).

5.3.3. The Emergence of Opposing Politics for Reform

Increasingly, the proponents of the forfeiture laws in the United States, who can be characterised as mostly reflecting either the jurisprudential or law enforcement point of views, have attracted wider and closer attention from the concerned public. American asset forfeiture, and particularly civil asset forfeiture, has been the subject of much critical debate within a variety of academic and societal circles in recent years. This situation is partly due to the widespread concerns from misuses of civil forfeiture in consequence to high-profile use to combat rampant drug trafficking since 1984. The highly visible and effective use of asset forfeiture by law enforcement agencies is indeed cause for criticism, both from a philosophical perspective, by those who view it as too broad an exercise of governmental power, and from a practical perspective, by those whose lives and interests are affected by forfeiture.

Most criticisms focus upon the government's use of the forfeiture provisions of 21 U.S.C. § 881, the primary federal civil drug forfeiture statute. The opponents of civil forfeiture maintain that it is abused by law enforcement, which has a vested interest in the property forfeited (Gurule, 1995). The proceeds of forfeited assets are often distributed to law enforcement agencies through the Federal Asset Forfeiture Fund (28 U.S.C. § 524 (1) (Supp. V 1993). In many cases, forfeiture provides a needed budgetary supplement to law enforcement agencies. Cheh (1994), indicates
that forfeitures are popular, not because they are quick and easy, but because they are also highly profitable. The more the law enforcement agencies confiscate, the more they get. As a result, a significant portion of law enforcement revenue now depends on aggressive and frequent pursuit of forfeitable property. For example, since 1985, the federal government has given $1.2 billion to state and local police. According to a former head of Justice Department's Asset Forfeiture Section, Michael Zeldin, the department's 'marching orders' were: 'Forfeit, forfeit, forfeit. Get money, get money, money'.

Further criticism is directed at the fact that the government is not required to meet the more demanding criminal standard of 'beyond reasonable doubt'. Instead, and as has been mentioned before, civil forfeiture only requires a showing of 'probable cause' that the subject property is used for, or is derived from a prohibited purpose.

Two bills have been introduced to Congress seeking major legislative reform. Congressman Henry Hyde introduced a bill in June 1993 which was directed at, among other things, amending the 'innocent owner' defence. The Hyde Bill 'Civil Asset Forfeiture Reform Act of 1993' seeks to avail the defence to an owner who is either without knowledge, or does not consent to the illegal conduct giving rise to forfeiture. Gurule (1995) realises that this will resolve a current split in the circuits concerning whether a claimant must prove both that the illegal use of the property occurred without the owner's knowledge and without his consent. In addition, he claims that it also authorises the district court to appoint counsel for indigent claimants, and perhaps more importantly, it seeks to enhance the standard needed for the government to sustain a forfeiture from the current probable cause to a 'clear and convincing' standard.

Upon Gurule's remarks, many institutions have given consideration and support. Mark Kappelhoff, for example, a legislative counsel from the American Civil Liberties Union mentioned that the Union and the National Association of Criminal Defence Lawyers have joined Congressman Hyde in seeking major legislative changes to the forfeiture laws (1996, p. 2).
The second bill was introduced by Congressman John Conyers in October 1993 which is, as Gurule described it, a much more ambitious bill (p. 160). This Bill is entitled 'The Asset Forfeiture Act'. It proposed sweeping changes that would, in effect, dismantle civil forfeiture. The Conyers' Bill would mandate that forfeiture proceedings be conducted only upon the conviction of the property owner for the relevant crime. Accordingly, a criminal conviction would be a necessary precondition to civil forfeiture like the situation with the criminal forfeiture. It would also require the government to show by 'clear and convincing evidence'\textsuperscript{100} that the property was subject to forfeiture. In addition, claimants unable to afford legal representation would receive court-appointed counsel. The right to a jury trial would also be extended to civil forfeiture proceedings. Furthermore, \textit{bona fide} attorney's fees would be exempted from forfeiture and the value of forfeited property would be limited so as not to exceed the pecuniary gain derived by the wrongdoer from the offence.

While Congress has been actively re-examining the civil forfeiture laws, the United States Supreme Court has not stood silent on the subject, but has issued several major civil forfeiture decisions, of which two have substantially restricted the use of civil forfeiture (Gurule, p. 161). In \textit{Austin v. United States}, for example, the Supreme Court pierced the legal fiction of \textit{in rem} forfeitures and held that civil forfeiture under §§ 881 (a) (4) and (a) (7) is punitive in nature and, therefore, subject to the constraints of the Excessive Fines Clause of the Eighth Amendments. In the following, there will be a detailed examination of the two issues that made the American Supreme Court look at it attentively, and caused it to give a reversed decision.

\textbf{5.3.3.1. Civil Forfeiture: Punitive or Remedial Procedure}

The defendant, Austin, was convicted in State court for possessing two grams of cocaine with the intent to distribute. Following his conviction, the United States filed an \textit{in rem} action seeking forfeiture of his mobile home and auto body shop, the locations of the drug transaction which led to his conviction. Austin argued that the forfeiture of his mobile home and auto body shop would violate the Eighth Amendment prohibition against excessive fines. The district court rejected the excessive fines.

\textsuperscript{100}Standards of proof range from the minimal "probable cause" through a "preponderance of the evidence" to "clear and convincing evidence" to proof "beyond reasonable doubt"(Hyde, 1995, p. 59).
argument and entered summary judgement for the government. The Eighth Circuit affirmed the conviction.

The Supreme Court, reversing the Eighth Circuit, concluded that forfeiture constituted punishment and reasoned that the Eighth Amendment, unlike other amendments, does not contain language expressly limiting itself to criminal cases. The Court noted that the purpose of the Eighth Amendment was to limit the government's power to punish. Thus, the Court stated that the dispositive question was not whether the forfeiture provisions were characterised as criminal or civil, but whether forfeiture served in part to punish. If so, civil forfeiture under §§ 881 (a) (4) and (a) (7) is limited by the Excessive Fines Clause.

The Supreme Court proceeded to analyse whether civil forfeiture was considered to serve in part to punish at the time the Eighth Amendment was ratified. The Court also questioned whether forfeiture under §§ 881 (a) (4) and (a) (7) should be construed as imposing punishment today. After engaging in an historical review of civil forfeiture, the Court concluded that even though the 'innocence' of the owner could not serve as a common-law defence, forfeiture consistently has been recognised as serving, at least in part, the goal of punishing and deterring the owner.

The Court next considered whether the forfeiture statute at issue was considered punishment today. Three reasons were advanced in support of the conclusion. First, the Court reasoned that the forfeiture provisions expressly provide an 'innocent owner' defence which serves to focus on the culpability of the owner. From this, the Court inferred a 'congressional intent to punish only those involved in drug trafficking'. Second, the Court noted that the congressional intent was to tie the availability of civil forfeiture directly to the commission of drug offences. Third, the legislative history revealed that Congress intended forfeiture to serve as 'a powerful deterrent' or punishment against those dealing in illicit drugs. In enacting § 881 (a) (7) in 1984, Congress recognised that 'the traditional criminal sanctions of fines and imprisonment are inadequate to deter or punish the enormously profitable trade in dangerous drugs'.

Finally, the Court rejected the government's arguments that the civil forfeiture provisions should be considered remedial in nature, rather than
punitive. This is quite similar to the argument concerning the nature of the British confiscation as a punitive or reparative procedure.

The Court found an insufficient nexus between the value of the forfeited property and any damages sustained by the government. The Court commented that the 'forfeiture of property... is a penalty that has absolutely no correlation to any damages sustained by society or to the cost of enforcing the law'. Even assuming that §§ 881 (a) (4) and (a) (7) serve some remedial purpose, the Court stated that the Government's argument must fail because 'a civil sanction that cannot fairly be said solely to serve a remedial purpose, but rather can only be explained as serving either retributive or deterrent purposes, is punishment'. Since the forfeiture of the property constitutes punishment, the Court held that the provisions are subject to the Excessive Fines Clause (Austin v. United States, 113 S. Ct. 2801, 1993).

The Supreme Court's holding in Austin, has generated a firestorm of judicial controversy (Gulue, 1995, p. 163). The determination of the exact content of the judicial controversy will not be examined here, but the impact of Austin upon prosecution and law enforcement agencies is worth being reviewed.

With the Supreme Court having overcome its fixation that civil forfeiture is remedial in nature, Kessler (1994) indicates that Austin probably will instil an element of moderation in the prosecution of forfeiture cases. Extreme and weaker cases, such as 'drive-by'\textsuperscript{101} cocaine sales, probably will be dropped, with the government concentrating its efforts on those properties with a greater nexus and financial correlation to the underlying criminal activity. In a statement predicting victory in the circuit court, the Department of Justice asserted that it has anticipated 'no significant change in day-to-day operations' (Kessler, 1993). The Department has exercised restraint in enforcing civil forfeiture laws and will continue to do so. One thing is certain; the Court's decision will encourage more challenges to the government's seizure and forfeiture procedures (Kessler, 1994).

\textsuperscript{101}In these cases, the government seizes an automobile where its only connection to a crime is its use to transport its owner to the location where the owner purchased narcotics. Those
5.3.3.2. The Innocent Owner Defence

The Supreme Court's ruling in United States v. 92 Buena Vista Avenue has likewise been controversial and has created a split in the circuits (113 S. Ct. 1126 (1993)). The majority of the writers on this issue believe that the decision in this case is significant for two main reasons. First, the court holds that the innocent owner defence is not limited to *bona fide* purchasers. Accordingly, a donee, someone who paid no value and received the tainted property as a gift, can claim the defence. Second, the Supreme Court states that the innocent owner defence trumps the relation-back doctrine which provides that the government's interest rests after the offence giving rise to forfeiture (see 21 U. S. C. § 881 (h)). Thus, a donee who is without knowledge or does not consent to the property being used for criminal activities holds a superior title over the government.

Nevertheless, Kessler explains that the Court reveals that there is a clear ambiguity in the statutory language and found that the statute is punitive in nature. Consequently, the court reasons that the rule of lenity applies, which requires that any ambiguity must be resolved in favour of the claimant. Moreover, the Court states that the statutory construction problem arises not from certain decisions in certain cases or the Court's interpretation of the relevant statute, but rather that the problem originates from Congress when it fails to draft a statute that takes into account the substantial differences between the owners of property during the improper use and those who acquire it afterwards. The Court has strongly admonished Congress to redraft the statute.

Gulue (1995) attributes the failure of the proposed Bills by Representatives Hyde and Conyers to those recent rulings by the Supreme Court where both Bills have been not taken into consideration.

In November 1995, Criminal Justice Section of the American Bar Association (ABA) presented a 'Statement of Principles on the Revision of the Federal asset Forfeiture Laws' to the House of Delegates consisting of thirteen general principles which urge that federal asset forfeiture laws be amended.

cases in which the car is used to transport or import narcotics probably will not be affected (Kessler, p. 213)
The Criminal Justice Section created a working group to study the need for revision of the federal forfeiture laws. The members of the working group, as the attached report mentioned, held widely divergent views on the details of any revisions of the forfeiture laws, but found that there was general agreement that some legislative changes should be made to ensure that forfeiture is administered in accordance with the requirements of due process (common criminal standards).

5.3.4. The Interest of the Law Enforcement Agencies

Where the British law provides that all proceeds recovered from the payments of the confiscation orders must goes directly to the Treasury, the American law allows sharing the fruits of confiscation with law enforcement agencies. Zander suggests that a closer inspection of the American approach is needed. The obvious advantage is that it provides a direct incentive to the police to be effective in their pursuit of criminals; the more effective they are, the greater the resources available to them. But there is a serious danger that such incentives will distort law enforcement. For instance, it seems that investigators sometimes actually hoard their information rather than sharing it for fear that their organisation will otherwise have to share the ultimate spoils of success. Units are apt to suffer pressure to make bigger and bigger seizures to ease other financial burdens within the organisation. This can lead to a hurried investigation, a poorly prepared prosecution and an unjustified acquittal. Zander reveals that there are known cases where police authorities and even politicians have included projected future seizures as part of the police budget (p. 48).

5.3.5. Scale of Asset Forfeiture

It is worth noting here that there is a huge contrast between the volume of asset forfeiture (both civil and criminal) in the United States, compared with the British system (England and Wales). Lombardo (1991) holds that forfeiture in the United States differs from forfeiture in most other parts of the world. The major difference is that the United States advocates civil forfeiture, while most other countries permit only criminal forfeiture. The power to apply any of the two systems (civil or criminal) or both,
which are the most common in United States, makes the attempt to compare it with the British single confiscation system quite difficult, confusing, and inconsistent.

Added to that, is the absence of authentic records of forfeiture revenues for the whole United States. The available information is attributed to certain federal agencies and particular states. This is contrary to the British system where it is governed by a central office. Resolving the difficulty of comparison cannot overcome another problem which is of the validity of the records provided by the American federal law enforcement agencies. The impreciseness of the real amounts recovered compared with the values of the forfeited properties also leads to a belief that the size of the profits in large scale drug trafficking remains more or less an open question.

The Annual Report of the Department of Justice, Asset Forfeiture Program, fiscal years 1993 and 94, indicates that the amount deposited in the U. S. Department of Justice Asset Forfeiture Fund increased from $27 million in fiscal year 1985, to $556 million in 1993 and $550 million in 1994. The 1994 Report pointed out that since 1985, more than $3.8 billion in illicit cash and proceeds from the sale of forfeited property have been deposited into the Assets Forfeiture Fund.

Schroeder from the FBI, indicates that the value of property forfeited by criminal and civil actions in one year and half is roughly one billion dollars. He explains that the number of forfeiture actions for the same period is 5,000, and of about 85% are civil. He also asserts that the difference between the amounts and values of the seized properties and the recovered forfeiture orders never exceeds 10 percent.

The following tables show the volumes and values of seizures, forfeitures, deposits, and the budgets and allocations for the criminal justice system and in particular the federal law enforcement agencies compared with other law enforcement agencies and other institutions. The distribution of the recovered proceeds is also explained.
Table (5.1) Seizure statistics of the financial year 1990 to financial year 1996 which were carried out by the DEA.

<table>
<thead>
<tr>
<th>Year</th>
<th>Drug Enforcement Seizures Count</th>
<th>Value</th>
<th>Referred Asset Seizures Count</th>
<th>Value</th>
<th>Grand Total Count</th>
<th>Value</th>
</tr>
</thead>
<tbody>
<tr>
<td>1990</td>
<td>16,154</td>
<td>$886,611,029</td>
<td>2,685</td>
<td>$191,191,282</td>
<td>18,839</td>
<td>$1,105,802,311</td>
</tr>
<tr>
<td>1991</td>
<td>16,376</td>
<td>725,102,225</td>
<td>2,621</td>
<td>232,029,298</td>
<td>18,997</td>
<td>957,131,523</td>
</tr>
<tr>
<td>1992</td>
<td>17,042</td>
<td>664,420,164</td>
<td>3,112</td>
<td>213,693,245</td>
<td>20,154</td>
<td>878,113,409</td>
</tr>
<tr>
<td>1993</td>
<td>14,007</td>
<td>560,500,177</td>
<td>2,948</td>
<td>127,674,372</td>
<td>16,955</td>
<td>688,174,549</td>
</tr>
<tr>
<td>1994</td>
<td>11,186</td>
<td>502,056,512</td>
<td>2,700</td>
<td>149,682,748</td>
<td>13,888</td>
<td>651,739,260</td>
</tr>
<tr>
<td>1995</td>
<td>11,205</td>
<td>503,851,713</td>
<td>2,695</td>
<td>145,054,494</td>
<td>13,800</td>
<td>648,906,207</td>
</tr>
<tr>
<td>1996</td>
<td>10,896</td>
<td>365,544,397</td>
<td>1,736</td>
<td>86,578,153</td>
<td>12,632</td>
<td>452,122,550</td>
</tr>
<tr>
<td>Total</td>
<td>96,866</td>
<td>$4,208,086,217</td>
<td>18,497</td>
<td>$1,173,903,592</td>
<td>115,365</td>
<td>$5,381,989,809</td>
</tr>
</tbody>
</table>

Source: The Drug Enforcement Administration (DEA), 1996.

Table (5.2) Forfeiture statistics financial year 1990 to financial year 1996.

<table>
<thead>
<tr>
<th>Year</th>
<th>Administrative Count</th>
<th>Value</th>
<th>Judicial Count</th>
<th>Value</th>
<th>Grand Total Count</th>
<th>Value</th>
</tr>
</thead>
<tbody>
<tr>
<td>1990</td>
<td>14,189</td>
<td>$152,812,525</td>
<td>3,583</td>
<td>$513,033,484</td>
<td>17,772</td>
<td>$665,846,009</td>
</tr>
<tr>
<td>1991</td>
<td>11,503</td>
<td>148,580,154</td>
<td>4,095</td>
<td>418,343,759</td>
<td>15,598</td>
<td>566,923,913</td>
</tr>
<tr>
<td>1992</td>
<td>12,228</td>
<td>183,363,745</td>
<td>3,934</td>
<td>450,888,755</td>
<td>16,162</td>
<td>634,052,500</td>
</tr>
<tr>
<td>1993</td>
<td>10,632</td>
<td>184,209,087</td>
<td>3,886</td>
<td>387,308,970</td>
<td>14,518</td>
<td>571,518,057</td>
</tr>
<tr>
<td>1994</td>
<td>8,469</td>
<td>202,926,447</td>
<td>3,223</td>
<td>314,793,199</td>
<td>11,692</td>
<td>517,719,646</td>
</tr>
<tr>
<td>1995</td>
<td>7,076</td>
<td>152,883,754</td>
<td>2,283</td>
<td>201,923,120</td>
<td>9,359</td>
<td>354,806,874</td>
</tr>
<tr>
<td>1996</td>
<td>6,415</td>
<td>142,449,393</td>
<td>1,662</td>
<td>107,151,715</td>
<td>8,077</td>
<td>249,601,108</td>
</tr>
<tr>
<td>Total</td>
<td>70,512</td>
<td>$1,167,225,105</td>
<td>22,666</td>
<td>$2,393,243,002</td>
<td>93,178</td>
<td>$3,560,468,107</td>
</tr>
</tbody>
</table>

Source: The Drug Enforcement Administration (DEA), 1996.
Table (5.3) The amounts (\$m) of deposits in the Asset Forfeiture Fund, Treasury Department, from 1986-1994.

<table>
<thead>
<tr>
<th>YEAR</th>
<th>DEPOSITS</th>
</tr>
</thead>
<tbody>
<tr>
<td>1986</td>
<td>93.7</td>
</tr>
<tr>
<td>1987</td>
<td>177.6</td>
</tr>
<tr>
<td>1988</td>
<td>205.9</td>
</tr>
<tr>
<td>1989</td>
<td>580.8</td>
</tr>
<tr>
<td>1990</td>
<td>460.3</td>
</tr>
<tr>
<td>1991</td>
<td>644.3</td>
</tr>
<tr>
<td>1992</td>
<td>631</td>
</tr>
<tr>
<td>1993</td>
<td>555.7</td>
</tr>
<tr>
<td>1994</td>
<td>549.8</td>
</tr>
</tbody>
</table>


The Asset Forfeiture Fund holds an account in the Treasury Department that receives forfeited cash and the proceeds of sale from forfeited property from all cases involving Department of Justice DOJ and the judicial cases from those non-DOJ agencies that are participating in the Program. Fund revenue is measured in terms of net deposits to the Fund. In FY 1985, $27 million in forfeited cash and property sale proceeds were deposited into the Fund, since then as it indicated in table (5.3), remarkable increase have been made in depositing revenues gained by the law enforcement agencies. (the amounts is counted by $ millions). The annual report of the DOJ (Fiscal Year 1994) indicated that without the forfeiture fund, law enforcement agencies would not have adequate resources to aggressively implement the Asset Forfeiture Program (p. 17).
Table (5.4) Allocation of law enforcement agencies for 1993 & 1994. (Dollars in Thousands). This table shows that FBI and DEA receive the highest allocation comparing with other law enforcement agencies.

<table>
<thead>
<tr>
<th>Direction</th>
<th>1994</th>
<th>1993</th>
</tr>
</thead>
<tbody>
<tr>
<td>Executive Office for Asset Forfeiture</td>
<td>3,097</td>
<td>450</td>
</tr>
<tr>
<td>Community Relations Service</td>
<td>1,400</td>
<td>0</td>
</tr>
<tr>
<td>Civil Rights Division</td>
<td>3,500</td>
<td>0</td>
</tr>
<tr>
<td>Federal Bureau of Investigation (FBI)</td>
<td>28,460</td>
<td>24,200</td>
</tr>
<tr>
<td>Drug Enforcement Administration (DEA)</td>
<td>9,127</td>
<td>4,000</td>
</tr>
<tr>
<td>Immigration and Naturalization Service</td>
<td>4,000</td>
<td>0</td>
</tr>
<tr>
<td>United States Marshals Service (USMS)</td>
<td>4,995</td>
<td>0</td>
</tr>
<tr>
<td>United States Postal Service</td>
<td>1,250</td>
<td>0</td>
</tr>
<tr>
<td>United States Food and Drug Administration</td>
<td>450</td>
<td>0</td>
</tr>
<tr>
<td>Internal Revenue Service</td>
<td>3,400</td>
<td>2,000</td>
</tr>
<tr>
<td>Department of Health and Human Service</td>
<td>250</td>
<td>0</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>$59,930</strong></td>
<td><strong>$30,650</strong></td>
</tr>
</tbody>
</table>


The Annual Report of the Department of Justice-Asset Forfeiture Program (DJAFP) (FY 1994) indicates that in the beginning of FY 1994, the Federal Accounting Standards Advisory Board's Statement of Federal Financial Accounting Standards (Number 3) 'Accounting for Inventory and Related Property', required that revenue associated with property not disposed off through sale be recognised upon approval of distribution. During FY 1994, the property was distributed pursuant to the Attorney General's authority to share forfeiture revenues with state and local law enforcement agencies that participated in the forfeiture that generated the property, and pursuant to the Department's authority to place forfeited property into official use by the Government. The amount for the respective property distributions are as indicated in Table 5.5:

Table (5.5) Distribution of forfeited property. *United States Marshal Services ($m)

<table>
<thead>
<tr>
<th>Way of Distribution</th>
<th>1994</th>
</tr>
</thead>
<tbody>
<tr>
<td>Property Retained by USMS*</td>
<td>1,570</td>
</tr>
<tr>
<td>Property Transferred to State and Local Agencies</td>
<td>7,299</td>
</tr>
<tr>
<td>Property Transferred to Federal Agencies</td>
<td>12,872</td>
</tr>
<tr>
<td><strong>Total Revenue</strong></td>
<td><strong>21,741</strong></td>
</tr>
</tbody>
</table>

5.4. SUMMARY & CONCLUDING REMARKS

Although a substantial amount of studies have been focused on American forfeiture laws and in particular about the civil forfeiture law, few studies have been conducted to determine the common comparative aspects of the American forfeiture system which can be contrasted with different jurisdictions. But despite the difficulties and the normal complications that distinguish forfeiture laws, determining the most distinctive features and principles of one forfeiture system is very important in comparing it with other systems.

Inspired by the lucid categorisation that Walther (1994) has considered as 'broadly sweeping', we can summarise the discussion of this chapter regarding the American confiscation system with the following:

(i) The 'gross worth' principle: where not only the profits are the subject of the forfeiture order, but also all the proceeds and the entire fruits of the criminal activity are subject to forfeiture;

(ii) The 'no back door', or 'substitution' principle: the forfeiture embraces not only the immediate proceeds, but also any derivative proceeds. Further, the law permits the forfeiture of alternative property in case the perpetrator has caused the originally tainted property to be unavailable in order to thwart its seizure;

(iii) The 'exclusion of third parties' principle: the state's forfeiture rights are largely given priority over any third party rights which might accrue at the time the crime is committed (it is also known as the 'relation back doctrine'). Thus, a third party having acquired the property subsequently can only prevail, if he or she can prove having done so in 'good faith'. Procedurally, third parties cannot intervene in the defendant's trial, but must pursue their property claims in a separate proceeding. Similarly, victims will be referred to the Justice Department's Forfeiture Fund for their compensation claims;

(iv) The 'relaxation of proof' principle: with regard to the connection between criminal activity and the proceeds. It should be noted that it entails a relaxation of the standard and method of proof, but not shifting the burden of proof to the defendant. Thus, the prosecution, who carries
the burden of proof that the property in question is subject to forfeiture, can do so by a demonstration that the property was acquired during the time period the crime was committed or within a reasonable time thereafter, and there was no likely source for its acquisition other than revenue from the violation of the drugs laws. If these elements can be established (by a preponderance of evidence), the judge or jury may draw a 'permissible inference' that the property in fact represents illicit proceeds. Walther indicates that in American evidence law, this principle is known as the 'bursting bubble' principle - because the defendant can make the 'bubble burst' by coming forward with some evidence making a legitimate source plausible. Then the presumption disappears, or 'bursts', and the case must be treated as if such a presumption has never existed;

(v) The 'freezing principle': it gives the law enforcement broad powers to secure the availability of the 'suspect' property by way of a restraining order or injunction when formal proceedings are commenced, i.e. when an indictment or information is filed with the court, and, often more importantly, by way of a temporary restraining order even before that time. To secure such a temporary restraining order, the prosecution need demonstrate to the judge that there is 'probable cause to believe that the property in question would, in the event of conviction, be subject to forfeiture (21 USC. sec. 853 (e)). This is quite similar to the English restraint order;

(vi) The 'tainted property' principle: it provides for civil forfeiture of illicit proceeds as 'tainted' where criminal prosecution is not feasible or where a conviction can otherwise not be obtained.

As far as the differences and distinctions are concerned, with some explanations and comments that have been accompanied with the previous detailed examination of the American forfeiture provisions, there are some major differences between the British confiscation system and the American Laws of forfeiture. These major differences appear to be the following:

-English law has no equivalence of criminal RICO which creates various new criminal offences defined by reference to a 'pattern of racketeering'.

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- English law has no equivalence of the forfeiture of convicted person's entire interest in an 'enterprise' reaching interests which are not derived from a criminal source.

- Other than in the context of customs' enforcement and a few other exceptional cases, English law makes little use of confiscation powers without a conviction for a criminal offence, whereas American law, especially in recent years, has made extensive use of 'civil forfeiture' which does not require any criminal proceedings.

- American law goes considerably further than English law in permitting confiscation/forfeiture without any hearing, simply by administrative action.

In addition to these general and major distinctions, there are many other differences which can be located, some of the other distinctive differences are:

- The unitary system of government: it is the British unitary system which may avoid many of the complications encountered in federations such as the clash or overlap of federal and state legislation, the creation of multiple levels of jurisdiction involving federal, state and local law enforcement agencies, and the problem of state and federal courts. The federal structures tend to cause fragmentation as the result of the division of power and responsibility between the various, horizontal levels of government. When the effect of this horizontal division of power is combined with the vertical division of power between the Parliament, the executive and the legislature, found in most democratic systems, a complex structure is created which is very difficult to move in any particular direction as no one part of it has sufficient power.

- Unlike the English value-based system where the government must be able to collect on the value judgement, and requires considerable post-forfeiture work in the investigation and tracing of assets belonging to the convicted defendant, the United States adopts a property confiscation system which require less
investigation because the property to be forfeited has already been identified at the outset of the criminal action.

Although the United States has generally adopted a property confiscation system, as opposed to a value confiscation system, it provides authority to secure money judgements of forfeiture and to forfeit substitute assets in criminal proceedings against defendants charged with drug trafficking, money laundering, or racketeering offences. It should be noted, however, that this authority extends only to criminal forfeiture. No civil statute provides for the forfeiture of substitute assets, presumably because civil forfeiture is premised on the theory that the subject property itself is 'guilty' of the underlying criminal offence. Thus, the issue of enacting a property or value confiscation system is tied to the broader question of whether the forfeiture system provides for civil or criminal forfeiture.

-Under the criminal forfeiture law (21 USC. 853(d)), a rebuttable presumption is created that any property belonging to a person convicted of a drug felony is forfeitable if the prosecution establishes that: (1) such property is acquired by such person during the period of the violation or within a reasonable time after such period, and (2) there is no likely source for such property other than drug trafficking.

Under United States law, drug traffickers who carry out their offences over many years can be charged with conspiracy to violate the drug laws. All drug income generated within the span of the conspiracy is subject to forfeiture. The British system in this regard applies a more explicit assumption, providing for the forfeiture of all earnings generated by a defendant within a statutory-defined period (six years) prior to the date of the offence which he stands convicted.

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102The forfeiture of substitute assets (as authorised by 21 U. S. C. 853(p), 18 U. S. C. 1963 (P), and 18 U. S. C. 982) allows the United States to reach alternatives property of a convicted defendant if he or she has dissipated or alienated the actual proceeds or instrumentalities of the crime or transferred them beyond the jurisdiction of the court.
Under the American civil forfeiture system, the government must first establish probable cause to believe that the property in question is forfeitable. Each claimant must then establish a legally viable defence by a preponderance of the evidence. In criminal forfeiture, there is a rebuttable presumption in favour of the government that certain proceeds are forfeitable drug wealth.

The legal fiction in civil proceedings, upon which *in rem* actions rest provide that the property itself is guilty of the forfeitable offence, and is therefore the defendant in the suit. And although in recent years, and as mentioned in this chapter, Congress attempted to incorporate 'innocent owner' defences into recent civil forfeiture statutes, the innocence of the property's owner will have no bearing on civil forfeitability of his or her property. This is of course contrary to the situation in the criminal proceedings which is analogous to the British confiscation system where conviction always preceded the confiscation or forfeiture decisions of all normal cases.\(^{103}\)

In determining the British position from the American system, and as mentioned in chapter one, Mrs Thatcher's Government rejected the House of Commons Home Affairs Select Committee's recommendation concerning the importance of providing the civil and criminal law with more powers of seizures and forfeiture of assets connected with drug traffic in accordance with the American practice. The issue came up in 1986 during the debates on the Drug Trafficking Offences Bill. Speaking on the Second Reading, Mr. David Mellor, then Parliamentary Under-Secretary for the Home Office said:

'The reason why we decided not to adopt the American example of civil proceedings was that we did not think that it would fit readily into the British system. The power is draconian and would have appeared out of sorts with anything we have hitherto done because it gives authorities powers to seize property, if they have reasonable suspicion that it has been acquired illegally. Then the individual who claims to be the owner is put to proof. Without having been convicted of anything, it is up to him to establish that the property was lawfully acquired' (Hansard, HM, 1986).

\(^{103}\) Confiscation without conviction is only permitted in cases where the defendant is absconded.
Chapter Five

The American Forfeiture System

On the 'Third Reading' of the Drug Trafficking Offences Bill, Mr Mellor returned to the issue:

'The civil forfeiture procedure, though effective in America is difficult for us to swallow. As links across the Atlantic have proved to be so controversial these days I hope that we have not taken hook, line and sinker the American model but that we have used the American experience to spur us on with a British answer to the problems.'

The answer of the British government then is conclusive. That confiscation where there is no criminal conviction is unacceptable because it is fundamentally objectionable. Calling the process 'civil' does not alter the fact that it is in reality penal and, being effectively a penal process, it should not in principle be permitted without the safeguards associated with a criminal proceedings.

Lastly, forfeiture in the United States differs from forfeiture in most other parts of the world. The major difference is that the United States advocates civil forfeiture, while most other countries permit only criminal forfeiture. The power to apply any of the two systems (civil or criminal) or both, which are the most common in United States, makes any attempt to compare it with the British single confiscation system quite difficult, confusing, and inconsistent.

The American forfeiture system was one of two main references to those who proposed the confiscation theory for the British Government, beside the Canadian confiscation system. It has been influential and helped to determine some important provisions of the DTOA 1986. But in spite of the defects or the critiques addressed to the British confiscation system, the British legislator is wise in not adopting the powers of the American civil forfeiture. The American forfeiture laws seems to be a reaction to problems of organised crime and drug trafficking on a very large scale. The Hodgson Committee said: 'Britain has both (organised crime and drug trafficking), but not on the same scale' (p. 36). Whether organised crime or drug trafficking offences is or is not on the increase in Britain, no-one seriously suggests that it is anything like that in the United States, notably in the form of the mafia. Dorn et al (1992) asserted that there is no mafia, no cartel organising the market overall, rather, a large number of small organisations operate fairly autonomously of each other in a manner that
may be described as 'disorganised crime' (p. 202). This issue is also consistent with data shown previously in chapter three.

The reach and scope of the definitions and powers provided under the American criminal and civil forfeiture laws are clear indicators that they are established to strike at the economic base of two of the main problems facing the American law enforcement: organised crime and major drug trafficking offences. Supporting and strengthening these laws by the American government is part of its strategy in the so-called 'war on drugs'. The 'war on drugs', however, must not be used as a pretext for weakening the traditional protections of individual and property rights. If the American federal government is adopting the legal precept which says 'Necessity has (or knows) no law' *necessitas facit lici
tum quod alias non est licitum*, then one can expect that such adoption is supposed to be for a limited period of time to deal with certain unusual problem(s), not as a general rule for a fluctuated kind of problem. If there is a possibility of abuse in the enforcement of these excessive powers by law enforcement agencies, no one will be able to measure the extent of the subsequent destructive consequences and impact upon the rights of citizens and the trust between people and law enforcement agencies. This means that compliance with the common criminal standards is the only protection by which any abuses can be avoided. Adopting striking powers requires rational justifications not only for having such powers but also to justify the ways of enforcement. The clamour about the civil forfeiture law is a clear indicator that either the link between the underpinning principles of the system and the practical enforcement by the law enforcement agencies is lost, or the purposes are re-directed to serve irregular interests. Marrero, (1993), for example indicated that the main purpose of American forfeiture laws was the protection of the federal fisc, not criminal law enforcement. Hyde (1995) revealed that Units are apt to suffer pressure to make bigger and bigger seizures to ease other financial burdens within the seizures as part of the police budget organisation. Zander (1989) pointed out that there are known cases where police authorities and even politicians have included projected future seizures as part of the police budget. Accordingly, if 'the end justifies the means' is the underpinning philosophy of civil forfeiture law and the threat posed by drug trafficking has been used to justify the means that infringe individual liberties then the end of civil forfeiture law must be examined. If the system produces
more mischief than it prevents then it loses its justification (Bean, 1981, p. 36). Accordingly, the subsequent chorus of resentments and continuous allegations of injustice incidents since the enactment of the American forfeiture systems will make the law lose its justification and credibility, not only to the public but also to the law enforcement agencies who are part of the same society.
CHAPTER SIX

THE KUWAITI AND THE EGYPTIAN
CONFISCATION SYSTEMS

6.1. INTRODUCTION

This chapter seeks to realise aim 5 of main aim 1 as set out in the Introduction i.e. to examine the Kuwaiti and the Egyptian asset confiscation systems and to locate any convergences and discrepancies with the British system (and where it is useful to refer also to the American systems).

Various legislations and subsequent amendments of the confiscation laws in both systems are introduced, specifying wherever possible the rules upon which the original provisions and the amendments are based, and the legal operators, enforcement agencies and institutions involved in, and assigned for, sustaining these rules. The aim is to point out the locations of the main situations which could draw attention to the values embedded in both systems. Such an aim is believed to help with an understanding of the various reasons for having confiscation laws.

The point which is important to re-state, and as stated in the introduction, is that the premise for including the Kuwaiti confiscation system in the context of studying the British confiscation system results from the researcher's national concerns. A critical study of the British system enables a frame of reference to be established in which the Kuwaiti position can be contextualised. In other words, including the Kuwaiti confiscation system as an object of analysis (or even comparison at particular aspects) can act as a warning to any dangers, risks and unreasonable costs that might arise for Kuwait.

The method incorporated to study the Kuwaiti system (including the Egyptian system) is to use various sorts of published and unpublished documents, together with conducted interviews to examine the way the
legal texts related to confiscation are addressed and inscribed into the present socio-legal situation of Kuwait and Egypt.

The chapter consists of two sections. The first section is devoted to a review of the theory and practice of the Kuwaiti confiscation system. The focus will be mainly on the development of the system to include new principles and powers to deal with the proceeds and profits of drug traffickers, the extent of the available powers, and the views of some of those involved in legislating and enforcing the available confiscation powers.

The second section will examine the theory and extent of application of the Egyptian confiscation law provided under Act No. 34 of 1971, amended by Act No. 95 of 1980 in regard to Organising the Imposition of Sequestration\textsuperscript{104} and Securing the People Safety.

It is important to mention here that due to the similarities between the original confiscation provisions provided by the Constitutions and Penal Codes of both countries (Kuwait & Egypt), an examination of these provisions will be confined only to the Kuwaiti system. The similarities between both systems are attributed to the fact that most of the precepts of confiscation laws provided under the Kuwaiti criminal law were extracted from the Egyptian criminal law. Accordingly repetition is not necessary and an examination of the Egyptian confiscation system will be in terms of the above mentioned Act only.

6.2. CONFISCATION LAW IN KUWAIT

6.2.1. Introduction

The renaissance of Kuwait's legal system is relatively new, having started with the enactment of the Judiciary Organisation Act 1959 (Al-Tabtabae, 1994, p. 308). It was part of the development that accompanied the transformation in Kuwait brought about by the discovery of oil, the

\textsuperscript{104}Section 729 of the Civil Code define sequestration as 'handing over a property which has a dispute about its origins and rights to a reliable person who save it and administer it and return it to whoever proved to be his'.

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gaining of independence and the continuous popular demand for participation in running its own affairs.

The legal evolution in Kuwait was preceded by a phase of preparation during which Kuwait partly depended upon foreign expertise. Capable and highly qualified experts were needed to promulgate and codify laws, rules and legal customs prevalent at the time. Following the revocation of the Kuwait-Britain Treaty of 1960, there were increasing calls to establish a basic system that determines the rights and obligations of the ruler (Al-Amir) and the people. This occurred in the wake of the declaration of independence in 1961 and the announcement of the intention to hold general elections for a first constituent assembly in the State. Some Kuwaiti specialists and other experts contribute in drafting the provisions of the Constitution. The Constitution was then issued on the 11th of November 1962. It contained several chapters: the system of government, the fundamental constituents of the Kuwaiti society, public rights and duties, powers (legislative, executive, judicial), and lastly, some basic financial and military affairs.

After the election of the first People's Assembly (Majless Al-Omah) in Kuwait in 1963, the issue of registration was perceived necessary. There had to be rules laid down to regulate and control the legal system (regularisation) on the basis of popular and sound rules, administered once again by specialised national cadres who are also assisted by external legal expertise from different Arab countries. Seeking the assistance of experts, particularly from Egypt, goes back to the strong, cultural and religious relations and bonds, as well as a realisation by the Kuwaiti government that Egypt is one of the advanced countries in the region in regard to legal domain105.

105The two mentioned features dictating the nature of relations between Egypt and Kuwait have established a well grounded justification for recourse to a friendly state like Egypt. In fact, it was the ambition of Kuwait to sustain its relation with it, recreating thus a stronger position in light of increasing challenges of development. A situation which had required from the state to strive for modern and advanced legal progression keep pace with the rapid socio-political and economic growth. Distinctively, the exchange of expertise in between the two states enhanced as a result of existence of what was called the 'Kuwait House' in Egypt at the time. This house played a great role in achieving objectives and requirements taking place for development processes, particularly, in connection with modernising the legal system.
There are many significant similarities in the codification processes and provisions between Egyptian and Kuwaiti’s legal system especially those which tackle the Penal and Drugs law. Actually, the Kuwaiti legislature has adopted similar principals and philosophies regarding the graduation of punishment. Punishment has been established on two premises; the seriousness of the offender and the degree of offence. The provision of article No. 78 of the Kuwaiti Penal law No. 16 for 1960 regarding the question of confiscation, for example, is a similar version of the provision of article No. 30 of the Egyptian Penal law, and also provision of article No. 39 of the Kuwaiti Narcotic Drugs Act No. 74 of 1983 regarding confiscation which corresponds with the provision of No. 42 of the Egyptian Drugs Prevention Act No. 182 for 1960 and some other provisions.

In this section, a detailed review of the confiscation provisions provided under Kuwaiti law is confined to the provisions of the Constitution, criminal law and the Combat of Narcotic Drugs Act No. 74 of 1983 and the subsequent amendments in the Act No. 13 of 1995. But before examining the available powers and defects in dealing with the proceeds of drug trafficking a close look at the nature, character and scope of the common confiscation system in Kuwait will be reviewed.

6.2.2. Confiscation System (The Constitution And The Penal Code)

In regard to the Constitution, the principle law in Kuwait explains the system of the State and the Government, the fundamental constituents of the Kuwaiti society, public rights and duties, the powers of the Head of the State, the fundamental legislative and executive powers (the cabinet, the financial affairs, and the judicial powers). Article 174 of the Constitution provides that

'Either the Amir or one-third of the members of the National Assembly shall have the right to propose the revision of this Constitution by amending or deleting one or more of its provisions or by adding new provisions' (Kuwait Constitution, Article. 174)
In respect to confiscation, the Constitution contains three important articles that must be regarded by government and law enforcement agencies. These three articles are:

'Public property is inviolable and its protection is the duty of every citizen' (Article. 17).

'Private property is inviolable. No one shall be prevented from disposing of his property except within the limits of law. No property shall be expropriated except for the public benefit in the circumstances and manner specified by law, and on condition that just compensation is paid. Inheritance is a right governed by the Islamic Sharia' (Article. 18)

General confiscation of the property 106 of any person shall be prohibited. Confiscation of particular property as a penalty may not be inflicted except by a court judgement in the circumstances specified by law' (Kuwait Constitution, Article. 19).

Traditions of Kuwaiti Constitutions are based upon the continental law and the Islamic shariah. Dr. Gannam in an interview in (1996)107 points out that the origins of some of the provisions of the current Constitution and most of the laws and regulations (the Penal Code, the procedural Code) are mainly extracted from the Egyptian legal system which is also extracted from French law. The historical relations between Egypt and France has had its own impact upon the formation of the legal system in Egypt, which subsequently, extended to other Arab countries in the region. The most distinctive feature of the legal system which has been adopted by the Egyptian and the Kuwaiti governments is that it is a 'written law'. This feature is common to Continental or Latin legal family systems unlike the situation with Common law systems (the Anglo-Saxon legal family).

Zweigert. K & Kotz. H, (1977) affirm some differences between those two legal families by stating

106The exact translation of the things which are confiscable under the Kuwaiti confiscation laws is "monies", but the official translator for the government had translated the term as "property". Al-Gamaz (1996) had defined "property" as everything or anything which has a certain monetary value (cash money, drugs, boats, vehicle etc.), on the other hand, Al-Gannam (1996) refers to General Rules which provide that the confiscation order is only confined to the things that already seized, and this does not include for instance, buildings, real properties or any other immovables.

107This statement is part of a telephone interview with Dr. Gannam a senior lecturer at Law Faculty in Kuwait University (2nd of October, 1996), who explained the recent relevant amendments and interpretations of the Kuwaiti confiscation laws.
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The tradition of the English Common law has been one of gradual development from decision to decision; historically speaking, it is case-law, not enacted law. Common law comes from the court, unlike the Continental law\textsuperscript{108} where it comes from the study. The great jurists of England were judges, on the Continent professors. On the Continent lawyers, faced with a problem, even a new and unforeseen one, they ask what solutions the rule provides, unlike Anglo-Saxon legal systems in England and the United States where lawyers predict how the judge would deal with the problem, given existing decisions. These differences in style run through the whole legal system\ldots \ldots Accordingly, French law dominated most of the Arabs states (p. 66). The authors ended their arguments by saying that 'recently the attitudes of Common law and Continental law have been drawing closer' ((p. 63-75, p. 71).

The second traditional source that the Kuwaiti constitution has derived its legitimacy is the Islamic Shariah. Article 2 of the Kuwaiti constitution states 'The religion of the state is Islam, and the Islamic Shariah shall be a main source of legislation'. This Shariah is a premise that can be a guiding element for evaluating the extent that the confiscation order as witnessed in other countries can establish a consistent theory with the tradition of the Kuwaiti system. What is essential to know is that the Islamic Shariah has its own details that might contradict main premises of the current confiscation systems. It is not possible to go into details about the variations in the system except the ones that can help us in determining the extent that the British confiscation system is in harmony with the tradition that the Kuwaiti constitution relies upon.

A close analysis of the Islamic Shariah, shows that two school of thought regarding the confiscation issue exist. The first is exclusionary where the pecuniary punishments are forbidden on the ground that no guilt can replace the property of a person. This punishment is exercised on the \textit{in personam} and not on the goods. The second is inclusive where the judge can withhold a culprit's property for some time on the ground of

\textsuperscript{108}In summing up the comprehensive examination of the world wide law systems and the origin of grouping the legal systems Zweigert & Kotz stated that 'these groupings primarily for taxonomic purposes, so as to arrange the mass of legal systems in a comprehensible order'. They indicated that many attempts tried to devise grouping those mass legal systems (Arminjon; Nolde; Wolf and many others). The legal ideologies of the Anglo-Saxon, Germanic, Romanistic, and Nordic families are essentially similar, and it is because of other elements in their styles that they must be distinguished. But in general, the world today knows two different 'law types': Latin or Continental legal system which stem from Roman and Germanic law (combine the legal system of most countries of Europe, Latin America, many countries in Middle East and Asia) on one side, and the Anglo-Saxon legal system which the United States, England and some other countries come under on the other side (p. 63-75 ).
deterrence that can lead to repentence. If this is achieved the property will
be given back to him when his repentence becomes clear without passing
such property to the public treasury.

Regarding the nature of the confiscation principles, the Kuwaiti
constitution adopts the view of the Islamic Shariah. The Shariah requires
confiscation to be a principal punishment imposed on the crime, but
mostly it is enforced as a complementary punishment decided by law in
consequence of other penalties. The justification for the confiscation are as
follows:

a) non-payment of the Zakat (a type of Islamic tax applied on
Individual) to the state provides the right to confiscate part of the
offender's property.

b) illegal investments and gains which are obtained from robbery or
theft and the owner is unknown. These can be confiscated to the
Treasury.

c) suspected gains and gifts that are presented to the officials of the
states during the duty appointed for them. The law entitles the
confiscation of half of their properties even those which are gained
in legal means.

In light of these, the confiscation of the proceeds of drug traffickers can be
treated under the category (b).

6.2.2.1. Theoretical Principles
Al-Shinnawi (1988) indicates that the general power of confiscation is
abolished in most of the developed and developing legislations (referring
to Article 19 of the Kuwaiti Constitution) because it prejudices the social
position of the convicted person and makes his repetition of the crime
more likely. This is apart from the fact that the consequences thereof affect
his children and spouse. This is said to be a state of affairs which is
inconsistent with the spirit of justice. However, particular or 'speciale'
confiscation as originally called by the French legal system (Merle. R &
Vitu. A, 1978), has been permitted by most legal systems, provided that it
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should be made by a court judgement and only in the events set forth by the law.

Section 78 of the Penal Code consists of two paragraphs: the first indicates that the judge may (discretionary power) order the confiscation of the seized things which have been used or intended to be used in committing the crime and their yields if the judge is sentencing for a felony (a serious crime) or a deliberate misdemeanour and without prejudice to the rights of bona fide third parties. The second paragraph provides that if the mere possession of the mentioned seized things is an offence, then the judge shall (obligatory) order the confiscation and irrespective to the rights of bona fide third parties (Department of Fatwa and Tashrea, p. 33).

Confiscation procedures are considered to be complementary procedures to the principle sentences (Al-Shinnawi, 1988, p. 222). Section 66 of the Kuwaiti Penal Code No. 16 of 1960 lists clearly the types of consequential and complementary sanctions. Section 67 specifies the events where sanctions are to be consequential or complementary. Reviewing, in brief, the differences between the consequential and the complementary procedures is important because they enclose the philosophy and principles of the current application of confiscation orders.

6.2.2.2. The Consequential Sanctions:
The consequential procedure comes from committing certain crimes irrespective to whether the principle penalty has been executed or not and even an Amiri pardon\textsuperscript{109} does not affect it. (sect. 239 of Criminal Procedures Act).

Accordingly, it is mandatory in any sentence of a criminal offence to entail deprivation of certain rights which are listed under section 68 of the Penal Code. These rights are not recoverable unless the defendant has been exonerated in accordance with the procedure of law. These rights are: (a) occupying public office or acting as contractor or supplier to the government; (b) running for membership of public councils or other

\textsuperscript{109}Article 75 of the Constitution provides that "The Amir (the president of the State) may, by decree, grant a pardon or commute a sentence. However, general amnesty shall not be granted except by a law and then only in respect of offences committed prior to the proposal of the amnesty".
bodies, or appointment in one of them as a member; and (c) voting in elections of members of councils or public organisations.

Al-Thahabi (1978) indicates that a confiscation order is not a consequential sanction by virtue of its nature and its direct relation to the offence (p. 142).

6.2.2.3. The Complementary Sanctions

Section 66 of the Penal Code determines the complementary penalties by providing a list of eight procedures. Confiscation is one of these procedures. The Penal Code stated very clearly that all these procedures are punishments. Section 67 explains that complementary penalties depend upon their announcement by the judge, whether the law has made it mandatory or discretionary.

In most cases, the term 'confiscation' is meant to be the special confiscation which is devoted to the transfer of ownership of a certain thing to the state without compensation (Al-Thahabi, 1978 & Al-Gamaz, 1985). Along the same line, Al-Shinnawi defines confiscation as a deprivation of the ownership of a property from beneath the hand of its owner, against his will, and add it to the State’s Finance and without any compensation (Al-Shinnawi, 1988, p. 222).

The first paragraph of section 78 of the Penal Code states that confiscation is discretionary and the second paragraph states that it could be for other cases as mandatory (The Penal Codes and the Supplementary Codes, 1993, p. 7-33).

Section 39 of the Narcotic Drugs Act No. 74 of 1983 and section 49 of the subsequent Act No. 48 of 1987 provide that 'in all events, the judgement or the sentence should include a confiscation order for the seized drugs, plants (which are stated in schedule 5 of this Act), used instrumentalities, appliances, vessels and seized vehicles and without prejudicing the rights of those who are acting in a good faith'. This means that confiscation-related drug misuse, in all cases, is a mandatory sanction (Ibid., p. 179).
6.2.2.3.1. Mandatory Confiscation:
Al-Gamaz (1985) mentions that in accordance with specific provisions of the first paragraph of section 39 of the Narcotic Drugs Act 1983 and pursuant to the provision of second paragraph of section 78 of Penal Code 1960, confiscation of illegal narcotic substances is deemed to be one of the precautionary procedures because manufacturing, possessing or dealing with them is an offence by itself which entails direct implementation of confiscation. Thereupon, confiscation is enforced by an administrative action even if the final sentence did not mention it. This, however, should not be taken to mean that confiscation is restricted to conviction, but it is mandatory whether there is conviction or not, whether the criminal proceedings has been ceased due to the death of the accused; prescription (the invalidation of the sanction by lapse of time) or for any other reasons. Confiscation is mandatory and there is no need for it to be announced or stated in the sentence as long as there are some drugs which have been seized. Lacking the knowledge of who is the owner does not affect these proceedings (p. 345-349).

Al-Shinnawi (1988) confirms that 'mandatory confiscation is the one which the judge should order along with or in addition to the original sanction. For this reason it is regarded as a complementary sanction in all events' (p. 224). Al-Shinnawi also indicates that mandatory confiscation applies only in two exceptional cases:

(i) In the event of the things that are used in the crime or that result from the crime, where the mere possession of or dealing with such things is not, by itself, an offence. This is similar to discretionary cases, but the whole idea is that the legislator requires this punishment to be imposed in accordance with the legal provisions dealing with such crimes in order to achieve more deterrence. For this reason, confiscation in such cases is purely penal, and should be imposed against the convicted person alone (the second paragraph of section 39, Act No. 74 of 1983).

(ii) Where the seized things are of the type whose manufacture, possession or dealing with is regarded as an offence per se then a confiscation order must be imposed in the sentence. This provision
also provides that advanced and actual seizures are important for confiscation orders (sect. 78 (2) of the Penal Code 1960).

Apart from these two exceptional cases, the conditions of confiscation would be different to the point where this could be considered as a precautionary and a discretionary measure rather than a pure punishment in the strict sense of the word (Al-Shinnawi, 1988, (p. 226) and Al-Gamaz 1985, (p. 346)). Consequently, the imposition of a confiscation order does not need to be preceded by an original sanction, and the court must impose the order if possession or dealing with a certain thing is an offence even if the court has acquitted the defendant. Furthermore, the court should order the confiscation of the seized things\footnote{The legislator and even the writers in this area are always using the term 'thing' or 'things' which often reflects the ambiguity in determining what the 'things' actually are, or what comes under it. Unlike the English system where the definition of the things was quite clear (see the definition of property under the DTA 1994).} even if ownership of such things has passed to another party (inheritors or others) prior to conviction, or where the confiscation order may infringe upon the rights of third party who act in good faith (sect. 39 (1) of the Narcotics Act, No. 74, 1983 & sect. 78 of the Penal Code, No. 16, 1960).

Al-Gamaz (1985) criticises the latter provision (referring to the second paragraph of sect. 78 of the Penal Code), by saying that it could cause damage(s) to the person who acts in good faith. Confiscation should not be reverted to by courts where the possession of things is only an offence to the person whose in his possession they are found, while they are actually owned by another party. Therefore, they should return to their owner. While this could be conceivable, it seems that the legislator in drafting this provision has depended upon the guarantees and protection provided in Article 18 of the constitution\footnote{Article 18 of the Constitution provides that "Private property is inviolable. No one shall be prevented from disposing of his property except within the limits of law. No property shall be expropriated except for the public benefit in the circumstances and manner specified by law, and on condition that just compensation is paid".} and by the main provision of confiscation under Act No. 74 of 1983 and Act No. 49 of 1987 where both provide that the imposition of confiscation order should not prejudice the rights of those who are acting in a good faith (p. 347).
6.2.2.3.2. Discretionary Confiscation:
The first paragraph of section 78 of the Penal Code provides that the judge may consider confiscation of the seized things but only when he imposes a criminal or a deliberate misdemeanour sanction. This means that confiscation is a discretionary procedure. Al-Shinnawi (1988) comments that such confiscation requires certain conditions:

(a) The defendant must be sentenced with a principle sanction for a criminal offence or for a deliberate misdemeanour. Accordingly, confiscation is not permitted if the sentence is acquittal, or the committed offence is not deliberate.

(b) The materials or drugs subjected to confiscation should have been seized either because they are used in the committal of the offence or could have been used in the committal thereof, or is one of the things which resulted from the committal of the offence. Therefore, the court should not confiscate things that are irrelevant to the offence. Moreover, confiscation should not be permitted for things that are not seized. In cases where there are things that are sought to be seized, section 77 of the Procedures Act should be implemented, which gives the investigator the right to issue an order to the person in possession of such things to present those things at such time and place as are specified in the order. If this is not affected, the investigator may conduct a search and take any of the measures within the jurisdiction of the public power to oblige such person to do so.

(c) When a confiscation order is imposed, care should be taken to observe the rights of the third party who is acting in a good faith. In accordance with section 180 of Procedures Act, the court which renders the sentence in this matter should impose its sentence in respect of the demands of the litigant parties in connection with the things that have been impounded. The judge should refer the dispute to a civil court for hearing or should dispose of the impounded things by means of an independent and separate decision, such as an order of delivery of things, or an order to confiscate the impounded things for the benefit of the government or to destroy them.
(d) Discretionary confiscation is of an absolute penal character. Accordingly, imposing confiscation should take into consideration the personal aspect of the matter (the sanction is personal). This means that the sanction may be imposed only against the defendant or the convicted person (p. 347).

6.2.3. **Act No. 13 of 1995 (Confiscation of Assets)**

Powers of investigating, seizing and confiscating the proceeds and profits of drug traffickers similar to the British, American and the Egyptian criminal or civil laws are not available in Kuwaiti law before the issuance of Act No. 13 of 1995 which amended Act No. 74 of 1983 in regard to the Combat of Narcotics Drugs.

Before the issuance of this latest Act (No. 13 of 1995), and as explained above, confiscation was confined only to the narcotic substances and compositions or seized plants mentioned in a special schedule. The law also provides that tools, equipment and containers utilised as well as the seizing of the means of transportation used in committing the offence can be confiscated (Section 39, Act No. 74, 1984).

Act No. 13 of 1995 amended some provisions and added some new paragraphs to Act No. 74 of 1983. The two paragraphs of section 3 Act No. 13 of 1995 are added to section 39 of Act No. 74. These two paragraph provide that:

- The court also shall order the confiscation of properties proved to be acquired from committing the crimes provided for in this Act; and

- the court, upon request from the Public Prosecutor may order to restrain the accused from disposing of all of his properties or part thereof until the court makes its final judgement in the criminal proceeding' (Section 3, Act No. 13, 1995).

Because there is no comprehensive explanation for the purpose of such an addition in the explanatory memorandum of this Act, and because there are no studies or researches on the new confiscation measures, several interviews were conducted to establish an explanation for those two paragraphs. The aim was to identify the rationale behind such a new additions, to locate the principal aims the legislature seeks to accomplish,
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and to determine the arrangements taken by government and in particular the police and prosecution to enforce these new provisions.

The legal expert in the Kuwaiti Parliament (pers. communication, 12 Feb. 1995) has commented on these particular additions by saying that,

'properties acquired from an offence is the outcome of an offence. It is impossible for the person, as long as the act itself is impermissible, to benefit from outcome of such act, and so, there should be confiscation. This is a logical obvious principle'.

He also points out that this addition is a consequence of the awareness of the Kuwaiti legislature to this new aspect of drug trafficking offences and the subsequent international concerns by stating:

'The Kuwaiti legislator has perceived the importance of extending the provision of confiscation to this procedure, therefore he added it. He might also realised the same through the development and exacerbation of drugs problems and their conversion into organised crimes. This is besides the fact that confiscation of illegal proceeds has become a main objective of a world-wide strategy against illicit drug trafficking offences'.

In his explanation for this new confiscation provision, he asserts that confiscating the proceeds, as provided in the text, is obligatory on every outcome of any drug trafficking offences determined by the law. This means that the same procedures are provided for narcotic substances mentioned in the first paragraph of the section.

The legal counsellor in the Drugs Prosecution Office at the Ministry of Justice in an interview held in his office on 13 February 1995, affirms that the new addition to the provision of section 39 of the Drugs Act entitles the court to confiscate all the properties acquired from drugs trafficking offences. The meaning of 'properties' include everything having monetary value whether movable or immovable.

Regarding the actual application of this new provisions and the current level drug trafficking offences in Kuwait, Al-Athari112 (pers. communication, 1996), thinks that there is no serious drug trafficking cases. He states:

'There are a limited individual activities which are far from being described as an organised criminal gangs. Most of the drug

112 Mr. Al-Athari is one of few Kuwaiti lawyers specialised in drug cases.
trafficking offences, however, in Kuwait are accidental and are not permanent'.

The recorded numbers of drug trafficking cases provided by the Kuwaiti Ministry of Interior give a different picture. The figures included in table 6.1 below provide very clearly that all forms of illegal possession and dealings are escalating. The number of drug cases (illegal possession for personal use and illegal trafficking offences) increased from 101 cases in 1980 to near 400 in 1995. The table reveals also that the number of drug trafficking offences is not 'limited to accidental activities', as Mr. Al-Athari indicated. From 1986 onwards the number of drug trafficking cases is higher than the number of personal taking cases. Taking 1986 as the median year, the number of drug trafficking cases increase from 222 in 1987 to 266 in 1995 (a total increase of 44 cases). However, an increase in the number of personal taking had jumped from 14 cases in 1987 to 128 in 1995 (the amount of increase is 114 cases).

Table (6.1) shows the number of cases, defendants, drug trafficking, and illegal taking during the period 1980-1995. The numbers of 1990 is not included due to the invasion crisis.

<table>
<thead>
<tr>
<th>Year</th>
<th>No. Cases</th>
<th>No. Defendants</th>
<th>Trafficking</th>
<th>Taking</th>
</tr>
</thead>
<tbody>
<tr>
<td>1980</td>
<td>101</td>
<td>206</td>
<td>75</td>
<td>26</td>
</tr>
<tr>
<td>1981</td>
<td>111</td>
<td>215</td>
<td>56</td>
<td>55</td>
</tr>
<tr>
<td>1982</td>
<td>144</td>
<td>270</td>
<td>60</td>
<td>84</td>
</tr>
<tr>
<td>1983</td>
<td>231</td>
<td>384</td>
<td>110</td>
<td>121</td>
</tr>
<tr>
<td>1984</td>
<td>234</td>
<td>350</td>
<td>86</td>
<td>148</td>
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<tr>
<td>1985</td>
<td>154</td>
<td>236</td>
<td>75</td>
<td>79</td>
</tr>
<tr>
<td>1986</td>
<td>221</td>
<td>342</td>
<td>198</td>
<td>22</td>
</tr>
<tr>
<td>1987</td>
<td>236</td>
<td>330</td>
<td>222</td>
<td>14</td>
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<tr>
<td>1988</td>
<td>168</td>
<td>313</td>
<td>143</td>
<td>25</td>
</tr>
<tr>
<td>1989</td>
<td>173</td>
<td>312</td>
<td>143</td>
<td>30</td>
</tr>
<tr>
<td>1991</td>
<td>82</td>
<td>177</td>
<td>66</td>
<td>16</td>
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<tr>
<td>1992</td>
<td>238</td>
<td>375</td>
<td>199</td>
<td>39</td>
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<tr>
<td>1993</td>
<td>348</td>
<td>744</td>
<td>279</td>
<td>69</td>
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<tr>
<td>1994</td>
<td>335</td>
<td>565</td>
<td>220</td>
<td>115</td>
</tr>
<tr>
<td>1995</td>
<td>394</td>
<td>664</td>
<td>266</td>
<td>128</td>
</tr>
</tbody>
</table>

Al-Athari also indicated that:

'We suffer tragedies that have nothing to do at all with what the legislator means of the provisions under Drugs Act. Act No. 13 of 1995 has unreasonably escalated all the penalties and included life imprisonment and death penalty for certain drug trafficking offences. The legislator has raised the penalty of possession for personal use to 10 years imprisonment. This is too much'.

This statement indicates that there is a different perspective beside that of which the government hold. It shows that there are those who do not believe that the drug trafficking problem in Kuwait needs to be dealt with by increasing penalties. The statement implies that the nature of the Kuwaiti culture, traditions and relationships require looking at a variety of other social and practical solutions other than the deprivation of liberty.
This is quite similar to the negative impressions Derek Hodgson, the chairman of Hodgson Committee, has about the provisions of the DTOA 1986. The British Government has set its face against some of the proposed principles aimed at providing alternatives and justifications that should be reflected as a matter of mitigation in any sentence of imprisonment. The Committee pointed out that the aim must be to construct a system of redress that is adequate to obviate, as much as possible, the necessity to resort to imprisonment (Hodgson Report, 1984, p. 7).

The statement also implies that the new governmental sentencing policy does not reflect a response to a serious drug trafficking problem as much as to reflect certain regional or international conditions and developments which lead to some unjustified obligations and pressures upon national laws. The ratification of the United Nation Convention (1988) and the subsequent Arabic Convention Against Illicit Trafficking In Narcotics Drugs And Psychotropic Substances 1994 by the Kuwaiti Government is a natural consequence of being a member state and of the attempts and conditions which subsequently entail such new powers to be inserted within the national laws. The argument of Al-Athari implies that the actual problem is not in the addition of a confiscation order because it is a discretionary power which needs a long period of time to be enforced by law enforcement agencies, but it is in the increase of the prison sentences (life imprisonment and the death penalty for traffickers and 10 years imprisonment for mere possession). These penalties, as Al-Athari stated: 'were originally designed for a country that not only lost the war on drugs but even failed to control and restrict the developing epidemic aspect of their drug problem. In Kuwait, however, the problem of drugs is under control even before the introduction of these new additions'. In responding to such a statement, table (6.1) provide two pieces of evidence: (a) the number of drug trafficking cases is escalating (from 75 cases in 1985 to 266 in 1995) and (b) the number of drug trafficking cases were higher than the number of illegal drug taking case which indicate that the greater part of the drug problem in Kuwait is related to illegal drug trafficking. This may means that the drug trafficking problem in Kuwait is part of a bigger organised criminal network in the area which demand more efficient protection powers and qualified law enforcement agencies.
The scandal of the Bank of Credit and Commerce International BCCI\(^{113}\) (in United Arab Emirates) had led most of the states in the area to review their laws and look for new laws and regulations which provide them with more protections against any similar problems.

The Riyadh Seminar on Economic Crimes held in Saudi Arabia in October 1993 is another example of how different forces are determined to extend the recognition of the United Nation Convention on confiscation of the proceeds of drug traffickers to the Arabian Gulf's states because they are considered as the most important financial centres in the world\(^{114}\).

On the other hand, Al-Athari adds that law enforcement agencies must at least realise differences between the various types of drug traffickers. i.e. between professional traffickers, street dealers, and the accidental ones. The Narcotic Drugs Act deals with the nature and type of the offence and not with offenders' conditions. This may entail that professional and accidental offenders may be charged with the same offence and receive the same penalty\(^{115}\). He exemplifies this by saying

> 'If we review the definition of trafficker in the Commerce Code, we shall find that it stipulates that the 'trafficker' is the person who considers the sale of narcotic substance as ordinary profession for him. Accordingly, if someone acquires a prohibited substance and sells it accidentally, this cannot be considered as trafficking'.

This suggests that drug traffickers in Kuwait are of a different type and level, and unless one recognises this fact, the court will always misjudge the defendants and then impose disproportionate sanctions. Moreover, the social relations, customs and traditions of the Kuwaiti society play an important part in the drug problem, in the awareness of the definitions, principles and all the social aspects and its potential positive and negative elements is a key factor in dealing with drugs offences. Al-Athari asserts that such essential awareness does not exist at present among the judiciary and law enforcement agencies in Kuwait. And the Narcotic Drugs Act

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\(^{113}\)The Bank was accused of involvement in money laundry and fraud crimes in which USA played a major part in the subsequent investigations and prosecution.  
\(^{114}\)This Seminar was organised by SAMA (The Saudi Arabian Monetary Agency), GCC (Gulf Co-operation Council, and FATF (Financial Action Task Force).  
\(^{115}\)The Kuwaiti law is a written law, which means that the judges must first identify the offence which must be conform with one of particular offences provided in the law, and then apply the attached penalty to this offence. The only discretionary power the judges have is in choosing between a minimum to a maximum penalty.
amended by the 1995 Act is intended to fight the real professional drug traffickers whose number does not really exceed 1% of the total drug trafficking offences.

With regard to confiscation orders, Al-Athari mentions that the court usually orders the confiscation of the seized materials and properties acquired from the offence, and the properties that have been seized at the time of the arrest and in the scene of the crime. This means that confiscation is provided only for the seized illegal things.

The new confiscation provisions which empowered the court to confiscate the proceeds of crime did not encounter any official or real opposition or academic analysis. This is due maybe to the lack of experience and because people have not yet experienced its effects. Where the British confiscation system is mostly a consequence of actual drug trafficking incidents (the Julia case), the situation in Kuwait is different. The new confiscation provisions have been inserted into the system without preceding incidents or unusual cases.

The last contact with the Drugs Prosecution Department in the Ministry of Justice, the Drugs Department in the Ministry of Interior, and the Ministry of Finance was on 15th of September 1997. They confirmed that the government did not yet establish any financial investigative systems to execute the new confiscation provisions by determining the responsibilities and jurisdiction of law enforcement agencies in regard to the enforcement of confiscation proceedings. The Act provides the powers of seizing drugs and assets, and empowers the court with confiscation orders, but it did not explain how, when and who is responsible for its implementation.

The country, after the Gulf war, has witnessed several outrageous transgressions on public monies and some embezzlement cases which have dominated the attention of the mass media and even the legislative authority. Several Parliamentary committees were established to investigate such crimes. Act No. 1 of 1993 was one of the solutions provided by the Parliament and governmental committees for such crimes. The Parliament and the public, in general, are interested in following the proceedings of these cases and their investigations. The
punishments provided under this Act include an obligatory complementary 'punishments' (suspension from job, returning the same amount of money, fine of double the stolen embezzled public money.

The new confiscation provision under the Narcotic Drugs Act 1983 amended by the Act No. 13 of 1995 did not stimulate any criticism mainly because of two reasons: (a) the anger of people over those who committed the crimes may have prevented them from questioning the confiscation provisions in 1995 and (b) the confiscation of proceeds is quite similar to the obligatory complementary punishments provided under The Protection of Public Money Act 1993. Section 11 & 12 provide that benefiting from embezzlement is also a crime. All the profits are included within the return of the amounts of money or properties of the state or within the double fine which is equal to the amount of the stolen money.

Moreover, the country has not witnessed yet any conflict in dealing with the confiscation of assets and profits of drug trafficking offences. All the drug trafficking cases which were dealt with by courts or police did not yet require financial tracing nor showed any interest in seizing properties which might be proved to be related to drug trafficking offences.

The confiscation of proceeds and profits as provided by the Narcotic Drugs Act will not be efficient simply because it lacks a detailed provisions that cover all the necessary procedures needed for a successful implementation. Without realising, for instance, the most important supportive provisions such as the production order, the restraint order, and seizing provisions, the confiscation system will be counter-productive.

6.2.4. United Nation Convention Against Illicit Trafficking In Narcotics Drugs And Psychotropic Substances 1988 (Vienna)

There are a vast number of official reports and correspondences between governmental Ministries\textsuperscript{116} and legislative committees concerning the

\textsuperscript{116}Copies of most of the correspondences between Ministries and legislative Committees were collected from different resources (Ministry of Interior, Ministry of Justice, Ministry of
ratification of this Convention. Though most of the correspondents advocate ratification, some reservations about particular articles in the Convention have prevented the government from proceeding in ratifying it. The confiscation provisions provided under this Convention have been accepted and reservations are confined to other articles, like for instance, the extradition's provisions under article six and eleven. In what follows is a review of some of the correspondents and some of views and disputes about confiscation procedures provided under article five.

A letter from the Office of International Relations at the Ministry of Justice, declares that confiscation provisions of the United Nation Convention complements national law. It asserted that depriving the illicit gains of drug traffickers is one of the objectives intended to be achieved by the Convention. It is considered also as an international goal and a great advantage for the international community, and the state should persist in achieving it (Ministry of Justice, 1993).

Another letter from the Public Prosecutor forwarded to the Under Secretary, Ministry of Interior, indicates that article five of the Convention, with some exceptions, does not contradict the basic confiscation system provided for in the national laws. There is no harm in taking the measures and procedures recommended in articles 2, 3, and 4 as long as they shall not be taken without certain guidelines for law enforcement agencies within the limits permitted by procedural rules applicable in the state. The public prosecutor raises a reservation against section five of article five and particularly subsection (B) (i) which provides:

> 'When acting on the request of another Party in accordance with this article, a Party may give special consideration to concluding agreements on:

> (i) Contributing the value of such proceeds and any property, or funds derived from the sale of such proceeds or property, or a substantial part thereof, to intergovernmental bodies specialising in the fight against illicit traffic in and abuse of narcotic drugs and psychotropic substances;

The public prosecutor believes that it is necessary to have a reservation against such a paragraph because selling narcotics and psychotropic
substances resulting from the offences or sharing the same, which are practically prohibited intoxicant, is in conflict with the Islamic Sharia and Constitution which prohibit such patterns of action (Ministry of Justice, 1989).

It seems that the public prosecutor has been confused. Selling confiscated drugs or alcohol and contributing the yielded money to certain legal institutions is indeed prohibited in Islam, but alcohol and drugs are not included under this provision. The 'proceeds' under article 1 of this Convention is defined as 'any monies (properties) which are obtained from or acquired in direct or indirect way from committing one of the offences listed in section (1) of article 3'.

Most of the sources that have been contacted in this regard asserted that a complete ratification will take place in the near future. The final point is that the preceding confiscation provisions under the Narcotics Drugs Act and the reservation against certain articles of this Convention need to be examined in-depth. In determining the actual need for such provisions in dealing with domestic, regional, and international drug trafficking offences, the authorities must take into consideration the provisions of the Constitution which protect the rights of the people, and prevents them from being at risk by a misuse or in going too far in applying certain provisions by the law enforcement agencies, whilst at the same time providing them with sufficient and efficient powers to deal with the proceeds of drug trafficking offences.

6.2.5. The Arabic Convention Against Illicit Trafficking In Narcotics Drugs And Psychotropic Substances 1994 (Tunisia)

Kuwait has ratified this Convention in 1994. Ratification is evidence that Kuwait is supporting the new international and regional trends in combating drug trafficking offences and the confiscation provisions provided under this Convention which are almost the same as the United Nation Convention against illicit trafficking of 1988. The Kuwaiti government must be very careful in implementing any of the provisions provided under this Convention which has no counterpart in domestic law. At the current time, there is no clear confiscation domestic system
that deals with tracing, seizing, and confiscating the proceeds of drug trafficking offence that is supported by laws and powers for enforcement. In such a situation it is not recommended to ratify regional or international systems before having a system that is able to deal efficiently with any inquiries such as reciprocity.

By reviewing the articles of the Convention, and comparing its provisions with the aforementioned United Nation Convention, it has been found that the Arabic Convention has adopted the exact confiscation procedures stipulated by the United Nations Convention.

Al-Gamaz (1996) mentions that ratifying the Convention by the state makes the Convention be in force by law within the state. Section (70) of Kuwait's Constitution provides that 'A treaty shall have the force of law after it is signed, ratified and published in the Official Gazette'.

This means that the prosecutor may rely on the articles of such a treaty in pleading against the offence of drugs trafficking which include proceeds and returns worth being confiscated, but this rarely happens. Ratification at a regional or international level must go through executive and legislative channels in Kuwait. This ratification must reflect a real need and a preceded preparation in dealing with subsequent inquires and questionings.

6.3. CONFISCATION IN EGYPTIAN LAW

6.3.1. Introduction

Confiscation related to the proceeds of drug trafficking offences in Egypt is not wholly different from that in the USA, inasmuch as there is more than one procedure to be used by those concerned with the drug trafficking offences prevention system in achieving their goals and their effort to dispossess drug traffickers of their illegal profits. Just as American confiscation laws are linked to criminal and civil confiscations, so too is the position in Egypt. Though the Egyptian legislature has not created special legislation for confiscating drug trafficking assets, it has established several rules and provisions included in different legislations which,
somehow, serve as an alternative. The main confiscation provisions which deal only with assets and proceeds of the drug trafficking offences are provided under the following laws:

1- Drugs Act No. 182 of 1960, amended by Act No. 122 of 1989 in regard to Drugs Act (Criminal law).

2- Act No. 34 of 1971, amended by Act No. 95 of 1980 in regard to Organising Sequestration Laws 117 and Securing the People Safety, which organise sequestration rules of illegally earned properties and issue confiscating orders if there is substantial evidence that the accumulation of properties as a whole or in part is done by self or by others through specified illegal activities - the most important of which is drug trafficking and smuggling.

3- The United Nations Convention Against Illicit Trafficking in Narcotics Drugs and Psychotropic Substances 1988 (Vienna), ratified by the Egyptian government in 1989.

4- The Arab Convention Against Illicit Trafficking in Narcotics Drugs and Psychotropic Substances 1994 (Tunisia).

This section will examine the theory and extent of powers vested to a particular law enforcement agency (the General Socialist Prosecutor) which are provided under the second law, Act No. 34 of 1971, amended by Act No. 95 of 1980. Details about the remaining laws are available in Appendix. V.

6.3.2. Act No. 34 of 1971, in Regard to Organising Sequestration Laws and the Complementary Subsequent Act No. 95 of 1980 Regarding Protecting Ethics from Fault

In addition to the powers of confiscation provided under the criminal Narcotics Drugs Act 1960 the Egyptian system has a special rule which deals with the proceeds of crime. Act No. 34/1971 which was enacted in 10

117Section 729 of the Civil Code define sequestration as 'handing over a property which has a dispute about its origins and rights to a reliable person who save it and administer it and return it to whoever proved to be his'.
June 1971 and amended by Act No. 95/1980 lays down rules for the sequestration of illicitly acquired property.

This Act has two main functions: first, it supplements the criminal laws where the latter is seen as insufficient to deal with the illegal gains and profits of drug trafficking offences (see Appendix V). Second, it deals with illegal gains and unusual suspected expansion of money and properties.

Section 3 authorises the sequestration of all or part of a person's property if it is established that such property has increased as a result of activities performed either by that person or through someone else in smuggling or trafficking in drugs, even if such property is registered in the name of the person's spouse or children or any other person. The section provided a list of certain acts which initiate the application of its powers (extent of jurisdiction):

1. The exploitation of position or occupation.
2. Fraud, collusion, or bribery.
3. Drug smuggling or trafficking.
4. The trafficking with illegal goods or the black market or the manipulation with the people's aliment or medicine.
5. The illegal appropriation of the state's public or private money or body corporate.

The background and principles of this law were originally related to the rules and regulations provided by the military government who succeeded the Egyptian monarchy after its fall in the 23th of July 1952\(^{118}\). An examination of the historical developments of the confiscation system in Egypt is a very complicated process. It has extended into a dispute about political perceptions pertaining to the benefits and interests of socialism. What is important to mention here is that there are several subsequent confiscation provisions provided within several sequestration laws which were issued by the military government during the period 1952-1970, and were repealed mostly due to some subsequent unjustified transgressions.

\(^{118}\)The revolution started in the 23th of July 1952, and the rising of the republic government in the 18th of June 1953.
and excess in the enforcement of the confiscation and sequestration powers\(^{119}\) against individual and property rights. After more than fifteen years, the government became aware of the importance of organising and rationalising the confiscation orders provided under these sequestration laws. Act No. 34 of 1971 aims at substituting the preceding sequestration laws and procedures with a system defined with certain rules and conditions (the explanatory memorandum of the Act, in Al-Shawarbi, p. 380).

The prosecution and trial have a special position under this Act. They are independent of the Common law and pertain to cases of sequestration imposed on the properties of some persons committing certain criminal behaviours or sinful acts (Saleh, 1986). What is important for us here is to focus upon the confiscation provisions of profits and proceeds of drug trafficking offences.

The former Director of the Arabic Bureau for Drugs Affairs (1995), indicated that in 1960s, the government became aware of the aggravated dangers and complications associated with drug trafficking crimes and of the role of the vast illegal proceeds and benefits of these crimes in criminal organisations. Accordingly, the government found the need to support the criminal system in dealing with drug trafficking offences by including drug trafficking offences within the jurisdiction of the court of Ethics and the work of the socialist general prosecutor (p. 3).

The socialist prosecutor works under the supervision of the People's Assembly and is not subordinated to the Supreme Judiciary Council (the judiciary power (section 6 of Act No. 95 1980) as is the case with the common law. One tenth of the members of People's Assembly amounting to 454 members may request relieving the socialist prosecutor from his position, and if the majority of the People's Assembly agree, then he shall be deemed retired. One of the forms of Parliamentary control over the acts of the socialist general prosecutor is what is decreed by section 15 of Act

\(^{119}\)The term 'sequestration' forms a threat of confiscation. It does not mean confiscation, but the way sequestration laws were executed by the law enforcement agencies of the military government during 1950s and 1960s, suggests that mere imposition of the sequestration by the Court of Ethics could lead to an impression that sequestration order is meant to be a definite and inevitable confiscation procedure. Al-Shawarbi (1993) defines sequestration by indicating that it is a temporary restraint order (a precautionary measure) imposed by a judge and enforced by the socialist general prosecutor (p. 23).
No. 95 for 1980. This section provides that the socialist general prosecutor should submit an annual report indicating the tasks performed, the investigations carried out and the procedures taken by him. The submission of this report to the People’s Assembly should be no later than March of every year (Al-Shawarbi, 1993, p. 396).

However, section 5 of the Act states that the socialist prosecutor is appointed and discharged by a decision from the President of the Republic (The ruling authority). The system is provided in the Egyptian Permanent Constitution which was enacted three months after issuing this 1971 Act. Section 179 thereof provides that the prosecutor is to be named 'the socialist general prosecutor'. Moreover, the Constitution specified his powers in general terms.

Notwithstanding the unusual origin, functions and powers of this Act, allocating a chapter in the Constitution about the jurisdiction of the socialist general prosecutor can be considered as clear evidence of the constitutionality of this system and its procedures which still exist to the present day. The socialist general prosecutor's office mentions that sinful deeds as determined in this Acts are deeds that can occur in any society whether socialist or capitalist. It also indicates that the economy's conversion from capitalism to socialism and vice versa does not mean divesting such economy away from an authority that protects capital turnover. Saleh (1986) points out that the such a unique system was originally inspired from analogous systems in Sweden, Finland and Denmark (p. 27).

Litigation procedures in regard to sequestration cases brought by the socialist general prosecution's panel are made before the Court of Ethics (a court of first instance for ethical judiciary whose judgements are

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120 Act No. 34 for 1971 was issued on 17/6/1971, while Egypt's Permanent Constitution was issued on 12/9/1971. Section 179 thereof stipulates that "Socialist General Prosecutor is responsible for taking measures which insure the people's rights and society's safety, political system, maintaining socialism benefits, committing to socialist conduct...". As for calling such General Prosecutor as the Socialist General Prosecutor, this was contemporary with the issuance of July Socialist Laws in 1961, for changing the nation's social structure and for serving the issue of transition from capitalism (at the time of monarchy) to socialism (Saleh, 1986).

121 Act No. 34 of 1971 established the Court of Sequestration, and Act No. 95 of 1980 established the Court of Ethics which substituted the Court of Sequestration (Al-Shawarbi, 1993, p. 255).
challenged only before the Supreme Court of Ethics). The Court of Ethics consist of a judge (president) from the Court of Cassation (a court of ordinary judiciary), three counsellors from the Cassation Court or Courts of Appeal, and three persons from the public (of good conduct and most likely from leaders in governmental institutions). In appealing the case, the Supreme Court of Ethics will take over.

More details about sequestration and the confiscation procedures provided under this Act are examined below:

6.3.2.1. Sequestration Procedure
The socialist general prosecutor office starts its contact with drug trafficking cases through complaints from police, statement, reports or notifications from government, domestic financial institutions, supervisory organisations, individuals, private or public establishments. Certain complaints or case studies published by the mass media are also taken under consideration (Soliaman, 1996).

The Complaints Department working under the socialist prosecutor office examines all received complaints and reports on whether the Panel has, or has no jurisdiction over their subject matter in accordance with the provisions of the Act. If it is found that the Panel has a jurisdiction, then it begins to identify the facts and inquiries about its contents. If the information contained therein are correct, it will be then submitted to the Office of Investigation and Prosecution to investigate the facts again and to verify the existence of substantial evidence\textsuperscript{122} on what is contained in the complaint.

\textsuperscript{122}Mr. Ibrahim, the Technical Advisor for the Socialist General Prosecutor, indicated that substantial evidence is the verified way in sequestration and, as preventive or protective measure, does not stipulate a proof that has the power of certainty, as the more it is preponderant by the presumptions submitted to the prosecutor and then to the Court of Ethics, the more the imposition of sequestration becomes permissible. As for confiscation action, the definitive and conclusive proof is stipulated because confiscation decision as a punishment results in forcibly expropriating the property’s ownership from its owner. However, the law, since sinful acts are confirmed in sections 2 and 3, does not stipulate more than the presence of substantial evidence thereto, yet investigation procedures in the Panel are performed with the guidance of Act of Demonstration and Criminal Procedure Code for more precaution in order to provide sufficient guarantees to whom the acts imputed are investigated.
According to the provisions of the Act, the socialist general prosecutor shall have all the jurisdictions determined for the authorities of investigation in the Criminal Procedure Code, and in particular, the right to make reservation upon any relevant documents or files. He can also make an order similar to the 'production order' in the British system, to get any information from any institution in the State. He can also ask the normal general prosecution to investigate about relevant matters which serves or facilitates his cases.

If the Investigative Office has probative evidence(s) about an increase of properties or monies because of drug trafficking offences, it can order the police (who in most of the cases is the original claimant) to do more investigation about the monies and properties of the accused, his wife or husband, and all children. The socialist prosecutor shall then order to restrain them from administering or disposing of the reserved properties in preparation of referring the case to Court of Ethics.

Section (7) of Act No. 34 provides that the case must be submitted within sixty days from the date of the restraining order\(^\text{123}\). If not, the restraint order would be considered as not having been issued. The socialist office should then prepare a detailed statement similar to the 'a affidavit' in the British system, to be presented to the court during the mentioned period.

The seizing and restraining orders would be enforced by specialised committees formed by the socialist prosecutor's office for this purpose. In regard to properties such as, vehicles or any similar things, they would be seized in one time wherever they are located in the country. The banks and other relevant institutions will be informed about the restraint order as well.

The socialist general prosecutor decides an 'alimony' for the person who is prevented from disposing his properties or administering thereof until the court reach a conclusion in the sequestration case.

Within the sixty days from submitting the matter before it, the Court of Ethics passes its decision, whether by setting the matter aside, or by

\(^{123}\text{Mr. Ibrahim mentioned that the period of sixty days is the period within which more verification and investigation can be made to prove that the seized properties are indeed belonging to the accused person or his family.}\)
continuing the execution thereof for a period not exceeding one year from the date of issue of the order. Before the expiration of such a period, the general prosecutor may request the court itself to continue the execution of the order for another period of no more than five years in total. The order, however, can be abolished if: (a) by law after the elapsing of the five years and/or (b) by the discontinuance of the prosecution before the elapsing of the five years.

The imposition of sequestration entails preventing the accused from administering the properties under sequestration. Every free act by the accused during the period of prevention shall be void, and the person violating the same shall be punished by imprisonment of no more than one year or a fine of no more than five hundred Egyptian Pounds (equivalent to one hundred Sterling Pounds) or both.

The law permits the person whose properties are under sequestration to appeal against such decision within 30 days from the date of the decision or notification thereof. The right of appeal is warranted for bona fide third parties at any time whether during the period of seizure and prevention in the office of the socialist general prosecutor, who then submits the complainer's opinion to the competent court in the event of being rejected.

6.3.2.2. Confiscation Procedure
Section 22 of the Act entitles the socialist general prosecutor, during the period of sequestration, to apply to the court of ethics to confiscate all or some of the seized properties under the sequestration order which are a proceeds of drug trafficking offences.

The General Socialist Prosecutor Office provided that confiscation referred to in the provision of section 22 is not a general confiscation which extends to all properties of the person without regarding their origins. It is a special confiscation restricted to properties upon which sequestration is imposed and which are vested in the person because of drugs smuggling or trafficking or some other specified illegal acts. Confiscation does not include the properties vested in the person during the sequestration as a result of his legal business, and it does not extend to the property acquired
before the imposition of the sequestration order, or thereafter, as long as the object of confiscation is property descended to him by inheritance.

Once confiscation is finally decided for the good of the people\textsuperscript{124}, the panel of the socialist general prosecution delivers the confiscated properties to the Panel of Sequestration Settlement in the Finance Ministry and thereby the decision of confiscation is executed.

With regard to the volume and the value of properties upon which a sequestration order is imposed, the data collected from the socialist prosecutor's office could not establish a complete picture in the differences between sequestration decisions and confiscation decisions. The technical adviser of the socialist general prosecutor provided this study with some figures concerning the difference between the amounts of the sequestration orders and the number of confiscation orders for 1995, and the value of the confiscated properties from 1994 to 1996.

Table (6.2) Number of cases, persons and the value of properties of those who received a sequestration order and confiscation order in 1995 by Court of Ethics or the Supreme Court of Ethics. *The Court of Ethics and the Supreme Court of Ethics deal only with properties.

<table>
<thead>
<tr>
<th></th>
<th>Sequestration</th>
<th>Confiscation</th>
</tr>
</thead>
<tbody>
<tr>
<td>cases</td>
<td>4</td>
<td>14</td>
</tr>
<tr>
<td>persons</td>
<td>*0</td>
<td>*0</td>
</tr>
<tr>
<td>Amounts</td>
<td>3,747,521</td>
<td>13,880,340</td>
</tr>
</tbody>
</table>


\textsuperscript{124}"for the good of people' 'or as in the British language 'in the public interest' is a statement which always indicted in the confiscation provisions of this Act."
Table (6.3) The value of properties confiscated by the Socialist General Prosecutor Office during the period 1994-1996 (up to 1/12/1996).

<table>
<thead>
<tr>
<th>Year</th>
<th>Confiscated Properties (Egyptian Pounds)</th>
<th>Equivalent in £</th>
</tr>
</thead>
<tbody>
<tr>
<td>1994</td>
<td>31,694,994</td>
<td>2,881,363</td>
</tr>
<tr>
<td>1995</td>
<td>7,339,804</td>
<td>667,254</td>
</tr>
<tr>
<td>1996</td>
<td>6,878,672</td>
<td>625,334</td>
</tr>
</tbody>
</table>


In addition, an assessment report from the Department of International Affairs to the work of the General Department of Narcotics Drugs Prevention states that during 1995, the Department transferred 21 drug traffickers to the socialist general prosecution office to take the necessary actions regarding the imposition of sequestration on their properties amounting to 114m (Egyptian pounds) and to be subject for a confiscation order.

Comparing such an amount with those specified in the above two tables for 1995 reveals the following. First, the latter amount (114 million) might be an overestimate of the value of the properties, and second, the amounts shown in the two tables, though they are different, are not related to the value of the properties assessed by the General Department of Narcotics Drugs Prevention. This is because the trial and the sequestration proceedings take time to be enforced and may extend over five years. Confiscation decisions must be imposed within that five years. Accordingly, the inquiry and investigation of cases starting from 1995 may have taken longer than commencement of the action of sequestration imposition. So, if we assume that it has commenced in the beginning of 1995, then we may expect the issuing of a confiscation order by the end of 1999. The amount mentioned in table (6.3) represents the actual amount confiscated during 1995, reflects the number and the type of drug traffickers dealt with prior to 1995.

Finally, the Egyptian Constitution and the provisions of this Act empowered the Court of Ethics and the socialist general prosecutor's office to deal with *inter alia*, the illegal proceeds of drug trafficking offences which have escaped from the control of the common criminal system. The powers under this Act do not depend upon conviction because, as indicated, the Act deals with properties not individuals (*in rem*). In
comparing this system with the Egyptian criminal system, the British confiscation system and the American criminal forfeiture system, one can observe that a pre-requisite conviction is a common factor for the last three systems, but with this particular socialist system, it is not related to any past or future conviction. This means that a person is accused of possessing illegal properties and proceeds and he shall present evidence of ownership and legality. If he can not defend his properties then the consequences will be a confiscation by the Ethics Court.

The socialist general prosecutor is empowered to order the pre-trial seizure of any documents, restraining the person from dealing with his properties, and seeking information from any governmental and non-governmental institutions. These powers and others can only be obtained by courts orders under the British and American criminal systems. However, there is a close similarity with the American civil forfeiture. In the latter system the criminal who escapes conviction can be punished through civil forfeiture action. Such an action can even be brought against any property owned by a defendant who is acquitted in criminal proceedings. The acquittal does not debar subsequent civil forfeiture proceedings. This is exactly what the powers of the socialist system are about.

6.4. SUMMARY

The confiscation of proceeds and profits of drug trafficking offences is a new concept in the Kuwaiti criminal law system. Recently, the legislator has added this concept as a short sentence in the common confiscation provisions of the Narcotic Drugs Act 1983 under the amended Act No. 13/1995.

The problematic situation or the consequential subsequent condition in adopting such a concept came as a result of demands for major changes and for reorganising the structure and the functions of the law enforcement agencies. They had to deal not only with this new legislative addition in the Narcotic Drugs Act but also with similar powers provided by regional and international conventions which are beginning to
Chapter Six

The Kuwait and the Egyptian Confiscation Systems

dominate the debate about a new means of dealing with organised crime and money laundering.

Kuwait, as a member state in the United Nation and of the League of Arabic States, is bound to adopt certain confiscation measures provided under the UN Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1988 and the Arabic Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1995. However, application of the new provision still lack appropriate acknowledgement by the government and the law enforcement agencies. The Drugs Department under the Ministry of Interior, for example, has not set out any instructions concerning this matter.

There are certain assertions that the ratification of the two Conventions by the Kuwaiti government is sufficient to deal with any attempts to trace, seize, and confiscate the proceeds and profits of drug trafficking offences. Currently, the government has not exercised any of the new provisions of the asset-confiscation of Act 1995 nor any of the measures of the confiscation proceedings of any of the two conventions simply because the means to achieve the aims of such provisions are not yet available.

In short, because the confiscation proceedings are supposed to be initiated by the police and in particular, the Narcotic Drugs Department, as is the case with the British system, and because, as mentioned above, the Kuwaiti police has no powers yet to do so, then one can infer that maybe a zealous effort is needed by the police or prosecution to activate these new means in dealing with drug trafficking offences. The Protection of Public Monies Act (No. 1 of 1993) might be an important step forward which may support the need to establish an effective financial investigative system that could deal with the proceeds of drug trafficking.

With regard to Egyptian asset confiscation system, the government is heavily reliant upon Act No. 34 of 1971 which was amended by Act No. 95 of 1980 in regard to organising the sequestrations and securing the peoples safety. The socialist general prosecutor is empowered to implement any of the available powers and provisions which are relevant and facilitate the seizure of suspected illegal gains. This means that he is authorised to

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benefit from all the available administrative, civil and criminal proceedings in conducting investigations and subsequent prosecutions.

Unlike the British and American confiscation and forfeiture systems, the Egyptian confiscation system provides that production orders, searching orders, restraining orders and the subsequent enforcement of the court's decisions with regard to sequestration and confiscation orders are the main jurisdiction of the socialist general prosecutor. The system does not depend upon a pre-conviction or a post-conviction of any crime but depends on the powers that are vested to the Socialist office to deal with certain crimes. It does not deal with persons who are accused of committing these crimes, but with illegal profits and proceeds that they have no right to possess. Interestingly, one can observe that whilst the general constitutional precept provides that the defendant is innocent until the court proves his conviction, the constitutional precept of the Egyptian socialist confiscation system provides that the person is a suspect until he (the person) can prove his innocence. This means that the properties of any suspects are liable to be seized and put under complete control of the socialist prosecutor's office for more than five years. If the owner did not produce any defences or a definite evidences the Court of Ethics will confiscate all the seized properties. In justifying such a process, the government turned to the Constitution as a means of injecting fairness and balance into a statutory confiscation system that often lacks both. Accordingly, identifying what current limitations the constitution might impose upon the use of such a confiscation system requires a historical analysis of both the confiscation law and the evolving balance between the government's interests in law enforcement and citizens' rights.

The criminal confiscation system under Egyptian Common law is restricted and not sufficient to deal efficiently with tracing, seizing and confiscating the proceeds of drug trafficking offences (for more details see Appendix. VI). The regional and international conventions are important in determining the status and nature of legality of certain domestic powers, and in exposing the strengths and weaknesses of those domestic powers which ensure legitimate confiscation of the proceeds of crimes. These Conventions may provide an important and needed recognition and justification of certain sweeping powers and restrictions upon
individual and property rights. (see Appendix VI). In short, the current Egyptian socialist confiscation system needs to be questioned thoroughly by criminologists and libertarians and those whose speciality is the protection of human rights, because securing the safety of people is indeed a noble aim but it might not be achieved by adopting such a system.
The Philosophical Position
The government, legislative bodies, police forces and the general public like the idea of confiscation against drug traffickers because it appeals strongly to their common sense of justice. It allows the 'good guys' a tool that can remove the ill-gotten gains that 'greedy drug kingpins' have accumulated by selling people 'misery disguised as pleasure'. The objectives of British confiscation legislation are to ensure that drug traffickers do not profit from their offences, to disrupt the functioning of organised crime syndicates and low-level street dealers by removing their working capital, and to deter existing potential offenders by inducing them to believe that they will not be able to keep the funds that they have either obtained or hoped to obtain. It can be said that British law on forfeiture and confiscation in its current form has a formidable array of powers that can be used potently to achieve these objectives.

In general, confiscation legislation provided under the DTA 1994, as it appears in the perceptions of the majority of the practitioners, looks at first sight to be workable and comprehensive. What makes such a positive perception sustainable are certain principles which have been made throughout the system. These principles centre around issues of legality and personal liability. If these are established, it is thought that all problems and defects can be solved. The British confiscation system is clearly struggling to attain these two conditions against anything that might contradict them. The system is meant to be a legislative statute and directed at the illegal proceeds of a particular drug trafficker. The confiscation system provided under the DTA 1994 is within the criminal law and operates as an a priori conviction.

However, no sooner have the positive aspects been put under close scrutiny, than the system seems to have disturbing contradictions that could undermine its very nature. Broadly speaking, even if the creation of a network of statutory provisions leads to the taking away of all the 'profits out of crime', this does not plug the loopholes which are themselves causing the problems related to the definition of and the nature and extent of the existing confiscation system.
The ambiguities surrounding the legislation as this thesis has demonstrated, have surfaced and crystallised into three main areas. The first surrounds the difficulty of resolving the nature and extent of a confiscation system which, if it continues in its current form, would almost reintroduce the same situation which led to the abolition of an old general forfeiture powers by the Forfeiture Act 1870. Equalisation and equity are a premise that should never be dispensed with. The second area is that the measures, amendments and theorisation relevant to the new system were a reaction to increasing international, national and local pressures. The problem with such pressures is that they are embedded in ad hoc policies which surface when there is a demand that 'something should be done'. This reactive situation had actually prompted a third area of difficulty. Under a desire for action, confiscation legislation has not received the amount of scrutiny by various sectors of society it deserves.

Clearly these are the conditions which led the Hodgson Committee to express frustration concerning the current provisions. When the members of Hodgson committee suggested a 'confiscation order' they were concerned to establish a clear rationale, with unambiguous purposes and straightforward conditions. The effects of these tensions have been felt throughout the application of the confiscation system.

The philosophy that the Hodgson committee introduced was that: 'no-one shall profit by his own wrong' and 'unjust enrichment' is something that the Committee took seriously, while at the same time exploring the relationship between a legal reality and a legal ideal; regarded as inescapable for any critical socio-legal analysis.

Confiscation cannot be separated from the problems and criticisms surrounding judicial and governmental institutions i.e. is confiscation about reparation or punishment. The current application of the confiscation system of the DTA 1994, is most certainly geared towards punishment rather than reparation? The principle that no-one should profit from their own wrong is a reparative principle which only applies if the requirements and consequences of the system do not, for example, extend to the defendant's relatives and friends, and if there is also no substantial prison sentence, in default. Crucially, even the default sentence does not wipe away the obligation to pay a confiscation order.
The process of determining the amount to be repaid, although it is perceived by the law enforcement agencies as of real significance can hardly be considered a serious attempt at restoring the *status quo ante*. Where there is no evidence of the defendant having received any particular payment or reward the courts are empowered for the purpose of determining whether the defendant has benefited from drug trafficking, to make a number of assumptions about the defendant. These assumptions are, plainly, of a rebuttable nature: (a) any property that appears to the court to have been transferred to the defendant in the six years ending with commencement of proceedings is assumed to be received in connection with drug trafficking; (b) any expenditure in the last six years has been made from payments received in connection with drug trafficking; and (c) for the purpose of valuing any property received or assumed to have been received by the defendant at any time, this property was so received by him free of any other interest in it (s. 4 (3), DTA 1994).

The most important critique about the system is not just that there are matters which can prove that the system is punitive or reparative but about the inconsistencies which result and the differences in the court’s decisions in similar cases. Consequently, this study has shown that in practice, many judges are reluctant to apply the required assumptions under the law and some judges habitually refuse to use it. It seems almost as if Parliament was aware that such conditions would arise, so it introduced such powers in the DTOA 1986. However, the confiscation system provided under the subsequent CJA 1988 has no equivalent provisions. This means that the legislature intended to deal very severely and in a punitive way by exploiting all the available powers and procedures in civil and criminal laws against drug traffickers. The severity of the law is shown by the fact that defendants are tried and sentenced based largely on a matter of guesswork.

Moreover, the study shows that the British confiscation system of DTA 1994 is burdened by numerous technical difficulties and unnecessary complications. It also lacks an adequate and unified procedural structure for decision-making. The major weaknesses in the system lie, for instance, in the interpretations of the system by different courts and in the seriousness and the willingness of the government and police forces to support the system.
It has been found that the government and some jurists are emphasising that a confiscation order is essentially about reparation rather than punishment. This plays a central role in how judges and prosecutors perceive their task and consequently how they seek a proportionate sentence. The courts' decisions in regard to confiscation cases indicate that there are clear inconsistencies and that the law enforcement agencies are in a state of confusion and uncertainty. This also means that the attempt to relate the system to reparative principles would legitimise certain draconian provisions and procedures such as the restraint procedures, the burden of proof, the retrospective impact, the realisation processes and the appointment of a receiver. The prosecution will face no difficulty in having a successful prosecution cases. The actual situation, as this study has demonstrated, is that the police and the prosecution are encountering a serious difficulties in convincing some judges that the intention behind these provisions is a re reparative one. Some judges believe that the confiscation system must be considered as an additional punishment beside the original penalty of imprisonment. The Criminal justice system, as is the case with the American Federal prosecutors, and the double jeopardy problem, restricted the powers provided for prosecutors and police by demanding a higher standards of proof from them (proof beyond reasonable doubt). Prosecutors believe that it is impossible for them to confiscate the illegal proceeds of the drug traffickers if such proof is required. Accordingly, and because Parliament did not explain the exact intention behind the confiscation order, relating the order to reparative principles is the only access for them to be able breach, for instance, the right of silence or in applying any retrospective provision.

The two major relevant categories about the confiscation system are the impact of certain provisions, and the implications of the value based principle. The importance of these two categories is that they can help to decipher, analyse and expose the legal reality of those involved in enforcement and become crucial elements in any articulation of confiscation law.

There are a number of related features, resulting from the inadequacies and ambiguities of the legislation, that show clearly the punitive nature of the system. Firstly, the value-based system involves potentially unreliable and non-expert assessment by some police financial investigators. In turn,
their assessments are treated by courts as wholly reliable, leading to disclosure orders (the deprivation of the right of silence) which are themselves punitive. Secondly, in terms of the applications of the legislation, extensive powers of entering and searching premises are available, even where the property is owned by, for example lawyers, who are not even accused let alone convicted. Such a serious breach of confidentiality is itself punitive. A third area that is far from satisfactory is the retrospective effect, whereby all property and wealth falling within a six year period is, assumed by courts to be directly related to drug trafficking offences. Finally, the default sentence, is clearly punitive in nature, since a prison sentence results from non-payment of the order, and further that serving a prison sentence does not remove the liability of payment made by the confiscation order.

Policy Implications
The study shows that most of the problems result from both the law and its enforcement. The law provided certain unusual principles and provisions, and the machinery the government and the law enforcement agencies chose for implementing the law faces defects and misunderstanding. However, there are other factors which also play a great role in the current status of the confiscation system. One of these, for example, is the discretionary power of judiciary. The judge has a broad discretion in choosing which sanction to impose and at what level of severity. Sentencers are guided in this by their own penal philosophy, be it incapacitation of the offender, protection of society, belief in the reformative qualities of punishment, general or individual deterrence, compensation to the victim or some interpretation of retribution and just deserts. This kind of freedom is inevitably a source of disparity because judges pursuing different objectives will treat similar cases differently. For example, a judge pursuing deterrence would consider a different type and severity of sentence than the retributively-minded judge. Such disparity is a plain breach of equal treatment principles of due process. The confiscation system offers a clear example, where some judges believe it is an additional punishment while others believe it is a means of reparation.

The solution to the current confusion is to define a principal objective through legislation. Indeed, if the nature of confiscation is defined very clearly this will have important consequences. Early, it was noted that the
Conclusion

CJA 1991 was an attempt to resolve such problems; it provided an authoritative definition whose primary rationale was to focus on retribution and just deserts (CJA 1991, s. 1). Unfortunately, this Act received intense criticism from sentencers who resented the 'straight-jacket' imposed upon their exercise of discretion. So under attack from magistrates, judges and, most fiercely, from the Lord Chief Justice Taylor, the Government abandoned its adherence to desert theory. Just nine months after the 1991 legislation had come into force, the Criminal Justice Act 1993 once more gave sentencers the discretion to consider previous convictions.

The confusion in the philosophy of the confiscation system has its own implications for law enforcement. The empirical work in the thesis shows the areas where such confusion exists. The 14 interviews and 47 responses of the questionnaires provided the research with an important comments from various influential personnel who also involve in the enforcement of the system. The data collected from the field work helped in producing a critical resource which goes beyond the recorded intentions of the legislation and the subjects provided by the literature.

In respect to the major findings about the British confiscation system and how the system can be improved, one can conclude that legislative intervention is urgently needed to resolve the conflicts in interpretations and to explain the legality of several procedures which resulted from these inconsistent interpretations. The government and the legislature must be aware of the actual nature of the confiscation system. They must be aware that an abuse of power led to the abolition and repeal of the Forfeiture Act of 1870, so the current conflict in interpretations between sentencers could lead to a similar result. Government intervention ought not to be based upon having a powerful system but on a fair system which considers legality and liability as its main principles. Although the legislative process is a net result of various phases of readings and amendments (from a 'Green Paper', passing through draft legislation and discussions, to Acts of Parliament), one is taken aback by the distinct ambiguities and inconsistencies of certain provisions which are embedded in the legislation and its enforcement. These can be a hinge to produce a gap between the original intention of the legislation decided by Parliament
and the governmental policies and strategies and the actual realities of the applications and enforcements undertaken by those relevant institutions.

Another important factor is the multiplicity in policies and applications. The relationship between central government with its forty-three police forces in England and Wales reduces the impact of confiscation law. Each force is funded 51% by central government and 49% by local government. There are forty-three autonomous chief officers. Policing in the United Kingdom is very much driven by local demands, local responsibilities and not by centralised policy. However, the only way available that central government can have an impact is by the so-called Home Office circulars. The responses of some of the interviewees show that the local police forces do not welcome political interference. This means that the way the confiscation system is being perceived and enforced varies among these forces. It is wrong then to generalise about them. Their performance depends upon a depth understanding of the socio-economic factors and the strategical policies which are adopted by each force to deal with particular local problems.

To determine the weaknesses and shortcomings in the enforcement of the confiscation system and to provide suggestions for improvements is an attainable goal. Periodic empirical examinations of the conditions, resources and the perceptions of the law enforcement agencies will help to improve the system. The study of Levi & Osofsky (1995) is a good example. Their report suggested that a number of factors have mitigated against the effective use of confiscation provisions provided under the DTOA 1986 and they then recommended how law enforcement agencies might improve their procedures in order to make financial investigation and confiscation more effective. Improving confiscation is not achieved only by providing resources and enforcement strategies.

Legal Implications
The problems in determining the actual nature of the confiscation system can only be resolved by legislative intervention and by clarifying this important issue in new or amended provisions in the DTA 1994. If this could be achieved, all courts will be bound to apply whatever the legislation provides without any differences leading to unjustified applications.
It seems clear that while Parliament desire was to ensure that not one unlawful penny is left unconfiscated and being eager to introduce unusual principles and uncommon criminal procedures that could threaten fundamental individual and property rights, it did not bother to clarify the essential purpose of the system. Is the purpose to punish the offenders or to restore the status quo ante? This study shows that confiscation is still oscillating between punishment and reparation. It has been indicated that this is mainly due to the intention of Parliament to leave such essential issues to be dealt with by law enforcement agencies and in particular by judges and prosecutors. Accordingly, differences and contradictions occurring between decisions of similar law cases by different Crown Courts has led to more confusion about the rationale and proportionality of certain subsequent consequences.

This also implies two important observations: (a) that the exact nature of the system is indeed oscillating between two different schools of thought (there are those who advocate a reparative aspect of confiscation with a majority of practitioners who believe that the system was intended to be a punishment) (b) that there is a confusion also amongst the practitioners where some believe that the system is merely reparative (10%). And in a direct question about whether the system is punitive or reparative the data shows that 70% of all the participants believe that it has great punitive effects upon drug traffickers, whilst only 10% believe that it is merely reparative. This shows that there are wide differences of opinions about the essential nature of the system.

Confiscation legislation represents a new departure in sentencing systems. The confiscation order was designed to supplement the normal criminal sanction of imprisonment by ensuring that the trafficker was deprived of any of the financial benefits of his drug trafficking crimes. The passage of the Act generated a degree of political excitement, but unfortunately this obscured some of the legal difficulties and practical problems which the Act created, and with which the law enforcement agencies and especially the police forces are now confronting. It is said, for example, that it is a common complaint that modern legislation is written in language which seems to be designed to obscure rather than to clarify, and the DTOA 1986 and the subsequent DTA 1994 are no exceptions. Examples can be found in
section 30 (2) of the DTOA 1986 which was repeated in DTA 1994 under section 59 (2).

Unfortunately, as this thesis has demonstrated, the reparation aspect in the confiscation seems to be facing a recurrent dilemma. The current aims seem to be mainly concerned with returning the drug offenders to *status quo ante*. Yet such measures are inappropriate because they transform reparation into punishment, thereby marginalising the distinction that is sought to be made clear in the philosophical nature of the confiscation system. There has to be a reconsideration of this policy of reparation. It has to include rehabilitative aspects as a necessary principle. In doing so, one could say a resolution is then made consistent with the problem of achieving justice.

**Status of Current Research**

It is essential to state the conclusions of this research in respect of other studies that have dealt with the confiscation system. Clarifying the positions of these studies draws out the particular critical contribution achieved by this research. There are many relevant issues needing to be explored, either as extensions to the work carried out in this thesis or as attempts to overcome a lack of otherwise in-depth case studies existing already.

This study is considered to be one of the early, if not first, critical examinations of the theory and practice aspects of the British confiscation system. Such a contribution that it makes can only be a preliminary one towards a more important up to date socio-legal critique which desperately needs to be undertaken. Specialists in the sociology of law and human rights need to pay attention to these sensitive and crucial procedures which affect the relationship between the rights and obligations of the state and the people.

The recommendations of the Hodgson Report were a landmark in this report. It tried to introduce a new concept for the enforcement of confiscation. Its scope emerged in the light of an increasing realisation of the deficiencies already available in the law and of a recognition of the profits in drug trafficking at the national and international levels. The perspective in that report is an important one. Others have taken things
Further, but not a great deal further it must be said. For example Feldman (1988), Mitchell et al (1992), and Fortson (1992) approached the issue by clarifying and interpreting the legislative powers. They do so by categorising and differentiating those which have caused complications and difficulties for the law enforcement agencies. Their methods centred around examining the powers and evaluating the consistencies of court sentences.

Zander (1989) writing in terms of an assessment of the powers of existing law was concerned about the legitimate financial returns to be made available to law enforcement agencies. This study was commissioned by the police as a basis for assessing the need and validity to adopt the wider powers in the British confiscation system which exist in American forfeiture laws. This perspective was a comparative one.

However, in a different vein altogether Levi & Osofsky (1995) focused on the technical and practical problems encountered by those enforcing confiscation proceedings. Their aim was to produce some suggestions to improve standards of 'good practice' (tracing, seizure and confiscating). Their work was the first empirical study to look at the perceptions of those involved in the enforcement of the system. As stated above, Levi and Osofsky have much in common with other research concerned with determining the extent of powers. The methodology is similar in that it is concerned with examined relevant proceedings.

Further research on the law of confiscation could more usefully be involved in the sociology of law. This approach is based on two main premises: Firstly, on examining how the law is developed and justified—that is how it has been interpreted by those who are involved in its enforcement, and how these interpretations determine the course of actions relating to confiscation principles and values. Secondly, by examining confiscation itself focusing on identifying the areas where confiscation has been taken for-granted. Before specifying the legal content required for confiscation there has to be some understanding of the definitions of the confiscation system. These will account for the dimensions, the scopes and the paradigms which deal with confiscation.
It is important also to focus on the relations between the principles and enforcement, and the status of any alternative principles found in different jurisdictions. This may help to avoid reproducing the same errors as before.

Future Research and Grounds for Model Advocacy
A study of the confiscation system in this thesis is restricted to certain aspects and has been conducted from a particular perspective. The exclusion of certain other features does not mean they are insignificant. It is important to take the confiscation system from different aspects of the drug problem including market forces, politics, culture and the lines of intersection at various junctures of a society's history. The suggestion here is that further research needs to be done on legal definitions, extent of powers, restrictions, safeguards and policies -but this list is not of course exhaustive.

This research has revealed that the current status of the confiscation system is not separate from a wider global system. Yet international systems, in terms of enablements and constraints, were not taken into account here, is not because of their marginal status but because such work would require more resources and time than that available for this research. Nor has this research be undertaken in terms of political economy. Such research is still rare but it is important to tackle confiscation in relationship to the market, to banking circuits and to the financial institutions, ownership, funding processes, priorities and preferences, and lines of distribution and their effect on defining the mechanisms of policies.

In the course of doing this research, it has been found that there is still too little attention to the cultural and social distinctions which constitute and produce variations in the types of drug trafficking crimes. This is an area too which needs more attention, explanation and impetus.

One of the most important means through which one can establish a convincing criteria about the effect of a confiscation system is through a number of studies that trace its impact upon the individual, investigation, proportionality and desert justice. Such studies too would be welcomed.
The Kuwaiti System

The final question to be asked is whether the current status of the British confiscation system and the experience gained produces a sensible and efficient model that sustains consistency with the principles of the Kuwaiti constitution? The answer is as yet unknown but Kuwait has ratified the Arabic Convention which is a sign that it is interested in acknowledging the regional and the international trends for tracing, seizing and confiscating the proceeds of drug trafficking offences. Significantly, there is now a confiscation provision or a confiscation order available under the Drugs Act, but more details about the way the order should be implemented and the necessarily provisions and procedures are required.

Without going into details about the conditions which produced the Kuwaiti legislation what is important to mention here is that there are certain political and constitutional (even cultural) factors which are the determining forces accompanying the Kuwaiti ratification of the Vienna Convention and the Arab Convention. Understanding these forces is essential in establishing the grounds in which to decide whether one can or cannot take the British confiscation system as a model.

The thesis has revealed that both conventions arose at the point where the concerns of Kuwaiti society were focused on certain public financial embezzlements and the establishment of relevant legislation in consequence to the Iraqi Invasion in 1990. This situation removed confiscation from the centre of attention. The recurring question is that with the passing of the invasion, is it the proper time to have a closer look at the confiscation issue? It seems that current research is not far from the influence of such a question. There have to be more studies to examine the way that the Kuwaiti system could fit with the British confiscation system.

The other crucial factor that has prevented the development of a confiscation system in Kuwait is the serious differences and inconsistencies emerging from having a completely different legal system based as it is on a written constitution. This research has shown that there are areas which were found to be critical and a cause for inconsistencies in the British confiscation system. Some of these are, for example, the value
based principle where assets are not available for confiscation; also the retrospective nature of the legislation is a prominent and sensitive issue. Article 32 of the Kuwaiti constitution states that 'no crime and no penalty may be established except by virtue of law, and no penalty may be imposed except for offences committed after the relevant law has come into force'. The rationale of such prevention lies in the fact that the nature of Kuwait confiscation law and particularly the confiscation of proceeds and assets is quite clear. It classify confiscation as an additional form of punishment. Another Articles provide that the 'penalty is personal', and the 'accused person is presumed innocent until proved guilty in a legal trial at which the necessary guarantees for the exercise of the right of defence are secured'. This legislation is partly derived from religious doctrines, Islamic jurisprudence which prevents any proposed amendments except for certain emergencies.

Despite multiple reservations about the British confiscation system there are many useful and influential elements in the model that can be imported into Kuwait. As long as the principles of the confiscation system are already a focus of serious debate in the Kuwaiti legislative authority then the British confiscation system can be a source of inspiration. There are already demands for early financial investigations, co-operation of financial institutions and governmental departments. Strategies of enforcement (local and regional forces), national and international intelligence services, a variety of powers for tracing and seizing evidences for the police, and utilising civil experiences in accountancy are being considered.

Finally, the British confiscation system has many other facets that can be incorporated within the Kuwaiti confiscation system. The original motivation for looking at the British confiscation system as a model for Kuwait stemmed, for example, from the unusual practice of the value based system. This system exists in stark contrast with other proceedings that confine confiscation to tangible assets (property based systems). This difference is an object of some wonder and is worth investigation to establish the extent to which the value based system could become as an option for the law enforcement agencies in Kuwait. However, the very uniqueness of the English system at the theoretical level, as the thesis
demonstrated, does not necessarily and sufficiently escape from being a cause of unfairness and ambiguity at the practical level.
APPENDIX I

The Questionnaire

Loughborough University
Department of Social Sciences
Midlands Centre for Criminology and Criminal Justice

Questionnaire For Police Officers

1. Do you think that enough resources are allocated for anti-drug trafficking programs in your force?

[Yes]___

[No]___

If (No) please state why.

2. The opinions about the actual nature of the confiscation system have divided. Some believe that the system is an additional punishment and some others believe that it is merely a means of reparation (redressing the wrongdoing). What do you think is the actual character of the system?

3. What is, in your opinion, the usefulness of the powers which facilitate the imposition and the recovery of confiscation orders?

4. Do the confiscation system provided under the DTA 1994 has an impact upon the drug trafficking offences in Britain?

[Yes]___

[No]___

Please state why.
5. Do you think that the current applications and enforcement by all law enforcement agencies correspond well with the provisions of the legislation?

[Yes]___

[No]___

State why:

6. It seems that the main purpose of confiscation of drug trafficker's assets is to deprive and strip offenders of their ill-gotten gains, however small the amounts that was likely to be recovered under a confiscation order might be, and regardless of the cost and time-limit of investigation and the procedural system of recovery.

7. Do you think that there are any defects in the law regarding drug trafficking offences?

[Yes]___

[No]___

If the answer is (Yes) would you please state these defects.

8. What is the most difficult aspect of the case that you encounter when it demands practising the provisions of the DTA 1994?

9. The former Home Office Minister Mr. Stephen Jack said 'the realisation of confiscation orders is often necessarily a lengthy and complex process'. Could you comment on this statement giving the reasons and the solutions?
10. The law allows the court to assume that any assets held by the defendant during the previous six years have been derived from trafficking. Do you think that this is the right approach?

[Yes]____

[No]____

State why:

11. What do you think of a 'property based system' which require less investigation, because the property to be confiscated has already been identified at the outset of the criminal action?, and why do you think the British Government adopted a 'value confiscation system'?

12. What are the main causes of the deficiency in the recovery of the amounts declared as confiscation orders?

13. Do you agree that all the funds 'realised and recovered' are paid into the consolidated fund of HM Treasury.

[Yes]____

[No]____

State why:

14. Do you think that the Unit you work for is sufficiently well funded to deal with confiscation cases?

[Yes]____

[No]____

State why:
15. Are you satisfied with the way the courts dealt with your suspects?

[Yes]___

[No]___

State why:

16. What further changes in the law, if any, would you like to see regarding drug trafficking?

17. If you have any comment which is not discussed in this questionnaire, please explain:
APPENDIX II

The Interview Questions:

A. Questions About The Principles Of The System

1. Would you please tell me what confiscation order is all about?

2. What do you think is the underpinning social justification(s) and purposes of the confiscation system?

3. Does your force need to have the powers of the DTOA 1986 to deal with local drugs problem?

4. What is wrong with the forfeiture order and fine? Do you think that extending the power of forfeiture order, for example, could be sufficient to deal with the proceeds of crime?

5. The opinions about the nature of the confiscation system have divided. Some judges consider the system is an additional punishment and some others regard it as means of reparation (redressing the wrongdoing). What do you think is the actual nature of the system? And what do you think is the rationale behind such differences?

6. The legislation did not provide a clear declaration about its nature, but the government through the Central Confiscation Branch emphasised in their manuals and guides that they used to send to all the financial investigation Units that the system is not a punishment but a reparative procedure. What do you think are the purposes of doing that and how that would serve the enforcement of the system by all the enforcement agencies?

7. The 'required assumption' provided in the legislation was described as sweeping and draconian. Is this true? If these descriptions are appropriate, why do you think they are appropriate?

8. Same descriptions were said about the investigation powers (searching, entering premises, delaying allowing a person in custody to receive legal
advice or to inform someone that he has been arrested for up to 36 hours, detaining a person without charge for over 24 hours or more and many others). To what extent these powers are powerful? Do you think that these powers would serve reparative purposes?

9. Same descriptions were also mentioned about the retrospective effects provided in the system (the six year period)? How and why?

10. The decision of nine judges of the European Court of Human Rights in Strasbourg declared that the retrospective provision of the Drug Trafficking Offences Act 1986 to be contrary to Article 7 of the European Convention on Human Rights. The judges ruled unanimously in 1995 that a British court acted unlawfully in one of the drug trafficking cases (Walch case). What do you think of that? And what do you think the government should do?

11. Default sentences are provided for those who are not willing to satisfy the confiscation order. If confiscation is considered as a reparative provision, is the default sentence means that confiscation may leads to be a punitive by putting the defaulter in prison and because imprisonment is a punishment and not a reparation procedure?

12. The legislation has introduced, for the first time in the criminal justice system, a new application for confiscating the proceeds of drug traffickers. An application which based mainly upon ordering a person to pay a sum of cash money or what so-called ‘value-based system’. What do you think about this new principle and to what extent its application is efficient?

**B. Questions About Applications**

13. Do you think that enough resources are allocated for anti-drug trafficking programs in your force?

14. Do you think that the Unit you work for is sufficiently well funded to deal with confiscation cases?

15. Do you think that the current applications and enforcement by all law enforcement agencies correspond well with the provisions of the legislation?
16. The former Home Office Minister Mr. Stephen Jack said 'the realisation of confiscation orders is often necessarily a lengthy and complex process'. Could you comment on this statement giving the reasons and the solutions?

17. What is the most difficult aspect of the case that you encounter when it demands practising the provisions of the DTA 1994?

18. Do you think that there are any defects in the law regarding drug trafficking offences?

19. What are the main causes of the deficiency in the recovery of the amounts declared as confiscation orders?

20. Do you agree that all the funds 'realised and recovered' are paid into the consolidated fund of HM Treasury.

21. Are you satisfied with the way the courts dealt with your suspects?

22. What is the nature of the relationship between the local force and the Regional Crime Squads? And what are the differences in regard to the application of the confiscation system?

23. What further legislative changes or amendments the current system needs to be improved?

24. What changes or issues you think are important to be added or resolved in the way the legislation is implemented by your force? And how you describe the current strategies of enforcement?

25. If you have any comment you wish to add or there are any important issues which we did not cover about the confiscation system and merit to be mentioned, please explain.
APPENDIX III

Drug Trafficking
Act 1994

Selected Provisions

Confiscation orders

2.- (1) Subject to subsection (7) below, where a defendant appears before the Crown Court to be sentenced in respect of one or more drug trafficking offences (and has not previously been sentenced or otherwise dealt with in respect of his conviction for the offence or, as the case may be, any of the offences concerned), then-

(a) if the prosecutor asks the court to proceed under this section, or

(b) if the court considers that, even though the prosecutor has not asked it to do so, it is appropriate for it to proceed under this section,

it shall act as follows.

(2) The court shall first determine whether the defendant has benefited from drug trafficking.

(3) For the purposes of this Act, a person has benefited from drug trafficking if he has at any time (whether before or after the commencement of this Act) received any payment or other reward in connection with drug trafficking carried on by him or another person.

(4) If the court determines that the defendant has so benefited, the court shall, before sentencing or otherwise dealing with him in respect of the offence or, as the case may be, any of the offences concerned, determine in accordance with section 5 of this Act the amount to be recovered in his case by virtue of this section.

(5) The court shall then, in respect of the offence or offences concerned-

(a) order the defendant to pay that amount;
(b) take account of the order before-

(i) imposing any fine on him;

(ii) making any order involving any payment by him; or

(iii) making any order under section 27 of the Misuse of Drugs Act 1971 (forfeiture orders) or section 43 of the Powers 1973 c. 62. of Criminal Courts Act 1973 (deprivation orders); and

(c) subject to paragraph (b) above, leave the order out of account in determining the appropriate sentence or other manner of dealing with him.

(6) No enactment restricting the power of a court dealing with an offender in a particular way from dealing with him also in any other way shall by reason only of the making of an order under this section restrict the Crown Court from dealing with an offender in any way the court considers appropriate in respect of a drug trafficking offence.

(7) Subsection (1) above does not apply in relation to any offence for which a defendant appears before the Crown Court to be sentenced if-

(a) he has been committed to the Crown Court for sentence in respect of that offence under section 37 (1) of the Magistrates' Courts Act 1980 (committal to Crown Court with a view to sentence of detention in a young offender institution); or

(b) the powers of the court (apart from this section) to deal with him in respect of that offence are limited to dealing with him in any way in which a magistrates' court might have dealt with him in respect of the offence.

(8) The standard of proof required to determine any question arising under this Act as to-

(a) whether a person has benefited from drug trafficking, or

(b) the amount to be recovered in his case by virtue of this section, shall be that applicable in civil proceedings.

(9) In this Act "confiscation order" means an order under this section and includes, in particular, such an order made by virtue of section 13, 14 or 19 of this Act.

3.- (1) Where the Crown Court is acting under section 2 of this Act but considers that it requires further information before-

(a) determining whether the defendant has benefited from drug trafficking, or

(b) determining the amount to be recovered in his case by virtue of that section, it may, for the purpose of enabling that information to be obtained, postpone making the determination for such period as it may specify.

(2) More than one postponement may be made under subsection (1) above in relation to the same case.

(3) Unless it is satisfied that there are exceptional circumstances, the court shall
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not specify a period under subsection (1) above which-

(a) by itself, or

(b) where there have been one or more previous postponements under subsection (1) above or (4) below, when taken together with the earlier specified period or periods,

exceeds six months beginning with the date of conviction.

(4) Where the defendant appeals against his conviction, the court may, on that account-

(a) postpone making either or both of the determinations mentioned in subsection (1) above for such period as it may specify; or

(b) where it has already exercised its powers under this section to postpone, extend the specified period.

(5) A postponement or extension under subsection (1) or (4) above may be made -

(a) on application by the defendant or the prosecutor; or

(b) by the court of its own motion.

(6) Unless the court is satisfied that there are exceptional circumstances, any postponement or extension under subsection (4) above shall not exceed the period ending three months after the date on which the appeal is determined or otherwise disposed of.

(7) Where the court exercises its power under subsection (1) or (4) above, it may nevertheless proceed to sentence, or otherwise deal with, the defendant in respect of the relevant offence or any of the relevant offences.

(8) Where the court has so proceeded, section 2 of this Act shall have effect as if-

(a) in subsection (4), the words "before sentencing or otherwise dealing with him in respect of the offence or, as the case may be, any of the offences concerned" were omitted; and

(b) in subsection (5) (c), after "determining" there were inserted "in relation to any offence in respect of which he has not been sentenced or otherwise dealt with".

(9) In sentencing, or otherwise dealing with, the defendant in respect of the relevant offence or any of the relevant offences at any time during the specified period, the court shall not-

(a) impose any fine on him; or

(b) make any such order as is mentioned in section 2 (5) (b) (ii) or (iii) of this Act.

(10) Where the court has sentenced the defendant under subsection (7) above during the specified period it may, after the end of that period, vary the sentence by imposing a fine or making any such order as is mentioned in section 2 (5) (b) (ii) or (iii) of this Act, so long as it does so within a period corresponding to that allowed by section 47 (2) or (3) of the Supreme Court
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Act 1981 (time allowed for varying a sentence) but beginning with the end of the specified period.

(11) In this section-

"the date of conviction" means-

(a) the date on which the defendant was convicted; or

(b) where he appeared to be sentenced in respect of more than one conviction, and those convictions were not all on the same date, the date of the latest of those convictions; and

"the relevant offence" means the drug trafficking offence in respect of which the defendant appears (as mentioned in section 2 (1) of this Act) before the court;

and references to an appeal include references to an application under section 111 of the Magistrates' Courts Act 1980 (statement of case by magistrates' court).

4.- (1) For the purposes of this Act-

(a) any payments or other rewards received by a person at any time (whether before or after the commencement of this Act) in connection with drug trafficking carried on by him or another person are his proceeds of drug trafficking; and

(b) the value of his proceeds of drug trafficking is the aggregate of the values of the payments or other rewards.

(2) Subject to subsections (4) and (5) below, the Crown Court shall, for the purpose-

(a) of determining whether the defendant has benefited from drug trafficking, and

(b) if he has, of assessing the value of his proceeds of drug trafficking, make the required assumptions.

(3) The required assumptions are-

(a) that any property appearing to the court-

(i) to have been held by the defendant at any time since his conviction, or

(ii) to have been transferred to him at any time since the beginning of the period of six years ending when the proceedings were instituted against him, was received by him, at the earliest time at which he appears to the court to have held it, as a payment or reward in connection with drug trafficking came on by him;

(b) that any expenditure of his since the beginning of that period was met out of payments received by him in connection with drug trafficking carried on by him; and

(c) that, for the purpose of valuing any property received or assumed to have been received by him at any time as such a reward, he received the
property free of any other interests in it.

(4) The court shall not make any required assumption in relation to any particular property or expenditure if-

(a) that assumption is shown to be incorrect in the defendant's case;

or

(b) the court is satisfied that there would be a serious risk of injustice in the defendant's case if the assumption were to be made;

and where, by virtue of this subsection, the court does not make one or more of the required assumptions, it shall state its reasons.

(5) Subsection (2) above does not apply if the only drug trafficking offence in respect of which the defendant appears before the court to be sentenced is an offence under section 49, 50 or 51 of this Act.

(6) For the purpose of assessing the value of the defendant's proceeds of drug trafficking in a case where a confiscation order has previously been made against him, the court shall leave out of account any of his proceeds of drug trafficking that are shown to the court to have been taken into account in determining the amount to be recovered under that order.

(7) References in subsection (6) above to a confiscation order include a reference to a confiscation order within the meaning of-

(a) the Drug Trafficking Offences Act 1986; or

(b) Part I of the Criminal Justice (Scotland) Act 1987.

(8) For the purposes of the application of Part II of this Act in Scotland and Northern Ireland, the expression "proceeds of drug trafficking" shall be construed in accordance with section 48 (2) of this Act.

5.-(1) Subject to subsection (3) below, the amount to be recovered in the defendant's case under the confiscation order shall be the amount the Crown Court assesses to be the value of the defendant's proceeds of drug trafficking.

(2) If the court is satisfied as to any matter relevant for determining the amount that might be realised at the time the confiscation order is made (whether by reason of the acceptance of an allegation made in a statement given under section II of this Act or made in the giving of information under section 12 of this Act, or otherwise) the court may issue a certificate giving the court's opinion as to the matters concerned, and shall do so if satisfied as mentioned in subsection (3) below.

(3) If the court is satisfied that the amount that might be realised at the time the confiscation order is made is less than the amount the court assesses to be the value of his proceeds of drug trafficking, the amount to be recovered in the defendant's case under the confiscation order shall be-

(a) the amount appearing to the court to be the amount that might be so realised; or

(b) a nominal amount, where it appears to the court (on the information available to it at the time) that the amount that might be so realised is
6. -(1) For the purposes of this Act the amount that might be realised at the time a confiscation order is made against the defendant is-

(a) the total of the values at that time of all the realisable property held by the defendant, less

(b) where there are obligations having priority at that time, the total amount payable in pursuance of such obligations,

together with the total of the values at that time of all gifts caught by this Act.

(2) In this Act "realisable property" means, subject to subsection (3) below-

(a) any property held by the defendant; and

(b) any property held by a person to whom the defendant has directly or indirectly made a gift caught by this Act.

(3) Property is not realisable property if there is in force in respect of it an order under any of the following enactments, namely-

(a) section 27 of the Misuse of Drugs Act 1971 (forfeiture orders);

(b) section 43 of the Powers of Criminal Courts Act 1973 (deprivation orders);

(c) section 223 or 436 of the Criminal Procedure (Scotland) (forfeiture of property);

(d) section 13 (2), (3) or (4) of the Prevention of Terrorism (Temporary Provisions) Act 1989 (forfeiture orders).

(4) For the purposes of subsection (1) above, an obligation has priority at any tune if it is an obligation of the defendant-

(a) to pay an amount due in respect of a fine, or other order of a court, imposed or made on conviction of an offence, where the fine was imposed or the order was made before the confiscation order; or

(b) to pay any sum which would be included among the preferential debts(within the meaning given by section 386 of the Insolvency Act 1986) in the defendant's bankruptcy commencing on the date of the confiscation order or winding up under an order of the court made on that date.

7.- (1) Subject to the following provisions of this section and to section etc. 8 of this Act, for the purposes of this Act the value of property (other than cash) in relation to any person holding the property is the market value of the property, except that, where any other person holds an interest in the property, the value is-

(a) the market value of the first-mentioned person's beneficial interest in the property, less

(b) the amount required to discharge any encumbrance(other than a charging order) on that interest.
Subject to section 8 (2) of this Act, references in this Act to the value at any time (referred to in subsection (3) below as "the material time") of a gift caught by this Act or of any payment or reward are references to

(a) the value of the gift, payment or reward to the recipient when he received it, adjusted to take account of subsequent changes in the value of money, or

(b) where subsection (3) below applies, the value there mentioned, whichever is the greater.

Subject to section 8 (2) of this Act, if at the material time the recipient holds-

(a) the property which he received (not being cash), or

(b) property which, in whole or in part, directly or indirectly represents in his hands the property which he received,

the value referred to in subsection (2) (b) above is the value to him at the material time of the property mentioned in paragraph (a) above or, as the case may be, of the property mentioned in paragraph (b) above so far as it so represents the property which he received, but disregarding in either case any charging order.

References in this section to a charging order include a reference to a charging order within the meaning of the Drug Trafficking Offences Act 1986.

A gift (including a gift made before the commencement of this Act) is caught by this Act if-

(a) it was made by the defendant at any time since the beginning of the period of six years ending when the proceedings were instituted against him; or

(b) it was made by the defendant at any time and was a gift of property-

(i) received by the defendant in connection with drug trafficking carried on by him or another person; or

(ii) which in whole or in part directly or indirectly represented in the defendant's hands property received by him in that connection.

For the purposes of this Act-

(a) the circumstances in which the defendant is to be treated as making a gift include those where he transfers property to another person directly or indirectly for a consideration the value of which is significantly less than the value of the consideration provided by the defendant; and

(b) in those circumstances, the provisions of subsection (1) above and of section 7 of this Act shall apply as if the defendant had made a gift of such share in the property as bears to the whole property the same proportion as the difference between the values referred to in paragraph (a) above bears to the value of the consideration provided by the defendant.

Where the Crown Court orders the defendant to pay any amount under section
2 of this Act, sections 31(1) to (3C) and 32 (1) and (2) of the Powers of Criminal Courts Act 1973 (powers of Crown Court in relation to fines and enforcement of Crown Court fines) shall have effect as if that amount were a fine imposed on him by the Crown Court.

(2) Where-

(a) a warrant of commitment is issued for a default in payment of an amount ordered to be paid under section 2 of this Act in respect of an offence or offences, and

(b) at the time the warrant is issued, the defendant is liable to serve a term of custody in respect of the offence or offences,

the term of imprisonment or of detention under section 9 of the Criminal Justice Act 1982 (detention of persons aged 18 to 20 for default) to be served in default of payment of the amount shall not begin to run until after the term mentioned in paragraph (b) above.

(3) The reference in subsection (2) above to the term of custody which the defendant is liable to serve in respect of the offence or offences is a reference to the term of imprisonment, detention in a young offender institution, or detention under section 4 of the 1982 Act which he is liable to serve in respect of the offence or offences; and for the purposes of this subsection-

(a) consecutive terms and terms which are wholly or partly concurrent shall be treated as a single term; and

(b) there shall be disregarded-

(i) any sentence suspended under section 22 (1) of the 1973 Act (power to suspend sentence of imprisonment) which has not taken effect at the time the warrant is issued;

(ii) in the case of a sentence of imprisonment passed with an order under section 47 (1) of the Criminal Law Act 1977 (sentences of imprisonment partly served and partly suspended) any part of the sentence which the defendant has not at that time been required to serve in prison; and

(iii) any term of imprisonment or detention fixed under section 31 (2) of the 1973 Act (term to be served in default of payment of fine etc.) for which a warrant of commitment has not been issued at that time.

(4) In the application of Part III of the Magistrates' Courts Act 1980 to amounts payable under confiscation orders-

(a) such an amount is not a sum adjudged to be paid by a conviction for the purposes of section 81(enforcement of fines imposed on young offenders), or a fine for the purposes of section 85(remission of fines), of that Act; and

(b) in section 87 of that Act(enforcement by High Court or county court), subsection (3) shall be omitted.

(5) Where the defendant serves a term of imprisonment or detention in default of paying any amount due under a confiscation order, his serving that term does
not prevent the confiscation order from continuing to have effect, so far as any other method of enforcement is concerned.

(6) This section applies in relation to confiscation orders made by-

(a) the criminal division of the Court of Appeal, or

(b) the House of Lords on appeal from that division,
as it applies in relation to confiscation orders made by the Crown Court, and the last reference in subsection (1) above to the Crown Court shall be construed accordingly.

10.- (1) If any sum required to be paid by a person under a confiscation order is not paid when it is required to be paid (whether forthwith on the making of the order or at a time specified under section 31 (1) of the Powers of Criminal Courts Act 1973) that person shall be liable to pay interest on that sum for the period for which it remains unpaid; and the amount of the interest shall for the purposes of enforcement be treated as part of the amount to be recovered from him under the confiscation order.

(2) The Crown Court may, on the application of the prosecutor, increase the term of imprisonment or detention fixed in respect of the confiscation order under subsection (2) of section 31 of the 1973 Act (as it has effect by virtue of section 9 of this Act) if the effect of subsection (1) above is to increase the maximum period applicable in relation to the order under subsection (3A) of that section.

(3) The rate of interest under subsection (1) above shall be that for the time being applying to a civil judgement debt under section 17 of the Judgements Act 1838.

Statements etc. in connection with confiscation orders

II.- (1) Where the prosecutor asks the court to proceed under section 2 of this Act he shall give the court, within such period as it may direct, a statement of matters which he considers relevant in connection with-

(a) determining whether the defendant has benefited from drug trafficking; or

(b) assessing the value of his proceeds of drug trafficking.

(2) In this section such a statement is referred to as a "prosecutor's statement".

(3) Where the court proceeds under section 2 of this Act without the prosecutor having asked it to do so, it may require him to give it a prosecutor's statement, within such period as it may direct.

(4) Where the prosecutor has given a prosecutor's statement-

(a) he may at any time give the court a further such statement; and

(b) the court may at any time require him to give it a further such statement, within such period as it may direct.

(5) Where any prosecutor's statement has been given and the court is satisfied that
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A copy of the statement has been served on the defendant, it may require the defendant-

(a) to indicate to it, within such period as it may direct, the extent to which he accepts each allegation in the statement; and

(b) so far as he does not accept any such allegation, to give particulars of any matters on which he proposes to rely.

(6) Where the court has given a direction under this section it may at any time vary it by giving a further direction.

(7) Where the defendant accepts to any extent any allegation in any prosecutor's statement, the court may, for the purposes of-

(a) determining whether the defendant has benefited from drug trafficking, or

(b) assessing the value of his proceeds of drug trafficking,

treat his acceptance as conclusive of the matters to which it relates.

(8) If the defendant fails in any respect to comply with a requirement under subsection (5) above he may be treated for the purposes of this section as accepting every allegation in the prosecutor's statement in question apart from-

(a) any allegation in respect of which he has complied with the requirement- and

(b) any allegation that he has benefited from drug trafficking or that any payment or other reward was received by him in connection with drug trafficking came on by him or another person.

(9) Where-

(a) there is given to the Crown Court by the defendant a statement as to any matters relevant to determining the amount that might be realised at the time the confiscation order is made, and

(b) the prosecutor accepts to any extent any allegation in the statement,

the court may, for the purposes of that determination, treat the acceptance by the prosecutor as conclusive of the matters to which it relates.

(10) An allegation may be accepted, or particulars of any matter may be given, for the purposes of this section in such manner as may be prescribed by rules of court or as the court may direct.

(11) No acceptance by the defendant under this section that any payment or other reward was received by him in connection with drug trafficking carried on by him or another person shall be admissible in evidence in any proceedings for an offence.

12.(1) This section applies where-

(a) the prosecutor has asked the court to proceed under section 2 of this Act; or
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(2) For the purpose of obtaining information to assist it in carrying out its functions, the court may at any time order the defendant to give it such information as may be specified in the order.

(3) An order under subsection (2) above may require all, or any specified part, of the required information to be given to the court in such manner, and before such date, as may be specified in the order.

(4) Crown Court Rules may make provision as to the maximum or minimum period that may be allowed under subsection (3) above.

(5) If the defendant fails, without reasonable excuse, to comply with any order under this section, the court may draw such inference from that failure as it considers appropriate.

(6) Where the prosecutor accepts to any extent any allegation made by the defendant in giving to the court information required by an order under this section, the court may treat that acceptance as conclusive of the matters to which it relates.

(7) For the purposes of this section, an allegation may be accepted in such manner as may be prescribed by Crown Court Rules or as the court may direct.

Compensation

18.-(1) If proceedings are instituted against a person for any drug trafficking offence or offences and either-

(a) the proceedings do not result in his conviction for any drug trafficking offence, or

(b) he is convicted of one or more drug trafficking offences but-

(i) the conviction or convictions concerned are quashed, or

(ii) he is pardoned by Her Majesty in respect of the conviction or convictions concerned,

the High Court may, on an application by a person who held property which was realisable property, order compensation to be paid to the applicant if, having regard to all the circumstances, it considers it appropriate to make such an order.

(2) The High Court shall not order compensation to be paid in any case unless the court is satisfied-

(a) that there has been some serious default on the part of a person concerned in the investigation or prosecution of the offence or offences concerned, being a person mentioned in subsection (5) below; and

(b) that the applicant has suffered loss in consequence of anything done in relation to the property by or in pursuance of

(i) an order of the High Court or a county court under sections 26
(ii) an order of the Court of Session under section II (as applied by subsection (6) of that section), 27 or 28 of the Criminal Justice (Scotland) Act 1987 (inhibition and arrestment of property affected by restraint order and recognition and enforcement of orders under this Act).

(3) The High Court shall not order compensation to be paid in any case where it appears to the court that the proceedings would have been instituted or continued even if the serious default had not occurred.

(4) The amount of compensation to be paid under this section shall be such as the High Court thinks just in all the circumstances of the case.

(5) Compensation payable under this section shall be paid-

(a) where the person in default was, or was acting as, a member of a police force, out of the police fund out of which the expenses of that police force are met;

(b) where the person in default was a member of the Crown Prosecution Service or was acting on behalf of the service, by the Director of Public Prosecutions; and

(c) where the person in default was an officer within the meaning of the Customs and Excise Management Act 1979, by the Commissioners of Customs and Excise.

Confiscation orders where defendant has absconded or died

19.- (1) Subsection (2) below applies where a person has been convicted of one or more drug trafficking offences.

(2) If the prosecutor asks it to proceed under this section, the High Court may exercise the powers of the Crown Court under this Act to make a confiscation order against the defendant if satisfied that the defendant has died or absconded.

(3) Subsection (4) below applies where proceedings for one or more drug trafficking offences have been instituted against a person but have not been concluded.

(4) If the prosecutor asks it to proceed under this section, the High Court may exercise the powers of the Crown Court under this Act to make a confiscation order against the defendant if satisfied that the defendant has absconded.

(5) The power conferred by subsection (4) above may not be exercised at any time before the end of the period of two years beginning with the date which is, in the opinion of the court, the date on which the defendant absconded.

(6) In any proceedings on an application under this section-

(a) section 4(2) of this Act shall not apply;

(b) section II of this Act shall apply as it applies where the prosecutor asks the court to proceed under section 2 of this Act, but with the omission of subsections (5), (7) and (8);
the court shall not make a confiscation order against a person who has absconded unless it is satisfied that the prosecutor has taken reasonable steps to contact him; and

any person appearing to the court to be likely to be affected by the making of a confiscation order by the court shall be entitled to appear before the court and make representations.

Subject to subsection (8) below, section 9 of this Act applies in relation to confiscation orders made by the High Court by virtue of this section as it applies in relation to confiscation orders made by the Crown Court and, for that purpose, references to the Crown Court in the provisions of the 1973 Act referred to in subsection (1) of that section (except in section 32(l)(b) of that Act) shall be construed as references to the High Court.

Where the High Court makes a confiscation order by virtue of this section in relation to a defendant who has died, section 9(1) of this Act shall be read as referring only to sections 31(1) and 32(1) of the 1973 Act.

Where the High Court-

(a) has been asked to proceed under this section in relation to a defendant who has absconded, but

(b) has decided not to make a confiscation order against him, section 14 of this Act shall not apply at any time while he remains an absconder.

Where a confiscation order has been made in relation to any defendant by virtue of this section, section 15 of this Act shall not apply at any time while he is an absconder.

Where, in the case of any defendant, the High Court has made a confiscation order by virtue of section 19 of this Act, the Crown Court shall, in respect of the offence or, as the case may be, any of the offences concerned -

(a) take account of the order before-

(i) imposing any fine on the defendant;

(ii) making any order involving any payment by him; or

(iii) making any order under section 27 of the Misuse of Drugs Act 1971 (forfeiture orders) or section 43 of the Powers of Criminal Courts Act 1973 (deprivation orders); and

(b) subject to paragraph (a) above, leave the order out of account in determining the appropriate sentence or other manner of dealing with him.

Where the High Court has made a confiscation order by virtue of section 19 of this Act and the defendant subsequently appears before the Crown Court to be sentenced in respect of one or more of the offences concerned, section 2(1) of this Act shall not apply so far as his appearance is in respect of that offence or those offences.
25. - (1) The powers conferred on the High Court by sections 26(1) and 27(1) of this Act are exercisable where-

(a) proceedings have been instituted in England and Wales against the defendant for a drug trafficking offence or an application has been made by the prosecutor in respect of the under section 13, 14, 15, 16 or 19 of this Act;

(b) the proceedings have not, or the application has not, been concluded;

and

(c) the court is satisfied that there is reasonable cause to believe-

(i) in the case of an application under section 15 or 16 of this Act, that the court will be satisfied as mentioned in section 15(4) or, as the case may be, 16(2) of this Act; or

(ii) in any other case, that the defendant has benefited from drug trafficking.

(2) The court shall not exercise those powers by virtue of subsection (1) above if it is satisfied-

(a) that there has been undue delay in continuing the proceedings or application in question; or

(b) that the prosecutor does not intend to proceed.

(3) The powers mentioned in subsection (1) above are also exercisable where-

(a) the court is satisfied that, whether by the laying of an information or otherwise, a person is to be charged with a drug trafficking offence or that an application of a kind mentioned in subsection (1)(a) above is to be made in respect of the defendant; and

(b) the court is also satisfied as mentioned in subsection (1)(c) above.

(4) For the purposes of sections 26 and 27 of this Act, at any time when those powers are exercisable before proceedings have been instituted-

(a) references in this Act to the defendant shall be construed as references to the person referred to in subsection (3)(a) above;

(b) references in this Act to the prosecutor shall be construed as references to the person who the High Court is satisfied is to have the conduct of the proposed proceedings; and

(c) references in this Act to realisable property shall be construed as if, immediately before that time, proceedings had been instituted against the person referred to in subsection (3)(a) above for a drug trafficking offence.

(5) Where the court has made an order under section 26(1) or 27(1) of this Act by virtue of subsection (3) above, the court shall discharge the order if proceedings in respect of the offence are not instituted, whether by the laying of an information or otherwise, or (as the case may be) if the application is not
made, within such time as the court considers reasonable.

26.- (1) The High Court may by order (in this Act referred to as a "restraint order") prohibit any person from dealing with any realisable property, subject to such conditions and exceptions as may be specified in the order.

(2) A restraint order may apply-

(a) to all realisable property held by a specified person, whether the property is described in the order or not; and

(b) to realisable property held by a specified person, being property transferred to him after the making of the order.

(3) This section shall not have effect in relation to any property for the time being subject to a charge under section 27 of this Act or section 9 of the Drug Trafficking Offences Act 1986.

(4) A restraint order-

(a) may be made only on an application by the prosecutor;

(b) may be made on an ex parte application to a judge in chambers; and

(c) shall provide for notice to be given to persons affected by the order.

(5) A restraint order-

(a) may be discharged or varied in relation to any property; and

(b) shall be discharged on the conclusion of the proceedings or of the application in question.

(6) An application for the discharge or variation of a restraint order may be made by any person affected by it.

(7) Where the High Court has made a restraint order, the High Court or a county court-

(a) may at any time appoint a receiver-

(i) to take possession of any realisable property, and

(ii) in accordance with the court's directions, to manage or otherwise deal with any property in respect of which he is appointed,

subject to such exceptions and conditions as may be specified by the court; and

(b) may require any person having possession of property in respect of which a receiver is appointed under this section to give possession of it to the receiver.

(8) For the purposes of this section, dealing with property held by any person includes (without prejudice to the generality of that expression)-

(a) where a debt is owed to that person, making a payment to any person in reduction of the amount of the debt; and
(b) removing the property from Great Britain.

(9) Where a restraint order has been made a constable may seize any realisable property for the purpose of preventing its removal from Great Britain.

(10) In subsection (9) above, the reference to a restraint order includes a reference to a restraint order within the meaning of Part I of the Criminal Justice (Scotland) Act 1987, and in relation to such an order "realisable property" has the same meaning as in that Part.

(11) Property seized under subsection (9) above shall be dealt with in accordance with the directions of the court which made the order.

(12) The Land Charges Act 1972 and the Land Registration Act 1925 shall apply:

(a) in relation to restraint orders, as they apply in relation to orders affecting land made by the court for the purpose of enforcing judgements or recognisances; and

(b) in relation to applications for restraint orders, as they apply in relation to other pending land actions.

(13) The prosecutor shall be treated for the purposes of section 57 of the Land Registration Act 1925 (inhibitions) as a person interested in relation to any registered land to which a restraint order or an application for such an order relates.

27.- (1) The High Court may make a charging order on realisable property for securing the payment to the Crown-

(a) where a confiscation order has not been made, of an amount equal to the value from time to time of the property charged; and

(b) where a confiscation order has been made, of an amount not exceeding the amount payable under the confiscation order.

(2) For the purposes of this Act a charging order is an order made under this section imposing on any such realisable property as may be specified in the order a charge for securing the payment of money to the Crown.

(3) A charging order-

(a) may be made only on an application by the prosecutor;

(b) may be made on an ex parte application to a judge in chambers;

(c) shall provide for notice to be given to persons affected by the order; and

(d) may be made subject to such conditions as the court thinks fit including, without prejudice to the generality of this paragraph, such conditions as it thinks fit as to the time when the charge is to become effective.

(4) Subject to subsection (6) below, a charge may be imposed by a charging order only on-

(a) any interest in realisable property which is an interest held beneficially
by the defendant or by a person to whom the defendant has directly or indirectly made a gift caught by this Act and is an interest-

(i) in any asset of a kind mentioned in subsection (5) below; or

(ii) under any trust; or

(b) any interest in realisable property held by a person as trustee of a trust ("the relevant trust") if the interest is in such an asset or is an interest under another trust and a charge may by virtue of paragraph (a) above be imposed by a charging order on the whole beneficial interest under the relevant trust.

(5) The assets referred to in subsection (4) above are:

(a) land in England and Wales; or

(b) securities of any of the following kinds-

(i) government stock;

(ii) stock of any body (other than a building society) incorporated within England and Wales;

(iii) stock of any body incorporated outside England and Wales or of any country or territory outside the United Kingdom, being stock registered in a register kept at any place within England and Wales;

(iv) units of any unit trust in respect of which a register of the unit holders is kept at any place within England and Wales.

(6) In any case where a charge is imposed by a charging order on any interest in an asset of a kind mentioned in subsection (5)(b) above, the court may provide for the charge to extend to any interest or dividend payable in respect of the asset.

(7) In relation to a charging order, the court-

(a) may make an order discharging or varying it; and

(b) shall make an order discharging it-

(i) on the conclusion of the proceedings or of the application in question; or

(ii) on payment into court of the amount payment of which is secured by the charge.

(8) An application for the discharge or variation of a charging order may be made by any person affected by it.

(9) In this section "building society", "dividend", "government stock", "stock" and "unit trust" have the same meaning as in the Charging Orders Act 1979.

28.- (1) The Land Charges Act 1972 and the Land Registration Act 1925 shall apply in relation to charging orders as they apply in relation to orders or writs made or issued for the purpose of enforcing judgements.
(2) Where a charging order has been registered under section 6 of the Land Charges Act 1972, subsection (4) of that section (effect of non-registration of writs and orders registrable under that section) shall not apply to an order appointing a receiver made in pursuance of the charging order.

(3) Subject to any provision made under section 29 of this Act or by rules of court, a charge imposed by a charging order shall have the like effect and shall be enforceable in the same courts and in the same manner as an equitable charge created by the person holding the beneficial interest or, as the case may be, the trustees by writing under their hand.

(4) Where a charging order has been protected by an entry registered under the Land Charges Act 1972 or the Land Registration Act 1925, an order under section 27(7) of this Act discharging the charging order may direct that the entry be cancelled.

(5) The Secretary of State may by order made by statutory instrument amend section 27 of this Act by adding to or removing from the kinds of asset for the time being referred to there any asset of a kind which in his opinion ought to be so added or removed.

(6) An order under subsection (5) above shall be subject to annulment in pursuance of a resolution of either House of Parliament.

Realisation of property

29.-(1) Where a confiscation order-

(a) has been made under this Act,
(b) is not satisfied, and
(c) is not subject to appeal,

the High Court or a county court may, on an application by the prosecutor, exercise the powers conferred by subsections (2) to (6) below.

(2) The court may appoint a receiver in respect of realisable property.

(3) The court may empower a receiver appointed under subsection (2) above, under section 26 of this Act or in pursuance of a charging order-

(a) to enforce any charge imposed under section 27 of this Act on realisable property or on interest or dividends payable in respect of such property; and
(b) in relation to any realisable property other than property for the time being subject to a charge under section 27 of this Act, to take possession of the property subject to such conditions or exceptions as may be specified by the court.

(4) The court may order any person having possession of realisable property to give possession of it to any such receiver.

(5) The court may empower any such receiver to realise any realisable property in such manner as the court may direct.
(6) The court may-

(a) order any person holding an interest in realisable property to make to the receiver such payment as it may direct in respect of any beneficial interest held by the defendant or, as the case may be, the recipient of a gift caught by this Act; and

(b) on the payment being made, by order transfer, grant or extinguish any interest in the property.

(7) Subsections (4) to (6) above do not apply to property for the time being subject to a charge under section 27 of this Act or section 9 of the 1986 c. 32. Drug Trafficking Offences Act 1986.

(8) The court shall not in respect of any property exercise the powers conferred by subsection (3)(a), (5) or (6) above unless a reasonable opportunity has been given for persons holding any interest in the property to make representations to the court.

30. - (1) The following sums in the hands of a receiver appointed under section 26 or 29 of this Act or in pursuance of a charging order, that is-

(a) the proceeds of the enforcement of any charge imposed under section 27 of this Act,

(b) the proceeds of the realisation, other than by the enforcement of such a charge, of any property under section 26 or 29 of this Act, and

(c) any other sums, being property held by the defendant,

shall be applied, subject to subsection (2) below, on the defendant's behalf towards the satisfaction of the confiscation order.

(2) Before any such sums are so applied they shall be applied-

(a) first, in payment of such expenses incurred by a person acting as an insolvency practitioner as are payable under section 35(3) of this Act; and

(b) second, in making such payments (if any) as the High Court or a county court may direct.

(3) If, after the amount payable under the confiscation order has been fully paid, any such sums remain in the hands of such a receiver as is mentioned in subsection (1) above, the receiver shall distribute those sums-

(a) among such of those who held property which has been realised under this Act, and

(b) in such proportions,

as the High Court or a county court may direct after giving a reasonable opportunity for such persons to make representations to the court.

(4) The receipt of any sum by a justices' clerk on account of an amount payable under a confiscation order shall reduce the amount so payable, but the justices' clerk shall apply the money received for the purposes specified in this section and in the order so specified.
Appendix III

(5) The justices' clerk shall first pay any expenses incurred by a person acting as an insolvency practitioner and payable under section 35(3) of this Act but not already paid under subsection (2) above.

(6) If the money was paid to the justices' clerk by a receiver appointed under section 26 or 29 of this Act or in pursuance of a charging order the justices' clerk shall next pay the receiver's remuneration and expenses.

(7) After making-

(a) any payment required by subsection (5) above, and

(b) in a case to which subsection (6) above applies, any payment required by that subsection, the justices' clerk shall reimburse any amount paid under section 36(2) of this Act.

(8) Any balance in the hands of the justices' clerk after he has made all payments required by the preceding provisions of this section shall be treated for the purposes of section 61 of the Justices of the Peace Act 1979 (application of fines, etc.) as if it were a fine imposed by a magistrates' court.

(9) In this section "justices' clerk" has the same meaning as in the Justices of the Peace Act 1979.

Exercise of powers for the realisation of property

31.-(1) The following provisions apply to the powers conferred

(a) on the High Court or a county court by sections 26 to 30 of this Act; or

(b) on a receiver appointed under section 26 or 29 of this Act or in pursuance of a charging order.

(2) Subject to the following provisions of this section, the powers shall be exercised with a view to making available for satisfying the confiscation order or, as the case may be, any confiscation order that may be made in the defendant's case, the value for the time being of realisable property held by any person, by means of the realisation of such property.

(3) In the case of realisable property held by a person to whom the defendant has directly or indirectly made a gift caught by this Act, the powers shall be exercised with a view to realising no more than the value for the time being of the gift.

(4) The powers shall be exercised with a view to allowing any person other than the defendant or the recipient of any such gift to retain or recover the value of any property held by him.

(5) In exercising the powers, no account shall be taken of any obligations of the defendant or of the recipient of any such gift which conflict with the obligation to satisfy the confiscation order.

(6) An order may be made or other action taken in respect of a debt owed by the Crown.
Investigations into drug trafficking

55. - (1) A constable may, for the purpose of an investigation into drug trafficking, apply to a Circuit judge for an order under subsection (2) below in relation to particular material or material of a particular description.

(2) If on such an application the judge is satisfied that the conditions in subsection (4) below are fulfilled, he may make an order that the person who appears to him to be in possession of the material to which the application relates shall-

(a) produce it to a constable for him to take away, or

(b) give a constable access to it,

within such period as the order may specify.

This subsection has effect subject to section 59(11) of this Act.

(3) The period to be specified in an order under subsection (2) above shall be seven days unless it appears to the judge that a longer or shorter period would be appropriate in the particular circumstances of the application.

(4) The conditions referred to in subsection (2) above are-

(a) that there are reasonable grounds for suspecting that a specified person has carried on or has benefited from drug trafficking;

(b) that there are reasonable grounds for suspecting that the material to which the application relates-

(i) is likely to be of substantial value (whether by itself or together with other material) to the investigation for the purpose of which the application is made; and

(ii) does not consist of or include items subject to legal privilege or excluded material; and

(c) that there are reasonable grounds for believing that it is in the public interest, having regard-

(i) to the benefit likely to accrue to the investigation if the material is obtained, and

(ii) to the circumstances under which the person in possession of the material holds it, that the material should be produced or that access to it should be given.

(5) Where the judge makes an order under subsection (2)(b) above in relation to material on any premises he may, on the application of a constable, order any person who appears to him to be entitled to grant entry to the premises to allow a constable to enter the premises to obtain access to the material.

(6) An application under subsection (1) or (5) above may be made ex parte to a judge in chambers.

(7) Provision may be made by Crown Court Rules as to (a) the discharge and variation of orders under this section; and (b) proceedings relating to such orders.
Appendix III

(8) An order of a Circuit judge under this section shall have effect as if it were an order of the Crown Court.

(9) Where the material to which an application under subsection (1) above relates consists of information contained in a computer-

(a) an order under subsection (2)(a) above shall have effect as an order to produce the material in a form in which it can be taken away and in which it is visible and legible; and

(b) an order under subsection (2)(b) above shall have effect as an order to give access to the material in a form in which it is visible and legible.

(10) An order under subsection (2) above-

(a) shall not confer any right to production of, or access to, items subject to legal privilege or excluded material;

(b) shall have effect notwithstanding any obligation as to secrecy or other restriction upon the disclosure of information imposed by statute or otherwise; and

(c) may be made in relation to material in the possession of an authorised government department;

and in this subsection "authorised government department" means a government department which is an authorised department for the purposes of the Crown Proceedings Act 1947.

56. - (1) A constable may, for the purpose of an investigation into drug trafficking, apply to a Circuit Judge for a warrant under this section in relation to specified premises.

(2) On such application the judge may issue a warrant authorising a constable to enter and search the premises if the judge is satisfied

(a) that an order made under section 55 of this Act in relation to material on the premises has not been complied with;

(b) that the conditions in subsection (3) below are fulfilled; or

(c) that the conditions in subsection (4) below are fulfilled.

(3) The conditions referred to in subsection (2)(b) above are-

(a) that there are reasonable grounds for suspecting that a specified person has carried on or has benefited from drug trafficking;

(b) that the conditions in subsection (4)(b) and (c) of section 55 of this Act are fulfilled in relation to any material on the premises; and

(c) that it would not be appropriate to make an order under that section in relation to the material because-

(i) it is not practicable to communicate with any person entitled to produce the material;

(ii) it is not practicable to communicate with any person entitled to
grant access to the material or entitled to grant entry to the
premises on which the material is situated; or

(iii) the investigation for the purpose of which the application is
made might be seriously prejudiced unless a constable could
secure immediate access to the material.

(4) The conditions referred to in subsection (2)(c) above are-

(a) that there are reasonable grounds for suspecting that a specified person
has carried on or has benefited from drug trafficking;

(b) that there are reasonable grounds for suspecting that there is on the
premises material relating to the specified person or to drug trafficking
which is likely to be of substantial value (whether by itself or together
with other material) to the investigation for the purpose of which the
application is made, but that the material cannot at the time of the
application be particularised; and

(c) that-

(i) it is not practicable to communicate with any person entitled to
grant entry to the premises;

(ii) entry to the premises will not be granted unless a warrant is
produced; or

(iii) the investigation for the purpose of which the application is
made might be seriously prejudiced unless a constable arriving
at the premises could secure immediate entry to them.

(5) Where a constable has entered premises in the execution of a warrant issued
under this section, he may seize and retain any material, other than items
subject to legal privilege and excluded material, which is likely to be of
substantial value (whether by itself or together with other material) to the
investigation for the purpose of which the warrant was issued.

57.-(1) For the purposes of sections 21 and 22 of the Police and Criminal Evidence
Act 1984 (access to, and copying and retention of, seized material) -

(a) an investigation into drug trafficking shall be treated as if it were an
investigation of or in connection with an offence; and

(b) material produced in pursuance of an order under section 55(2)(a) of
this Act shall be treated as if it were material seized by a constable.

(2) In sections 55 and 56 of this Act "excluded material", "items subject to legal
privilege" and "premises" have the same meaning as in the 1984 Act.

58.-(1) Where, in relation to an investigation into drug trafficking-

(a) an order under section 55 of this Act has been made or has been
applied for and has not been refused, or

(b) a warrant under section 56 of this Act has been issued

a person is guilty of an offence if, knowing or suspecting that the investigation is
taking place, he makes any disclosure which is likely to prejudice the investigation.
(2) In proceedings against a person for an offence under this section, it is a  
defence to prove -  

(a) that he did not know or suspect that the disclosure was likely to  
prejudice the investigation; or  

(b) that he had lawful authority or reasonable excuse for making the  
disclosure.

(3) Nothing in subsection (1) above makes it an offence for a professional legal  
adviser to disclose any information or other matter-  

(a) to, or to a representative of, a client of his in connection with the  
giving by the adviser of legal advice to the client; or  

(b) to any person-  

(i) in contemplation of, or in connection with, legal proceedings; and  

(ii) for the purpose of those proceedings.

(4) Subsection (3) above does not apply in relation to any information or other  
matter which is disclosed with a view to furthering any criminal purpose.

(5) A person guilty of an offence under this section shall be liable  

(a) on summary conviction, to imprisonment for a term not exceeding six  
months or to a fine not exceeding the statutory maximum or to both; and  

(b) on conviction on indictment, to imprisonment for a term not exceeding  
five years or to a fine or to both.

Disclosure of Information Held by Government Departments

59.-(1) Subject to subsection (4) below, the High Court may on an application by the  
prosecutor order any material mentioned in subsection (3) below which is in the  
possession of an authorised government department to be produced to the court  
within such period as the court may specify.

(2) The power to make an order under subsection (1) above is exercisable if-  

(a) the powers conferred on the court by sections 26(1) and 27(1) of this  
Act are exercisable by virtue of subsection (1) of section 25 of this  
Act; or  

(b) those powers are exercisable by virtue of subsection (3) of that section  
and the court has made a restraint or charging order which has not  
been discharged;

but where the power to make an order under subsection (1) above is exercisable by  
virtue only of paragraph (b) above, subsection (4) of section 25 of this Act shall apply  
for the purposes of this section as it applies for the purposes of sections 26 and 27 of  
this Act.
(3) The material referred to in subsection (1) above is any material which—

(a) has been submitted to an officer of an authorised government department by the defendant or by a person who has at any time held property which was realisable property;

(b) has been made by an officer of an authorised government department in relation to the defendant or such a person; or

(c) is correspondence which passed between an officer of an authorised government department and the defendant or such a person;

and an order under that subsection may require the production of all such material or of a particular description of such material, being material in the possession of the department concerned.

(4) An order under subsection (1) above shall not require the production of any material unless it appears to the High Court that the material is likely to contain information that would facilitate the exercise of the powers conferred on the court by sections 26 to 29 of this Act or on a receiver appointed under section 26 or 29 of this Act or in pursuance of a charging order.

(5) The court may by order authorise the disclosure to such a receiver of any material produced under subsection (1) above or any part of such material; but the court shall not make an order under this subsection unless a reasonable opportunity has been given for an officer of the department to make representations to the court.

(6) Material disclosed in pursuance of an order under subsection (5) above may, subject to any conditions contained in the order, be further disclosed for the purposes of the functions under any provision of this Act, apart from section 16, of the receiver or the Crown Court.

(7) The court may by order authorise the disclosure to a person mentioned in subsection (8) below of any material produced under subsection (1) above or any part of such material; but the court shall not make an order under this subsection unless—

(a) a reasonable opportunity has been given for an officer of the department to make representations to the court; and

(b) it appears to the court that the material is likely to be of substantial value in exercising functions relating to drug trafficking.

(8) The persons referred to in subsection (7) above are

(a) any member of a police force;

(b) any member of the Crown Prosecution Service; and

(c) any officer within the meaning of the Customs and Excise Management Act 1979.

(9) Material disclosed in pursuance of an order under subsection (7) above may, subject to any conditions contained in the order, be further disclosed for the purposes of functions relating to drug trafficking.

(10) Material may be produced or disclosed in pursuance of this section.
notwithstanding any obligation as to secrecy or other restriction upon the disclosure of information imposed by statute or otherwise.

(11) An order under subsection (1) above and, in the case of material in the possession of an authorised government department, an order under section 55(2) of this Act may require any officer of the department (whether named in the order or not) who may for the time being be in possession of the material concerned to comply with it, and such an order shall be served as if the proceedings were civil proceedings against the department.

(12) The person on whom such an order is served -

(a) shall take all reasonable steps to bring it to the attention of the officer concerned; and

(b) if the order is not brought to that officer's attention within the period referred to in subsection (1) above, shall report the reasons for the failure to the court;

and it shall also be the duty of any other officer of the department in receipt of the order to take such steps as are mentioned in paragraph (a) above.

(13) In this section "authorised government department" means a government department which is an authorised department for the purposes of the Crown Proceedings Act 1947.
APPENDIX IV

Financial Investigation Reports

WARRANT TO ENTER AND SEARCH PREMISES
DRUG TRAFFICKING OFFENCES ACT 1986, SECTION 28

To each and all of the Constables of the South Yorkshire Police Force

An application having been made up on this day by Detective Constable Michael David Gagg, I am satisfied that there are reasonable grounds for believing that.......... has carried on or benefited from drug trafficking and that there is at the premises of.......... material likely to be (by itself or with other material) of substantial value to the investigation, namely, all files, documents and other records used in ordinary business, whether those records are in written form, are kept on microfilm, magnetic tape, or any other form of mechanical or electronic data retrieval mechanism, managers notes, paid cheques, credit and debit slips, money market deposits, inter-account transfers, telegraphic transfers and all correspondence including inter-bank correspondence, concerning financial transactions in relation to all accounts in which the name of INSERT NAME OF SUBJECT appears on the Mandate or Signature card, any locked boxes or parcels, and that the issue of a warrant is appropriate by reasons of Sub-Section (2)(a), (3), (4) and Section 28.

You are hereby authorised to enter on one occasion only within one month from the date of this Warrant the said premises and to search them for the material in respect of which the application is made.

..................................................................................... Date:
(Signature of Circuit Judge)

ENDORSEMENT (to be made by Officer executing the Warrant)

1. (The following items were found (list) or (no item found)

2. (The following items other than items which were sought were seized: (list) or (no other item was seized).

Signature of Officer................................. D.C. 1644 Date: 19 January 1995

A copy of this Warrant should be left with the occupier of the premises, or, in his absence, the person who appears to be in charge of the premises or if no such person is present, any prominent place on the premises.
PRODUCTION ORDER
(Drug Trafficking Offences Act 1986, Section 27)

To:

An application having been made in pursuance of Section 27 of the Drug Trafficking Offences Act 1986, by Detective Constable Gagg of the South Yorkshire Police, that you should give the said Detective access to all the material to which the said application relates, namely, all files, documents and other records used in ordinary business, whether those records are in written form, are kept on microfilm, magnetic tape, or any other form of mechanical or electronic data retrieval mechanism, managers notes, paid cheques, credit and debit slips, money market deposits, inter-account transfers, telegraphic transfers and all correspondence including inter-bank correspondence, concerning financial transactions in relation to all accounts in which the name of INSERT NAME OF SUBJECT appears on the Mandate or Signature card.

I am satisfied that the conditions specified in Sub-Section (4) of Section 27 are fulfilled in relation thereto.

You are hereby ordered to produce the said material to the Detective for him to take it away, or give access to the material, to the said Detective no later than the end of the period of seven (7) days from the date of this order.

Signed: (Circuit Judge)

Dated: (Court Stamp)

Note:
(a) Where the material consists of information contained in a computer the material shall be produced in a form in which it can be taken away and in which it is visible and legible.
(Drug Trafficking Offences Act 1986, Section 27 (8a)).

(b) Where the material consists of information contained in a computer the Constable shall be given access to it in a form in which it is visible and legible.
(Drug Trafficking Offences Act 1986, Section 27 (8b)).

(c) Disclosures of information about this investigation may contravene Section 31 of the Drug Trafficking Offences Act 1986. If you are contacted by anyone in connection with this order you may wish to seek legal advice, or contact Detective Constable Gagg before disclosure is made.
IN THE CROWN COURT
AT MAIDSTONE

PROSECUTOR'S STATEMENT

DRUG TRAFFICKING ACT 1994

DEFENDANT

NAME : I Druggie

STATEMENT DETAILS

PREPARED BY : D Frost
RANK AND NUMBER : DETECTIVE SERGEANT
ADDRESS : FINANCIAL INVESTIGATIONS UNIT (DRUG TRAFFICKING)
BUTTON ROAD
MAIDSTONE, KENT

SIGNATURE OF OFFICER: __________ Date: 29 October-1-99-6

STATEMENT TENDERED BY:

PROSECUTOR: D Lawyer
ADDRESS
Crown Prosecution Service
South East
Maidstone Branch
Priory Gate
29 Union Street
Maidstone
Kent ME14 1PT
FINANCIAL STATEMENT:

The prosecution have asked the Court under Section 2 of the Drug Trafficking Act 1994 to consider the defendant's benefit from Drug Trafficking. Thus it is necessary for the Court to have a confiscation hearing.

This is the Prosecution statement prepared by Detective Sergeant D Frost, financial investigation officer for Kent County Constabulary made on behalf of the prosecutor after consultation with the Central Confiscation Branch, Crown Prosecution Service, Ludgate Hill, London EC4M 7EX pursuant to Section 11 of the Drug Trafficking Act, 1994.

I have made enquiries into the financial affairs of I Druggie for the purpose of establishing-

(a) the proceeds of drug trafficking received by him, to the civil standard and
(b) the nature, extent, amount and value of the realisable property of the defendant so far as it is known to me, from which any Confiscation Order made by the Court in accordance with the Drug Trafficking Act 1994 may be paid.

1. DETAILS OF ARREST

On Tuesday 25th July 1995, the defendant was arrested by police officers, whilst driving his Vauxhall Cavalier car, registration F392 PIM in Gillingham. A subsequent search of the defendant revealed that he had nine plastic bags containing Amphetamine Sulphate secreted in his underpants. The total weight of the Amphetamine Sulphate was 245 grams (8.75 ounces). When interviewed the defendant stated that he intended supplying this consignment as 9 ounces.

A search of the defendant's home, 77 Ecstasy Road, Rochester, Kent, was conducted; cash amounting to £7,820.02 was found in the bedroom and cash totalling $850 was found in his girlfriend's, J Sanger, handbag. On Wednesday 26th July 1995, I obtained a warrant, from the Crown Court in Maidstone. This was executed by me on the Midland Bank at 231 High Street, Chatham, Kent. As a result, a blue, locked safe deposit box belonging to the defendant and his girlfriend J Sanger was handed to me by an officer of the Midland Bank. The safety deposit box contained a substantial amount of cash and a quantity of jewellery and various building society account books, cash cards and a bank book.
2. PERSONAL HISTORY

The defendant is a plumber by trade and lives at 77 Ecstasy Road, Rochester, Kent with his girlfriend Miss Sanger in a house owned by her. The defendant claims that Miss Sanger supports both him and their three children. Enquiries have shown that Miss Sanger owns two other properties, namely 45 Maidstone Road, Rochester and 38 Boundary Road, Chatham (both of which were let to DSS tenants at the time of the defendant's arrest).

3. LEGITIMATE SOURCES OF INCOME

The defendant claims to have earned about £3,000 in cash for work during the previous year, prior to which he claims to have earned £15,000 to £18,000. However, no further information is known to support the defendant's claims.

The defendant was unemployed at the time of his arrest, and has stated that he has been since mid 1994. He does not claim any state benefits, and at the time of his arrest, was not registered as unemployed. Enquiries have shown that the defendant has no legitimate source of income.

4. FINANCIAL RECORD EXAMINATION

In the safety deposit box lodged at the Midland Bank, Chatham the details of nine building society accounts discovered. Table at Appendix 1 shows the amounts deposited. The defendant has admitted in interview that these represent some of his profits from drug trafficking.

5. CALCULATION OF PROCEEDS OF DRUG TRAFFICKING

A. Benefit admitted-by-defendant

<table>
<thead>
<tr>
<th>Description</th>
<th>Amount</th>
</tr>
</thead>
<tbody>
<tr>
<td>i) Cash in safety deposit box (excluding (1,000)</td>
<td>19,985.00</td>
</tr>
<tr>
<td>ii) Deposits in Building Society/Bank accounts</td>
<td>16,790.00</td>
</tr>
<tr>
<td></td>
<td>36,775.00</td>
</tr>
</tbody>
</table>

Defendant has stated in interview that the money identified above has come from his Drug Trafficking. This money obviously represents the defendant's profit from those drug deals. Mr Justice Henry in the Court of Appeal, in the matter of R -v- Simons,[ (1994) 98 Cr.App. Rep 100] stated that "The word "proceeds" means that which proceeds from something, such as "the proceeds of sale. "The proceeds of sale are not profit made in the sale but the sale price. This is confirmed by the definition of "proceeds" in the Act, namely the value of payments or other rewards received in connection with drug trafficking carried on by him."[DTOA 1986]
The defendant has also stated that he bought his drugs for £50 an ounce and sold them for £90 an ounce. Thus the £36,775.00 represents the £40 profit made on each ounce of drug the defendant has sold. To calculate the total proceeds you need to calculate the total proceeds received by the defendant. This is found as follows:

£36,775.00 divided by £40 equals 919 ounces of Amphetamine Sulphate.

Defendant sold 919 ounces of Amphetamine Sulphate at £90 which totals £82,710

Thus the defendant's proceeds from his admitted drug dealing is £82,710

B. Assumptions

a. Property held by the defendant at any time since conviction

i) Cash found in safety deposit box 1,000.00

The defendant stated that included in the money found in the safety deposit box was a £1,000.00 belonging to Miss Sanger, and was holiday money.

ii) Cash found in Miss Sanger's handbag 850.00

The defendant claimed that the 5:850.00 found in Miss Sanger's handbag was money left over from a recent holiday taken in Florida, and Miss Sanger confirmed this in interview.

iii) Cash found in bedroom 7,860.02

The defendant claimed that the cash found in the bedroom some £7,860.02 had come from a job that he had worked on in London and that it had been there for about four years. His girlfriend, Miss Sanger, stated that she thought it had been there for about six months possibly a year at the most.

As no documentary evidence has been produced by the defendant as to the source of the above monies then in accordance with Section 4(3) (a) (i) Drug Trafficking Act 1994 the Court shall assume the money has come from Drug Trafficking unless

- the assumption is found to be incorrect
or
- there would be serious risk of injustice to the defendant

If the Court rules that the assumptions are incorrect then the Court should state its reasons.
Appendix IV

b. Transfers

i) Midland Account Number 123456 in the defendant's name.
   Total Lodgements £120,000

ii) Halifax Account Number 1235678 in the name of Miss J Sanger.
   Total lodgements £35,000 all from DSS rental payments. It is therefore accepted that this money forms no part of the defendant's drug trafficking proceeds.

As no documentary evidence has been produced by the defendant as to the source of the monies under i) then in accordance with Section 4(3) (a) (ii) Drug Trafficking Act 1994 the Court shall assume the money has come from Drug Trafficking unless

- the assumption is found to be incorrect

or

- there would be serious risk of injustice to the defendant

If the Court rules that the assumptions are incorrect then the Court should state its reasons.

c. Expenditure

i) Holiday £4,000.00

ii) Renovations £15,000.00

iii) Purchase of Vauxhall Cavalier Registration F392 PJM £2,800.00

iv) Drugs (on possession) 9 ounces @ £50 oz £13450.00

As no documentary evidence has been produced by the defendant as to the source of the above monies then in accordance with Section 4(3)(b) Drug Trafficking Act 1994 the Court shall assume the money has come from Drug Trafficking unless

- the assumption is found to be incorrect

or

- there would be serious risk of injustice to the defendant

If the Court rules that the assumptions are incorrect then the Court should state its reasons.
6. PROCEEDS OF DRUG TRAFFICKING

<table>
<thead>
<tr>
<th>Paragraph Ref</th>
<th>Details</th>
<th>Amount</th>
</tr>
</thead>
<tbody>
<tr>
<td>5A</td>
<td>Benefit admitted by defendant</td>
<td>£82,710.00</td>
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<tr>
<td>5B</td>
<td>Assumptions</td>
<td></td>
</tr>
<tr>
<td>a.</td>
<td>Property held by the defendant at any time since conviction</td>
<td></td>
</tr>
<tr>
<td>i)</td>
<td>Cash in safety deposit box</td>
<td>£1,000.00</td>
</tr>
<tr>
<td>ii)</td>
<td>Cash found in handbag</td>
<td>£850.00</td>
</tr>
<tr>
<td>iii)</td>
<td>Cash found in bedroom</td>
<td>£7,860.02</td>
</tr>
<tr>
<td>b.</td>
<td>Transfers</td>
<td></td>
</tr>
<tr>
<td>i)</td>
<td>Lodgements into the Midland account</td>
<td>£120,000.00</td>
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<tr>
<td>c.</td>
<td>Expenditure</td>
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<tr>
<td>i)</td>
<td>Cost of holiday</td>
<td>£4,000.00</td>
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<tr>
<td>ii)</td>
<td>Cost of Renovations to property</td>
<td>£15,000.00</td>
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<tr>
<td>iii)</td>
<td>Vauxhall Cavalier</td>
<td>£2,800.00</td>
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<tr>
<td>iv)</td>
<td>Drugs found in defendant's possession</td>
<td>£450.00</td>
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<tr>
<td></td>
<td>Total Benefit</td>
<td>£234,670.02</td>
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</table>

7. RESTRAINT ORDERS

On 3rd October 1995 in the High Court of Justice, Queen's Bench Division, Mr Justice Popple well made a Restraint Order against the defendant which prohibited him from dealing with his assets save as authorised by the High Court.
8. AMOUNT THAT MIGHT BE REALISED

The onus is on the defendant to provide the Court with full details of all his realisable property, including full internal valuations (carried out by a professional valuer) for the various houses he has an interest in. He will also need to supply the Court with details of the likely costs that will be incurred in realising the property.

The realisable assets that I have traced are as follows:

- Cash in bedroom: 7,860.02
- Cash in safety deposit box: 20,985.00
- Balance of Building Society Accounts: 16,798.75
- Life Assurance Policy (Surrender Value): 1,714.90
- Cavalier E I TAB: 2,000.00
- Jewellery (gift provision): 17,500.00
- Interest in home: 23,000.00
- Interest in other property: 45,000.00

Minimum value of known realisable assets: 134,858.67

9. CONFISCATION. ORDER

If the Court accepts that the defendant has benefited from his drug trafficking to the extent of £234,670.02 then the court should declare the benefit in that amount or in any other amount in respect of which the court finds the defendant has benefited.

Unless the defendant satisfies the Court that the amount that might be realised is less than the amount it declares as his benefit from Drug Trafficking then, the court should make a confiscation order in that amount.

Any reply made to this statement made under the Drug Trafficking Act should be served on the Maidstone Crown Court and a copy sent to the Crown Prosecution Service, Maidstone Branch at Priory Gate, 29 Union Street, Maidstone, Kent ME14 1PT.
### West Midlands Police

**Drug Trafficking Offences Act, 1986/Criminal Justice Act, 1988**

**FINANCIAL INFORMATION REPORT**

The investigating Officer should complete a separate Financial Information Report for each defendant, when charged with an offence within the provisions of the Drug Trafficking Offences Act, 1986, or the Criminal Justice Act, 1988.

**PLEASE ATTACH COPY WC 208 - MG 5 — RECORD OF INTERVIEW**

<table>
<thead>
<tr>
<th>For Financial Investigation Unit Use Only:</th>
<th>Ref No.</th>
<th>Date Received</th>
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<table>
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<tr>
<th>Report completed by:</th>
<th>Date</th>
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**DRUG TRAFFICKING OFFENCES ACT, 1986**

**CRIMINAL JUSTICE ACT, 1988**

<table>
<thead>
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<th>DEFENDANT DETAILS</th>
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<tbody>
<tr>
<td><strong>Surname</strong></td>
</tr>
<tr>
<td><strong>Forename(s)</strong></td>
</tr>
<tr>
<td><strong>Address</strong></td>
</tr>
<tr>
<td><strong>Occupation</strong></td>
</tr>
<tr>
<td><strong>Date of Birth</strong></td>
</tr>
<tr>
<td><strong>National Insurance No.</strong></td>
</tr>
<tr>
<td><strong>Date of Arrest</strong></td>
</tr>
<tr>
<td><strong>Date of Charge</strong></td>
</tr>
<tr>
<td><strong>In Custody</strong></td>
</tr>
<tr>
<td><strong>Bail</strong></td>
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**OTHER DEFENDANTS**

<p>| <strong>Surname</strong>       |
| <strong>Forename(s)</strong>   |
| <strong>Surname</strong>       |
| <strong>Forename(s)</strong>   |
| <strong>Surname</strong>       |
| <strong>Forename(s)</strong>   |
| <strong>Surname</strong>       |
| <strong>Forename(s)</strong>   |
| <strong>Surname</strong>       |
| <strong>Forename(s)</strong>   |
| <strong>Surname</strong>       |
| <strong>Forename(s)</strong>   |</p>
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<thead>
<tr>
<th>Offences Charged</th>
<th>Identify and Amount of Drugs</th>
<th>Street Value of Drugs</th>
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<tr>
<td>Admits Trafficking</td>
<td>YES</td>
<td>NO</td>
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<tr>
<td>If YES, how long</td>
<td>Average Value of Benefit (per month) £</td>
<td>Cost of Own Habit £</td>
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<tr>
<td>INCOME</td>
<td>EMPLOYMENT:</td>
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<tr>
<td>--------</td>
<td>-------------</td>
<td></td>
</tr>
<tr>
<td>Name of employer OR state if self-employed:</td>
<td>...</td>
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</tr>
<tr>
<td>Address</td>
<td>...</td>
<td></td>
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<tr>
<td>Occupation</td>
<td>... Net income (per week/month*):</td>
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<table>
<thead>
<tr>
<th>OTHER INCOME:</th>
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<td>Source of Income:</td>
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<table>
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<th>OTHER FAMILY INCOME:</th>
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<td></td>
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</table>

* Delete as applicable
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<thead>
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<th>ASSETS — PROPERTY</th>
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<th>Other Residence</th>
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<tr>
<td>Domestic Premises:</td>
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</tr>
<tr>
<td>House, Bungalow, Flat, Other*</td>
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</tr>
<tr>
<td>Name in which held</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Freehold/Leasehold/Rented</td>
<td></td>
<td></td>
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<tr>
<td>How long at premises</td>
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<td></td>
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<tr>
<td>RENT (Leasehold/Rented Property)</td>
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</tr>
<tr>
<td>Name and Address of Landlord</td>
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<tr>
<td>Amount of Rent (per week/month*)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>When due</td>
<td></td>
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</tr>
<tr>
<td>Method of Payment</td>
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<td></td>
</tr>
<tr>
<td>GROUND RENT (if Leasehold)</td>
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<tr>
<td>Name of Address of Landlord</td>
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<td></td>
</tr>
<tr>
<td>Amount of Rent</td>
<td></td>
<td></td>
</tr>
<tr>
<td>When due</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Method of Payment</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Any other occupants paying rent</td>
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</tr>
<tr>
<td>Length of Time</td>
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<tr>
<td>Name</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Amount</td>
<td></td>
<td></td>
</tr>
<tr>
<td>If Owner Occupier estimated value of property</td>
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<td>MORTGAGE DETAILS</td>
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<td>When Due</td>
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<tr>
<td>Method of Payment</td>
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<tr>
<td>Deposit Paid when purchasing house</td>
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* Delete as applicable
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<td>When Due</td>
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<tr>
<td>Method of Payment</td>
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<td>Amount of Arrears</td>
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<td><strong>WATER RATES</strong></td>
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<td>When Due</td>
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<tr>
<td>Method of Payment</td>
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<td>Method of Payment</td>
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<td>Method of Payment</td>
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<td>Amount of Arrears</td>
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<td>Tel. No</td>
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<td>Name of Company Supplying Air Time</td>
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<td><strong>BUILDING INSURANCE</strong></td>
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<tr>
<td>Name and Address of Insurers</td>
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<tr>
<td>Amount Insured</td>
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<td>£</td>
</tr>
<tr>
<td>Premium</td>
<td>£</td>
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<td>Method of Payment</td>
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<tr>
<td>CONTENTS INSURANCE</td>
<td>Main Residence</td>
<td>Other Residence</td>
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<tr>
<td>Name and address of Insurers:</td>
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<td>Premium: £</td>
<td>.................................</td>
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<tr>
<td>Method of payment:</td>
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<table>
<thead>
<tr>
<th>PERSONAL EXPENDITURE</th>
<th>OTHER PERSONAL EXPENDITURE (Not previously listed i.e. TV Rental etc)</th>
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<tr>
<td>Food (per month) £</td>
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</tr>
<tr>
<td>Socialising (per month) £</td>
<td>.................................</td>
</tr>
<tr>
<td>Clothing (per month) £</td>
<td>.................................</td>
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<tr>
<td>Gambling (per month) £</td>
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<table>
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<th>CREDIT CARDS</th>
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<tbody>
<tr>
<td>Name of card:</td>
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<tr>
<td>Amount owed: £</td>
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<tr>
<td>Date of account:</td>
<td>.................................</td>
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<tr>
<td>Average monthly payments:</td>
<td>.................................</td>
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<tr>
<td>Name and address of holder:</td>
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<table>
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<th>CREDIT AGREEMENTS:</th>
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<tbody>
<tr>
<td>Name of company:</td>
<td>.................................</td>
</tr>
<tr>
<td>Branch address:</td>
<td>.................................</td>
</tr>
<tr>
<td>Purpose of loan:</td>
<td>.................................</td>
</tr>
<tr>
<td>Amount owed: £</td>
<td>.................................</td>
</tr>
<tr>
<td>Monthly payments: £</td>
<td>.................................</td>
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<tr>
<td>Method of payment:</td>
<td>.................................</td>
</tr>
<tr>
<td>Amount of arrears:</td>
<td>.................................</td>
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<table>
<thead>
<tr>
<th>DIRECT DEBITS OR STANDING ORDERS:</th>
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<tbody>
<tr>
<td>Account number:</td>
<td>.................................</td>
</tr>
<tr>
<td>Name and address of Bank: (where account held)</td>
<td>.................................</td>
</tr>
<tr>
<td>Purpose</td>
<td>.................................</td>
</tr>
<tr>
<td>Amount of order £</td>
<td>.................................</td>
</tr>
<tr>
<td>When payable</td>
<td>.................................</td>
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## Appendix IV

### Maintenance Payments:

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<tr>
<th>Court Order Date</th>
<th>Name and address of beneficiary</th>
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<th>When payable</th>
<th>Method of payment</th>
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### Income Tax:

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<tr>
<th>District</th>
<th>Tax Reference</th>
<th>Name and address of inspector</th>
<th>Amount owed (£)</th>
<th>When payable</th>
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### Personal Assets

#### Cash

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<tr>
<th>Seized by Police</th>
<th>Held by Defendant</th>
<th>With Other Person</th>
<th>Amount (£)</th>
<th>Person Holding</th>
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#### Bank Account(s) (Current)

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<tr>
<th>Name and address of bank</th>
<th>Account No.</th>
<th>Name of account</th>
<th>Balance (£)</th>
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#### Building Society Account(s)

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<th>Name and address of society</th>
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<th>Balance (£)</th>
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#### Safety Deposit Box(es)

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<th>Name and address where held</th>
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#### National Savings

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<th>Certificate Numbers</th>
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<th>Where held</th>
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### PREMIUM BONDS:

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<th>Certificate Numbers</th>
<th>Amount Held</th>
<th>Name and address of person holding</th>
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### SHARES

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<th>Value of holding</th>
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### UNIT TRUSTS

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<th>Name and description of Trust</th>
<th>No. of Unit Trusts held</th>
<th>Value of holding</th>
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<tr>
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### LIFE POLICY

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<th>Name of company</th>
<th>Branch address</th>
<th>Details of policy</th>
<th>Surrender value</th>
<th>Premium amount due</th>
<th>When due</th>
<th>Method of payment</th>
<th>Linked with mortgage</th>
<th>Details</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td></td>
<td>£</td>
<td>£</td>
<td></td>
<td></td>
<td>YES</td>
<td>NO</td>
</tr>
</tbody>
</table>

### MOTOR VEHICLE(S), CARAVANS etc:

<table>
<thead>
<tr>
<th>Make</th>
<th>Type</th>
<th>Registration number</th>
<th>Value</th>
<th>Date of valuation</th>
<th>Registered holder (or name and address of person holding)</th>
<th>Hire purchase agreement</th>
<th>Lease agreement</th>
<th>Name and address of company</th>
<th>Details of agreement</th>
<th>Deposit/Payments</th>
<th>Length of agreement</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td></td>
<td>£</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
### VEHICLE INSURANCE DETAILS:

<table>
<thead>
<tr>
<th>Name and address of Insurance Company:</th>
<th>...............................................................</th>
</tr>
</thead>
<tbody>
<tr>
<td>Cost of Premium: £</td>
<td>Method of payment:</td>
</tr>
</tbody>
</table>

### OTHER PERSONAL PROPERTY, IN UK OR WORLDWIDE:

Note: List all valuable personal property including jewellery (£100 or more), aircraft, boats and yachts, works of art etc.

<table>
<thead>
<tr>
<th>Description</th>
<th>Make/Type</th>
<th>Current market value: £</th>
<th>Date of valuation</th>
<th>Location</th>
<th>Name &amp; address of person holding:</th>
</tr>
</thead>
</table>

### GIFTS TO OTHER PERSONS/GIFTS HELD BY OTHER PERSONS:

<table>
<thead>
<tr>
<th>Description</th>
<th>Make/Type</th>
<th>Value: £</th>
<th>Date of valuation</th>
<th>Location</th>
<th>Date of gift and name &amp; address of person holding:</th>
</tr>
</thead>
</table>
## Appendix IV

### VALUE ADDED TAX:

<table>
<thead>
<tr>
<th>District:</th>
<th>YES</th>
<th>NO</th>
</tr>
</thead>
<tbody>
<tr>
<td>Customs &amp; Excise VAT office address:</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Registration number:</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Amount due:</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

### COURT JUDGEMENTS (e.g. Fine — County Court Orders)

| Court order date: | | |
| Name & address of plaintiff: | | |
| Amount of order: | £ | £ | £ |
| When payable: | | |
| Method of payment: | | |

### CONTRACTUAL COMMITMENTS: (e.g. School Fees etc)

| Subject: | | |
| Name & address of payee: | | |
| Amount: | £ | £ | £ |
| When payable: | | |
| Method of payment: | | |

### OTHER SIGNIFICANT LIABILITIES OR DEBTS: (Not already dealt with)

| Name & address of creditor: | | |
| Particulars of liability/debt: | | |
| Amount due: | £ | £ | £ |

### PERSONAL SOLVENCY

| Has a Bankruptcy Order been made against the defendant: | YES | NO |
| Date of order: | | |
| Name & address of Trustee/Official Receiver: | | |

| Has an Interim Receiver been appointed under Section 286, Insolvency Act 1986: | YES | NO |
| Details: | | |

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### BUSINESS DETAILS

**PRELIMINARY ASSESSMENT:**

Is this section being completed because:

(a) The defendant carried on the business of a sole trader and property used for the business is realisable property?  
   - YES [ ] NO [ ]

(b) The defendant holds a substantial interest in a partnership or limited liability company and such interest is in itself realisable property?  
   - YES [ ] NO [ ]

(c) A partnership or limited liability company holds realisable property?  
   - YES [ ] NO [ ]

### COMPANY/PARTNERSHIP NAME OR TRADING STYLE:

| Name: ............................................................................. |
| Address: .............................................................................. |

### NAMES OF DIRECTORS/PARTNERS: (indicate which)

| Name: ............................................................................. | D/P: ............................................................................. | Address: ............................................................................. |
| .................................................................................. | .................................................................................. | .................................................................................. |
| .................................................................................. | .................................................................................. | .................................................................................. |
| .................................................................................. | .................................................................................. | .................................................................................. |
| .................................................................................. | .................................................................................. | .................................................................................. |
| .................................................................................. | .................................................................................. | .................................................................................. |
| .................................................................................. | .................................................................................. | .................................................................................. |
| .................................................................................. | .................................................................................. | .................................................................................. |
| .................................................................................. | .................................................................................. | .................................................................................. |
| .................................................................................. | .................................................................................. | .................................................................................. |

### DEFENDANT’S INTEREST IN BUSINESS:

| .................................................................................. | .................................................................................. | .................................................................................. |
| .................................................................................. | .................................................................................. | .................................................................................. |
| .................................................................................. | .................................................................................. | .................................................................................. |
| .................................................................................. | .................................................................................. | .................................................................................. |
| .................................................................................. | .................................................................................. | .................................................................................. |
| .................................................................................. | .................................................................................. | .................................................................................. |
| .................................................................................. | .................................................................................. | .................................................................................. |
| .................................................................................. | .................................................................................. | .................................................................................. |
| .................................................................................. | .................................................................................. | .................................................................................. |
| .................................................................................. | .................................................................................. | .................................................................................. |

### REALISABLE ASSETS HELD BY BUSINESS: See also Schedule 1

| .................................................................................. | .................................................................................. | .................................................................................. |
| .................................................................................. | .................................................................................. | .................................................................................. |
| .................................................................................. | .................................................................................. | .................................................................................. |
| .................................................................................. | .................................................................................. | .................................................................................. |
| .................................................................................. | .................................................................................. | .................................................................................. |
| .................................................................................. | .................................................................................. | .................................................................................. |
| .................................................................................. | .................................................................................. | .................................................................................. |
| .................................................................................. | .................................................................................. | .................................................................................. |
| .................................................................................. | .................................................................................. | .................................................................................. |
| .................................................................................. | .................................................................................. | .................................................................................. |
### ACCOUNTANT:
Name & address:  
Person dealing:

### SOLICITOR:
Name & address:  
Person dealing:

### BOOKS OF ACCOUNT:
Location:  

### OTHER FINANCIAL INFORMATION
The confiscation officer should record here any other financial information which would be relevant to preliminary High Court orders with a view to the Prosecutor seeking a confiscation order against the defendant.
APPENDIX V

The Egyptian Criminal Confiscation Law (Aspects of similarities with the Kuwaiti criminal law)

The Egyptian Narcotics Drugs Act No. 182 of 1960, amended by Act No. 122 of 1989

Section 42 of this amended Act provides that:

'Without prejudice to the bona fide third party's right, in all cases the Court shall prescribe the confiscation of narcotising substances and impounded plants stated in schedule NO. (5) and their seeds, as well as the properties yielded from the crime and the impounded instruments and means of transportation used in commitment thereof.

The Court shall also prescribes the confiscation of land cultivated by the mentioned plants if such land is owned by the offender or belongs to him by unregistered deed. But if he is just a possessor, the decision shall be terminating the deed of his possession.

Instruments and means of transportation decided to be confiscated shall be allocated for the General Administration of Combating Drugs Crimes under the Ministry of Interior, and only when the Interior Minister decides that they are necessary for performing its activity'

In accordance with this provision, the confiscation of the seized instruments and the means of transportation used in committing the offence, as well as the properties yielded from it, are obligatory (see appendix 4). According to this section, Al-Ghamaz (1994) indicates that the court can confiscate all properties that proved to be assets or proceeds of crime. Here 'properties' refers to everything or anything which has a value (p. 157).

One of the main rules upon which the provision of this section is based, is that the items required to be confiscated must be owned by the convicted person. The mere possession is not a sufficient evident for ownership. And in the case of an acquittal, confiscation order will not be imposed as long as
possession or owning certain properties is legal.

Furthermore, if such items are owned by a bona fide party and he/she did not appear before the court, then confiscation shall be impermissible with greater reason that the vehicle of third party, for example, is used in drug transportation without his or her knowledge. This is based on the precept that punishment is in personam which is provided under article 66 of the State's Constitution.

The law's stipulation of the necessity and inevitability of confiscation does not mean its subordination to the original sanction. It cannot be executed if the provision overlooks mentioning it in the final sentence (Moheb Al-deen 1995, p. 181). This means that if the court overlooks taking a decision for confiscating located instruments, the means of transportation or vehicles used in smuggling incidents, then there will be no reason for confiscating them in relation to any legal or administrative proceedings. However, if possession of the seized items is regarded as a crime per se, confiscation will be obligatory even though the court unintentionally overlooked issuing a judgement of confiscation.

Regarding the proceeds of drug trafficking offences, there is a consensus that section 42 empowers the court to order confiscation of all kinds of assets and proceeds. Moheb Al-deen (Ibid.) pointed out that earlier opinions considered the items mentioned in the law as an object of confiscation which were not restricted to movables, but included immovables as well (p.182).

This confiscation system under this Act is supported with pre-trial provisions including production orders, seizure orders, search orders, and restraint orders. The prosecution carries the burden of proof namely the proof beyond reasonable doubt. This means that the prosecution has to prove that both the defendant has benefited, and the assets were obtained from drug trafficking offences.

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1. In a case where a person is acquitted but the possession or even the ownership of seized properties is illegal, the court will be obliged in most cases to order the confiscation.
2. Article 66 of Egypt's permanent Constitution for 1970, amended by People's Assembly's resolution 1980 that "penalty is personal, no crime without a law, no penalty is to be executed without legal judgement and no punishment on acts other than those subsequent to law's effective date". Accordingly, the term 'In personam' here means that penalty is personal.
As has been observed earlier in the British and the American confiscation systems criminal confiscation laws always encounter strict rules and restrictions in their application. One of the common rules on which most criminal laws are based is the burden of proof in dealing with individual rights, privacy, ownership, property rights and certain privileges. The situation with the Egyptian criminal confiscation system is not quite like that (an interview with Mr. Solaiman, Ministry of Justice, Cairo 1996). Providing evidence and proving the benefit and the relation between this benefit and the crime are accompanied by prolonged procedures and routine that always frustrate the prosecution. A close look at the percentages of the disposed and non-disposed drugs cases of 1995 illustrates this point. In 1995 the number of drugs cases is 13,078. 85% of these cases are non-disposed. Only 1062 cases were convicted (8%), 917 cases were acquittal (7%), and 60 cases were preserved³ (see Table 7.1).

This table shows the number of disposed and non-disposed drugs cases, number of cases and suspects preserved, acquittals, and convictions (Year 1995). Source: Ministry of Interior, Egypt.

<table>
<thead>
<tr>
<th>Total Number</th>
<th>Number of disposed Cases (Total: Cases 2039; Defendants 2182)</th>
<th>Number of non-disposed cases</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Preservation</td>
<td>Acquittal</td>
</tr>
<tr>
<td>Cases</td>
<td>Def Cases</td>
<td>Def Cases</td>
</tr>
<tr>
<td>13078</td>
<td>14602</td>
<td>60</td>
</tr>
</tbody>
</table>

³There was a lot of efforts made in order to collect more precise data for the study, but unfortunately the information needed was not available to the researcher. Obtaining information and statistics about the drug trafficking offence was not possible.
In addition to such legal burdens in the criminal confiscation system and administrative obstacles and defects encountering application, the Egyptian Constitutional Supreme Court\(^4\) issued a decision on the 5th of October 1996 stating that section 208 of the Criminal Penal Procedure Act 1950, which provides the confiscation law with an essential pre-trial restraint power, is unconstitutional.

Section 208 provides two important paragraphs. The first states that:

> 'the attorney general may, if investigation revealed sufficient evidence about the seriousness of indictment in the crimes listed in..., to order -as a guarantee for executing whatever fine decided or money returning, the value of items subject matter of the crime, or compensating the victim- restraining the accused from dispersing his properties or administering them or in regard to other preventive measures.'

While the second paragraph states that:

> 'He also may order such measures regarding the properties of the accused spouse or minor children as a guarantee for what he might decide unless it is proved that such properties are vested in them from anywhere other than the properties of the accused.'

Based upon the Constitutional Supreme Court's decision, section 208 was

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\(^4\)A juridical independent panel assuming judicial control on the constitutionality of laws and rules as well as on the interpretation thereof.
repealed from the aforementioned Act. Accordingly, the confiscation of proceeds of crime under the Egyptian Drugs Act (section 42) becomes restricted only to drugs, instruments, means of transportation and properties yielded from crime, which are seized at the time of arrest. This decision has widely affected the powers provided under this section to deal with the proceeds of drug trafficking offences. Without restraining power, the confiscation system will be lacking an important procedure in the attempt to trace, seize and confiscate the assets and proceeds of crime and drug trafficking offences in particular.

It is worth reviewing here some of the main reasons behind the decision of the Constitutional Supreme Court to repeal these two essential paragraphs under section 208 of the Criminal Procedures Act 1950. The court held that the procedures under those two paragraphs are unconstitutional for the following reasons:

1) The principle of innocence is presumed in every accused and such presumption may not be falsely destroyed but it should be challenged by evidence deduced from the documents. This cannot be done unless the person was convicted with a sentence that cannot be challenged and thereby becomes peremptory.

2) The principle of innocence is related to the criminal charge through its proof, and it has nothing to do with the nature or seriousness of the crime, nor with its type or degree of penalty. This principle is inherent in every individual, warranting his protection whether in the various influential stages preceding or during his criminal trial and along its circuits. The provisions under these two paragraphs, accordingly, have sanctions imposing restrictions on individuals properties so as to prevent them from being administered or disposed. These kind of restrictions have no support from the Constitutional articles and provisions, thus discriminating between those and other citizens or other indictees. All of them are incorporated in one legal position, that is the assumption that all of them are equal. Neither accusation nor investigation can set aside the principle of their innocence or discriminate between them in the rights they enjoy.

5This important and efficient judgement of the Constitutional Supreme Court was collected during the field work visit to Cairo/Egypt in December 1996.
3) Imposing restrictions according to the provision of section 208 is not associated even with issuing a specified accusation against a particular individual, but is mainly based upon sufficient evidence about the preponderant accusation with one of the crimes specified by the investigation. Such evidence is not to be confused with the adjudicated order and does not take its course with regard to other defendants. It is not accordingly considered as an absolute order. So discriminating between defendants with no constitutional ground, shall be in conflict with the judgement of reason and thus in conflict with the provision of article 40 of the constitution.

4) Promoting the property rights by confirming its positive contribution in protecting the social security and the preservation of rights of the efforts of owners. The constitution ensures its protection of every individual, not to be trespassed other than by way of exception which is mainly confined to a inevitable legislative re-organisation. Accordingly, the legislator may no longer derogate its elements, change its nature, strip it from its essentials, separate its component parts, destroy its assets, or restrict exercise of rights stemming therefrom unless necessitated by its social function. Without this, ownership loses its fundamental securities.

5) The restrictions imposed by the provision of the article on the properties of the defendants are not reached by convention, but derived from the provision of the law. Yet the defendants are not only deprived from administering their properties, they are also prevented from disposing them. Their minors (children) and spouse are not excluded from such restrictions. Such provisions derogate their ownership and destroy its most important characters. These restrictions operate as a form of guardianship or receivership far from common judicial decisions and in conflict with the provision of article 34 of the Constitution which states that:

'private property is inviolable and it should not be subject to receivership without a judicial decision'.

Based upon these reasons, the Constitutional Supreme Court decided the

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6Article 40 of the constitution stipulates that "Citizens are equal before the law, they are equal in common rights and obligations and no discrimination between them because of race, origin, language, religion or doctrine"
unconstitutionality of the restraint orders upon which confiscation procedures provided under section 42 of the Drugs Act are based. Thus, confiscation under this section was perceived to be counter-productive and would not achieve the aims of those interested in tracing the illicit gains and profits of even the major drug traffickers.

On the other hand, the second paragraph of section 42 of this Act permits the confiscation of land planted by drugs. Despite the fact that land confiscation requires only prevention of sale or exchange, arguments were raised concerning the legality of land confiscation and its consistency with article (36) of the Constitution which indicates that private ownership is protected and the public confiscation of properties is prohibited.

Moheb Al-deen (Ibid.) responded by saying that this is a common misunderstanding. Confiscation of agricultural land is a private and not a public confiscation. The confiscation procedure is confined only upon a specific land(s). He asserted that this provision is in agreement with article (31) of the Constitution which states that 'private ownership is represented in unemployed capital where the law organises its social function within the framework of development plan without deviation or exploitation and it should not, in its ways of utilisation, be in conflict with the public good of the people' (p. 183).

The perceptions of those who are against such criminal confiscation provisions are based upon the belief that:

1) Criminal legislation, which although it has permitted confiscation as a complementary or a supplementary punishment, has exhaustively restricted it to seized items that could be confiscated as proceeds to crime, such as instruments and weapons used in crime.

2) Seizure is an important element in the criminal confiscation. Seizure can be used only for movable properties. Lands are not intended to be included.

3) The constitutional general precept provides immunity and sanctity for ownership that should not be violated or squandered under any circumstance. The state always has its ways of deterrence and punishment that spare it from resorting to confiscate particular property that might or
might not be available to those who have committed the crime (Ibid., p.185).

Moheb Al-deen responded by indicating that the Constitutional provisions do not prevent the confiscation of agricultural land. On the contrary, confiscation conforms with the provision of article (32) of the Constitution which prevents the utilisation of ownership in purposes contradicting with the people's public interest. Moheb Al-deen adds that it is not true that the legislator prevents confiscation of immovables relying thereby upon the law of Organising the Imposition of Receivership Act 1971 which permits all kind of confiscation. Also, judiciary decisions, decisions of Court of Ethics, and the decisions of the Supreme Court of Ethics always have supported this trend (p.186). Moheb Al-deen here in resorting to Act 1971 is revealing that the criminal confiscation law in dealing with immovable properties is not sufficient enough to deal with such confiscations. He indicates that the state always selects the more preventive alternatives in such a way so as to agree with the nature and type of each crime and criminal. (p.190).

The decision of the Constitutional Supreme Court in repealing the most important pre-trial procedures such as the pre-conviction seizures and restraints is the only reason why the Drugs Department of the Ministry of Interior (the police force) has resort to a different law, and to a different system under the Socialist General Prosecutor Office (Act No. 34 of 1971). This situation is quite similar to the American confiscation system where law enforcement agencies are allowed to resort to civil confiscation which is provided under different statute.

**Criminal Confiscation as a Penalty or a Pre-Cautionary Provision**

Where the British confiscation system is struggling to clarify the destination between penalty and reparation, the Egyptian and the Kuwaiti confiscation systems are classified as a punishment or a precautionary as obligatory or discretionary.

The Egyptian and the Kuwaiti legal systems also consider confiscation provisions as a complementary procedures\(^7\). The rules and characters of

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\(^7\)The terms 'ancillary', 'complementary', and 'supplementary' can be defined in a variety of ways. The Kuwaiti and originally the Egyptian law differentiated between the supplementary and the complementary procedures. More details about the differences will be reviewed later in this chapter.
complementary sanctions and the definitions, extent, and the difference between punitive confiscation and the precautionary provisions will be examined in details later under the study of the Kuwaiti confiscation system. However, Dr. Gannam (1996)\(^8\), a senior lecturer at the Law Faculty in Kuwait University, points out that the origin of the Egyptian and the Kuwaiti Constitutions and most of the laws and regulations (the Penal Code, the Procedural Code) are extracted from the French legal system. The historical relations between Egypt and France have its own effects upon the formation of the legal system in Egypt, which subsequently, extended to other Arab countries in the region. The most distinctive feature of the legal system which has been adopted by the Egyptian and the Kuwaiti governments is that it is a 'written law'. This feature is the common of Continental or the Latin legal family, and is unlike the situation with Common law systems (the Anglo-Saxon legal family).

Zweigert & Kotz’s (1977) indicate that the tradition of English Common law has been one of gradual development from decision to decision; historically speaking, it is case-law, not enacted law. Common law comes from the court, unlike Continental law\(^9\) which it comes from the study. The great jurists of England were judges, on the Continent they were professors. Lawyers of the Latin systems when faced with a problem, even a new and unforeseen one, inquire about what solutions the law provides unlike Anglo-Saxon legal systems in England and the United States where lawyers predict how the judge would deal with the problem, given existing decisions. These differences in style run through the whole legal system’ (p. 63-75).

Moreover, Zweigert & Kotz state that 'as far as to family and inheritance law concerned, the Arab countries unquestionably belong to Islamic law, but the

\(^8\)This statement is part of a telephone interview with Dr. Gannam (2nd of October, 1996), who explained the recent relevant amendments and interpretations of the Kuwaiti confiscation laws.

\(^9\)In summing up the comprehensive examination of the world wide law systems and the origin of grouping the legal systems Zweigert & Kotz stated that 'these groupings primarily for taxonomic purposes, so as to arrange the mass of legal systems in a comprehensible order’. They indicated that many attempts tried to devise grouping those mass legal systems (Arminjon; Nolde; Wolf and many others). The legal ideologies of the Anglo-Saxon, Germanic, Romanistic, and Nordic families are essentially similar, and it is because of other elements in their styles that they must be distinguished. But in general, the world today knows two different 'law types': Latin or Continental legal system which stem from Roman and Germanic law (combine the legal system of most countries of Europe, Latin America, many countries in Middle East and Asia) on one side, and the Anglo-Saxon legal system which the United States, England and some other countries come under on the other side (p. 63-75 ).
economic law of these countries (including commercial law and the law of contract and tort) is heavily impressed by the legal thinking of the colonial and mandatory powers. Accordingly, French law dominated most of the Arabs states' (p. 66). The authors conclude by saying that 'recently the attitudes of Common law and Continental law have been drawing closer' (p. 71).

The United Nation Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances 1988 (Vienna)

A report by the Ministry of Interior (1996) on 'Money Laundering Crimes', states:

'Egypt has played an effective role in preparing for this Convention and ratified it in 1989 and its provisions became applicable and enforceable as a national legislation from the date of ratification by the People Assembly'.

This is confirmed by the provision of section 151 of the Constitution of the state which provides that ratifying Conventions must have the power of law after being concluded, ratified and published according to the stated situations.

Article 3 of the Convention provides that each party shall adopt such measures as may be necessary to establish as criminal offences under its domestic law. In regard to confiscation, article 5 provides that each party shall adopt such measures as may be necessary to enable confiscation of proceeds derived from offences established in accordance with article 3, or property the value of which corresponds to that of such proceeds. Confiscation can be made of narcotic drugs and psychotropic substances, materials and equipment or other instrumentalities used in or intended for use in any manner in offences established in accordance with article 3.

Paragraph 2 of article 5 provides that each party shall also adopt such measures as may be necessary to enable its competent authorities to identify, trace, and freeze or seize proceeds, property, instrumentalities or any other things referred to in last paragraph, for the purpose of eventual
Moheb Al-deen (1995) comments by saying that it is the beginning of a new and more effective stage of serious confrontation. It makes the legislator start establishing and developing new policies by reviewing the current dispersed confiscation laws and making them consistent with international law.

In specifying the impact of international law on the national law in terms of considering new penalties, he adds:

'We noticed that the international Convention has followed an integral penal policy aiming at encompassing all incrimination acts and links. It followed the policy of imposing the conventional penalties beside the other consequential and complementary penalties and other remedial or preventive measures concerned itself with stipulating the penalty of confiscation of everything, on immovables, movables and properties acquired from drugs offences considering it as original and not consequential or complementary penalty and linked such penalty with the objective in unique harmony and integration; while the international Convention stipulated that the parties states should take the necessary measures for enabling the confiscation of proceeds obtained from the offences provided for or the money which value is equivalent to the value of the said proceeds (section 5), and confiscating the narcotics drugs, psychotropic substances, materials, equipment or other means, used or intended to be used somehow in committing the offences provided for; while the international Convention compelled its members to take the necessary measures for enabling its authorities to follow and trace the properties acquired from drug trafficking offences, freeze and attach them with the aim of confiscating them, and while the international Convention demanded that the properties and monies acquired from drug trafficking offences are to be deprived of the confidential guarantees for the financial, banking, and commercial transactions and dealings, we find no such provisions in the Drugs Act and its subsequent amendments' (p. 257).

Moheb Al-deen indicates that Act No. 34 of 1971 is the only national provision which permits the confiscation of all properties which are considered (by Court of Ethics) as dirty money and proceeds of drug trafficking. The Court of Ethics is empowered to deal with any dirty money or suspected illegal gains of certain crimes. The Act provides a general provision which empowered the Court of Ethics to deal with any situations which are in the interest of the public and the national security. The Common

\[10\text{These articles are extracted from the final Act of the United Nations Conference for the Adoption of a Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (Compendium of International Anti-Money Laundering Conventions & Agreements, United States Department of the Treasury, Financial Crimes Enforcement Network, the second edition, 1996).}\]
law (criminal and civil law) may also resort to the provisions of this Convention in tracing and confiscating the illicit properties from drug traffickers even though this is difficult to be carried out under the current laws and the situation of the Supreme Constitutional Court toward the pre-trial seizure and restraint procedures. Moheb Al-deen concludes his commentary on Egyptian legislation related to confiscation procedures by saying that in a general sense, if the existing Egyptian legislation has been affected by the provisions of the international Convention, it has not integrated it in the new policies of incrimination despite the synchronism of the law and the Convention. And if the existing Egyptian law is the most sophisticated means in combating drugs misuse, the contemporary international Convention is considered the start of a new and a more effective stage for serious confrontation. Accordingly, the Egyptian Government must introduce new criminal legislation that is able to deal with local drug trafficking related proceeds and capable to co-operate with relevant international laws and Conventions (p. 262).

The Arabic Convention Against Illicit Trafficking in Narcotics Drugs and Psychotropic Substances 1994 (Tunisia)

This Convention was ratified by the Egyptian Government in November 1994. It includes provisions related to the confiscation of drug traffickers' proceeds and profits quite similar to the aforementioned Convention. It has recommended the necessity of tracing and seizing the properties resulting from drugs offences with the aim of confiscation thereof linked to of the other recommendations stipulated in the 1988 Convention.

In spite of the appeals of these two Conventions for member states to take the necessary measures to establish special legislations that enable their competent authorities to identify the proceeds and properties resulting from the offences and attaching the same with the aim of confiscation thereof, the Egyptian legislator seems satisfied with the available national laws and particularly with Act No. 34 of 1971. Neither the public prosecution nor the

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11In addition to the decision of the Constitutional Court, the Government enacted a new regulation which added more guarantees and facilities for investments by protecting the law of confidentiality of transactions in the Egyptian Banks (Regulation No. 568 of 1990). This regulation is a more restriction which makes the enforcement of the criminal confiscation proceedings (e.g. bank disclosures and information) almost impossible.
socialist general prosecutor had used or relied upon the provisions of one of those two Conventions yet (till 30th of December 1996). Al-Gamaz (in an interview held in 1996) asserts that this does not mean that the Egyptian prosecutors under the criminal system cannot utilise the provisions provided by these two ratified Conventions.

A bilateral convention with the Indian Government on the 20th April 1995 is a clear indication that the provisions of these two international and regional Conventions are been seriously considered by the Egyptian Government. Section 4 of the bilateral convention with the Indian Government provides that:

The two parties assist each other, to such extent permitted by the national law, regarding drugs offences. Such assistance includes in particular: (a) searching for or collecting evidence and (b) freezing, restraining and confiscating the moneys and properties resulting from or used in the illicit trafficking'.
APPENDIX VI

RESEARCH METHODOLOGY

RESEARCH METHODS

There are various types of research methods used in this study. The choice of methodology is determined by a prior understanding of the type of information needed to be collected, the relationship between the information and the chosen resources which are expected to provide it. Accordingly, the practices involved must be pragmatic, strategic and self-reflexive. As such the methods cannot always be set in advance; the choice will sometimes depend upon the questions being asked, whilst the questions depend on their context, what is available to the researcher, and what the researcher can do within that setting.

A combination of multiple methods, empirical materials, perspectives and observers in a single analysis is best understood as a strategy that adds rigour, breadth, and depth to the investigation. By incorporating different methods this allows a study of the performance of more than one task, ranging from interviewing to observing, to interpreting personal and historical documents, to intensive self reflections and introspection. The strategy adopted here is however interactive, working between and within competing and overlapping methods.

Three research methods have been used in this study. There will be a brief review of each in turn. Additional explanations are provided in Appendix V.

(a) Personal Interview: interviewing is one of the most common and powerful ways to understand the experiences of those participating in an event. It is an essential part of sociology because it involves interactions (Benney & Hughes, 1956, p. 142). According to Operheim, interviews are essentially of two kinds: (i) Exploratory and (ii) Standardised\textsuperscript{12} (p. 63).

\textsuperscript{12}Such as those used in public opinion polls, market research and government surveys
Exploratory interviews specially in a semi-structured form, give the researcher an insight into the thinking process of the interviewee. They allows a spontaneous flow and exchange of questions, answers and other ideas to and from the interviewer. It is this spontaneity that gives an ambiguous feel to the information collected, which in turn allows the development of new ideas and hypotheses. It helps the interviewer understand the psyche of those being interviewed and their process of thinking, which, makes the subject of research more exciting and effective. It gives a true perspective on a specific area of study (a first hand account in some cases) to the researcher rather than a factual data feedback with yes and no answers. It also gives additional answers to the researcher and helps formulate and classify research problems. These interviews have been used with high ranking government officials where it is important to let the interview range over a number of different matters which could not always be determined in advance.

Standardised interviews were used with more structured questionnaires.

(b) Mail Questionnaire: open ended or semi-structured mail questionnaires were used where a personal interview was not possible. But keeping them open-ended and semi-structured means that the respondent is still able to answer all questions in a spontaneous and an impromptu manner. One of the advantages of the mail questionnaire is that large samples can be used and there is a reduction in the biases that might result from personal characteristics of the interviews. The disadvantage of such a system is the typical non-response rate. Whereas in personal interviews this is a 95%, response in the case of mailed questionnaire it falls to anything between 20% to 40%, although various methods can be used to get over this problem like sampling, follow-up etc. Mail questionnaires were used by the researcher to get data from all the financial investigators at the remaining forces.

(c) Telephone Interview was used in a small number of interviewees, usually as an explanatory form of interviewing. Telephone surveys seems to be the medium method of interviewing. Although they allows personal voice communication and feedback, the social and personal viewpoints and characteristics of the interviewers are probably less pronounced. They offer a faster method of covering distant geographical areas (both within the national and international limits). The major disadvantage of such a method
can be, the problem of language (if the researcher is calling overseas or if researcher is not proficient with the native language), cultural problems (for example, in Kuwait where people might find telephone interviews impersonal) and the high telephone costs involved.

**THE RESEARCH PROJECT: INITIAL MAP OF EXECUTION AND ITS CONSEQUENT AMENDMENTS**

As said in chapter 1, one of the main objectives of this thesis is to examine the system of confiscation within the context of England and Wales' legislation. As said above semi-structured interviews and questionnaires and telephone interviews constituted the means of obtaining the data used in the research analysis although of course the more traditional library method was used for the other aims. However, regarding the information collected from the USA, Kuwait and Egypt, different methods were used. These were less structured and more suitable to personal visits made to each of these countries. This type of personal interview was seen as the most appropriate in order to deal with the many issues involved. More details of the visits and the conditions of the interviews are given later in this chapter.

With respect to the British confiscation system, it was intended that three populations should be investigated. The first was from the police financial investigators; the second would include some judges and prosecutors; and the last one would include a number of drug traffickers in prisons who were ordered by court to pay a confiscation order.

In the early stage detailed letters were sent explaining the purpose, aims and objectives of the study with copies of the relevant questionnaires attached to each letter. This initial letter was sent first to the Lord Chancellor's Department asking for permission to send questionnaires and to conduct interviews with some judges in Leicestershire, Nottinghamshire and Derbyshire. Unfortunately, the Department replied in the negative. Another letter to HM Prison Service was met with the same response. Accordingly, and after discussing the situation with the supervisor, it was decided that the study should focus only on the financial investigation system conducted by the police in England and Wales.
Financial Investigation Officers

In view of the research objectives, it was decided to use two survey methods for data collection. Each can be considered as a separated stage. For the first stage, the mail questionnaire method was chosen as the most appropriate data collection method. This decision was made primarily on practical grounds. From several personal visits to police forces and in particular to the Financial Investigation Units (FIUs) in ten districts, it was observed that eight forces had two financial investigator officers who specialised in drug trafficking offences and the remaining two forces had only one financial investigating officer. This proves Levi & Osofsky's (1995) finding that half of the thirty five forces who replied to the letters had two officers or fewer in their financial investigation unit; only four had five or more officers. Five forces had one civilian employed full-time on asset confiscation duties in their FIUs, and two thirds did not have any (p. 29).

The precise number of police financial investigation officers working on asset confiscation in regard only to drug trafficking offences is unknown and difficult to obtain due to several reasons: (a) some forces have no financial investigation unit. The execution of the confiscation provisions under the DTA 1994 is an additional task or duty to the main work of one of the Fraud's officers; (b) some forces vested the task to a civilian specialist accountant; and (c) some forces were sensitive in disclosing such information about the population of the police officers and their distribution in the Constabulary. However, it is thought there was a total of 87 -at least in 1993- which was calculated by Wright et al (1993) and is thought to reflect the numbers of all the police financial investigators of the FIUs. This figure has been validated by using data from other sources such as from a list of names and telephone numbers of all the financial investigators in UK obtained from NCIS; as well as some of the findings of the Levi & Osofsky's 1995 Report.

As will be shown later there is a relatively small number of financial investigation officers specialising in drug trafficking offences whether

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13The Broome report on the implementation of the Drug Trafficking Offences Act 1986 (1985) recommended that regionally the DPC team should consist of two RCS Detective Sergeants attached to each of the regional headquarters of the Crime Squad (para. 2.23, p. 28).
14Wright et al (1993) in their Report Drugs Squads: Law Enforcement Strategies and Intelligence in England & Wales, indicated that the number of DPC police officers is 87. This includes the number of police financial investigators in 43 police force, eight Metropolitan areas, the five Regional Crime Squads, and the NCIS (The Police Foundation Report, Appendix B, p. 115-122).
appointed by each police force or appointed by the Regional Crime Squads (RCSs) (concluded from those aggregate number of all the investigators in the UK). This made the use of the mail questionnaire more appropriate. At the beginning of the field work, a list of all the names of the financial investigators (Police and Customs & Excise) in the UK was obtained from NCIS. However, it was discovered later that the list is an old one, most of the names has been changed, or transferred to other tasks, or promoted to higher administrative ranks, or the telephone numbers were changed or wrong. Hence, the total number of respondents were thought to be no more than 47 and the total number of the forces who responded was 39 (10 forces by personal visits and 29 forces by mail questionnaires).

The second stage involved a series of interviews carried out in England and Wales, USA, Kuwait, and Egypt, with the main information provided by the respondents in the questionnaire survey. The decision to use the interview method was made on the basis that it was the most appropriate way of collecting comprehensive information from a limited number of specialised persons. Telephone interviews were also conducted with several lecturers from the Law Faculty, Kuwait University. These telephone interviews were mostly conducted to cover some points which were not fully covered during the face-to-face interviews.

The Pilot Study
To ensure the suitability and completion of the questionnaire, several steps have been followed. The first step was to conduct a small pilot study which in practice meant constructing a list of questions and inquiries relevant to the subject of the study. The second step in the questionnaire development involved submitting a draft list of questions and inquiries to several persons specialised in the area of study. They were asked to read the questionnaire critically, to give their reactions and suggestions, to make notes, and when necessary to eliminate, add, or rewrite certain questions. As a result of this, considerable improvements were made to the questionnaire contents and presentation.

Every aspect of the questionnaire was now tried out beforehand to make sure that it worked as intended. The researcher allowed a substantial period of time for the construction, revision and refinement of the questionnaire. Due to the limited number of police financial investigators in the 43
Appendix VI

Constabularies, it was not possible to use any member of the population for the pilot samples. Instead, the researcher managed to locate four personnel with comparable knowledge of the confiscation system and the financial investigations who could take part in this pilot study, and provide feedback about its suitability, clarity and any confusion that might occur. The aim was to eliminate any unnecessary questions or misunderstanding.

Once all of the above processes were completed, the questionnaire was distributed to all the financial investigation units in England and Wales.

The Mail Questionnaire Used

To overcome the problem of a low response rate for the British police study it was decided to adopt Dillman's Total Design Method (TDM) for the development and use of a mail questionnaire (Dillman, 1978). According to Dillman, three steps must be taken to maximise the survey response:

- Minimise the cost of responding;
- Maximise the rewards for doing so; and
- Establish trust that those rewards will be delivered.

Dillman, also offers detailed advice on matters such as the use of envelopes, the covering letter, mailing dates, and so on. However, such matters as personalisation and reminder procedures, for example, are not always possible. Dillman advised the use of three reminders or more, where the third reminder should be sent by registered mail to all non-respondents. Following Dillman, for this study, only three reminders were sent to most of the non-respondents.

Also, most of Dillman's other recommendations were used. The following methods were applied to increase the response rate:

- An individual, one-page, dated covering letter printed on headed paper with a signature was sent along with the questionnaire;

- Stamped, self-addressed envelopes giving a local address were provided;
To maintain the confidentiality of respondents, survey data were treated as confidential, steps had been taken to ensure that no information will be published about identifiable persons without their permission;

- It was explained in the covering letter that copies of the final report resulting from the research survey would be sent to the respondents upon request; and

- In terms of reducing the effort for respondents, the package was kept as clear and simple as possible.

In terms of this study every avenue and recommendation was used in order to maximise the response rate, additional copies of the questionnaires were sent to those places which have requested so. Also further interviews were held in order to compensate as much as possible the low rate of responses.

**Questionnaire Content for the Police Study**
The main objective of the questionnaire was to seek the police financial investigators' point of view, their perceptions and attitudes in terms of their awareness of confiscation philosophy, and the uses and practises of confiscation provisions under the Drug Trafficking Offences Act 1994, to determine also the adequacy of resources specially provided for the confiscation system. The intention was also to assess the level of resources devoted to financial investigation, to identify problems arising, and to determine the impact of the confiscation proceedings and provisions on the drug trafficking offences in each force.

The questionnaire was sent to all financial investigation units in England and Wales. It constituted seventeen questions. These questions cover those issues and inquiries which would help determine and apprehend the strengths and weaknesses of the current confiscation system conceived by police financial investigators who are involved in practising the confiscation system on a daily basis. The questionnaire represented two main areas of discussion: the provisions and powers provided by the confiscation legislation, and certain controversial issues related to the applications and the enforcement strategies of the system.
As mentioned earlier, because the number of the police financial investigators specialised in the enforcement of the confiscation provisions under the Drug Trafficking Act 1994 was limited, a decision was made to send the questionnaire to all the financial investigators. Four questionnaires were sent to each of the 33 forces. A sum of 132 questionnaires were distributed by post and 40 questionnaires were handed in to the remaining ten units during the personal visits.

A number of problems appeared during the data collection. One of the most difficult and time-consuming of these was associated with getting official permission from the Chief Constables offices themselves to distribute the questionnaire to their financial investigators. Leicestershire Constabulary and Staffordshire Constabulary preferred not to participate due to certain rules related to their own policies.

On the other hand, one of the advantages the researcher had which helped in obtaining quick access to the financial investigation officers is being a police officer himself and a member in the International Police Association. The cover letter attached to the questionnaire addressed to 'Dear Colleague' was also an added advantage. The aim was to assure the Chief Inspectors and the financial investigators that the research and the information was also required for the interest of the Kuwaiti Police Force.

The first mailing of the questionnaire took place on the 28th of August 1994. By the 2nd of March 1995, twenty seven replies were received. A follow-up letter (personal communication) and further questionnaire were sent to those who did not respond. By the end of May 1995, another 20 replies were received. Seven of the returned questionnaires were incomplete. Altogether, 47 complete questionnaires were finally received.

In what follows no claim are being made to suggest the data could be seen as providing a representative sample of a population studied. What it does show however is that some of the information provided is of considerable interest where when studying the British confiscation system.
Appendix VI

The Interview Method For All Studies

England and Wales
By not including the views and attitudes of judges and drug traffickers, the researcher had to collect data from institutions and subjects other than the police forces who could be considered as playing an essential role in confiscation proceedings. As well as the main subjects involved in the three stages of the confiscation proceedings (see chapter two), i.e. the prosecution, the defence, and the court, there are also others who could provide the police financial investigators with the help they need for a successful application of a confiscation order. The researcher was successful in gaining access to some of them. From the pilot study conducted with several forces, the researcher was informed of several people who could be useful in providing more information about the confiscation system. This, indeed, was one of the most distinctive advantages of pilot interviewing.

Additional interviews were recorded with the following:
- The first interview was with a principal prosecutor from the Central Confiscation Branch (CCB) Crown Prosecution Service Department in London.
- The second interview was with an officer from the National Criminal Intelligence Services (NCIS) in London.
- The third was with Mr. Jason Lloyd a lecturer at the Law School, University of Derby. He also lectured at the Midlands Centre for Criminology and Criminal Justice at Loughborough University, and has been the subject leader in several disciplines like criminal law, public law, public order, criminal justice and the law on drug misuse.
- The last was with a financial investigator from Customs & Excise Department, Financial Investigation Unit.

Several interviews were also conducted at the ten police forces chosen for the personal visits. Ten interviews were accomplished with a variety of police officers (one chief inspector, two detective inspectors, and seven detective sergeants). Five forces were chosen first (Leicestershire Police Force, Nottinghamshire Police Force, Derbyshire Police Force, West-Midlands Police
Force, and South Wales (Gwent) Police Force). Because of the low rate of
responses and the unwillingness of the Leicestershire Police Force to
participate, another six forces were chosen (Lincolnshire, South-East Wales,
South Yorkshire, West Yorkshire, Greater Manchester and Dyfed-Powys
Police in south east Wales). The choice of these forces were mainly for the
following reasons:

-The distance from Loughborough (some were chosen because they are
the closest forces to the residence of the researcher);

-West-Midlands Police Force in Birmingham and Greater Manchester
were chosen because they are in two of the biggest cities in England;

-The two Forces in Wales were the first respondents to the personal
communication, and it also happened that the visits to these two forces
in South and South West Wales coincided with a visit to South Wales
University to meet Professor Michael Levi for relevant purposes;

-Derbyshire Police Force was chosen because the statistical figures
obtained from the Home Office indicate that Derbyshire Police Force
had no registered confiscation cases in regard to drug trafficking
offences, the situation provoked the curiosity of the researcher to
determine to what extent this information was credible or reliable; and

-Other forces were mainly selected because of their willingness to
communicate with the researcher and of their appreciation of the
purposes of the research.

The main points of the interviews was to see and observe closely how the
confiscation system was implemented, to understand the structure of the
financial investigation system within the force, to determine the differences
between forces with regard to resources and allocations devoted to the
financial investigations and some other interesting points which could help to
understand how to examine the system from within the existing differences
and similarities. The researcher has used the interview guide approach which
serves as a basic checklist during the interview to make sure that all relevant
topics are covered. The advantage of an interview guide is that it makes sure
that the interviewer has carefully decided how best to use the limited time
Appendix VI

The interviews conducted in Britain took place between 1st of October 1994 and 30th of May 1995. Interviews were also conducted in USA, Egypt and Kuwait during the period 1/10/1996 to 30/12/1996.

**United States of America**

The American Embassy in London helped make several appointments with professionals in the field of confiscation in the United States. Within a week, the Embassy received notice of these appointments, which included personal visits and interviews in different specialised institutions which dealt mainly with the confiscation (or as the American refers to as 'forfeiture') with regard to drug trafficking offences.

Adding to this, and due to the insufficient data about the American forfeiture system available in England and the need to update most of the collected main laws and provisions, the researcher had to search for the missing and the updated information from its original source (Washington DC, USA). The aim of the visit was also to help in expanding the awareness of the researcher about the extent of limitations and restrictions of the system, the way it works, and identifying the real attitudes of some officials from the recent developments and serious arguments about the civil forfeiture system in the American Congress.

Several interviews were conducted in Washington DC during the period 13/10/1996 to 20/10/1996. These were as follows;

1. An interview held with a senior Attorney from the Asset Forfeiture Section, Office of Chief Counsel, Drug Enforcement Administration (DEA).

2. An interview which took place at the Office of General Counsel in the Federal Bureau of Investigation with a detective inspector who is the chief of the Forfeiture Counsel, Forfeiture Unit).

3. An interview with two professionals from FinCEN (Financial Crimes Enforcement Network) under the US Department of the Treasury.

4. An interview with a trial attorney, the United States Department of Justice, Criminal Division, Asset Forfeiture Office, and with an officer
from the Asset Forfeiture and Money Laundering Section.

5. An interview with the Director of the Criminal Justice Section, American Bar Association (ABA).

During this research, the researcher took the chance to visit various libraries around the country in order to gather some relevant literature. These places were the libraries of George Washington University, American University, George Town University, and finally the Library of Congress.

**Kuwait**

A visit to Kuwait was vital to this study not only to collect information about laws and data relevant to the Kuwaiti confiscation system, but also to determine the procedures chosen for the application of the new confiscation provision which had been added to the Drugs Act No. 74 of 1983 (the amendments under Act No. 13 of 1995). Moreover, the researcher wanted to examine the attitudes of some Kuwaiti academic staff and some professionals in which the new confiscation provisions was part of their concern.

Three interviews were held with three academics in the Faculty of Law, Kuwait University. Two interviews with the Head of Drugs Department, Ministry of Interior took place in different times. Another interview was conducted with a lecturer in Criminal Law with the Police Academy, Ministry of Interior. An interview also took place with one of the Kuwaiti lawyers who have a long experience with the application of the Drugs Act and the new confiscation provisions in specific. The value of this interview was appreciated in revealing the strengths and defects of the law and its enforcement by police and court. This information was not available from the other resources or interviewees.

The researcher also interviewed the counsellor in the Kuwaiti Parliament. The aim of this particular interview was to determine the philosophy and principles behind the new confiscation legislation which is mainly about the profits and proceeds of drug trafficking offences (see chapter eight). In addition to the interviews, the researcher had also collected data from a variety of important resources. Most of these resources provided the research with few and limited but essential documented information and data about the sitution of confiscation laws and the new developments that accompanied the so called 'after liberation stage'.
a) The Ministry of Interior: The Information and Planning Centre, and The Drugs Department, The Public Relation Department, Police Academy (the main Library).

b) The Ministry of Justice: Drugs Prosecution Department, Monies Protection Department, and The Conferences Division.

c) Kuwait University: Law Library, Sociology Division, and Political Sciences Division.

Egypt
In order to encompass the main aspects of the Egyptian Confiscation System, a visit to the country was required. It was very difficult to obtain all information needed. For instance, statistical data were not available for academic research purposes. However, there were some accessible information resources which made the visit worthwhile despite the difficulties mentioned above.

The data collection processes mainly relied upon personal visits and prolonged interviews in Cairo the capital. The Interviews were confined to certain officials at two Governmental Departments: the Police College, and the Socialist Prosecution Office.

Two interviews were made with two professors from the Sociology Departments in Cairo University.

The main interview in the study of the Egyptian system was with the Socialist General Prosecutor. It was held at his office and took more than five hours (10.00 am - 3.30 p.m.).

With the assistance of two Egyptian Lecturers at the Kuwaiti Police

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15Apart from libraries, all the governmental departments and the academic divisions open from 8 a.m. to 2 p.m. In two weeks (the period decided for the empirical work), all relevant documents, books, reports, and even official letters were collected from the mentioned resources.

16Three visits to the Drugs Prosecution Office at the Ministry of Justice in Cairo were conducted, but no interviews were held. A short conversations were the main features at those visits.

17Dr. Ibrahim Al-Gamaz (a previous police general at the Egyptian Police Force) and Dr. Hijazi Jommah (a previous police general at the same force as well).
Academy who fortunately were in Cairo during the visit, the researcher managed to collect most of the literature relevant to the Egyptian confiscation system from the National Library, Police Academy's main library and from several specialised book shops.

All the interviews mentioned above were recorded personally with the interviewees and then transcribed in papers. Some were recorded Arabic and then translated into English by the researcher. Several telephone calls were made with several authorised personnel at the Ministry of Interior and Kuwait University to provide the researcher with updated information.

**Method of Analysis**

The main method of analysis for the data in all studies is qualitative. This is due in part to the high non-response rate of the questionnaires, but also to the importance placed on the interviews with senior officers at different law enforcement agencies (FIUs, CCB, NCIS, DEA, FBI, or elsewhere). However, some of the data supplemented are considered quantitative. To start analysing all the data it is important to distinguish, in brief, between the definitions and the implications of those two different data types. The main differences and the possibility of combining them for analysis is also covered in this section.

Denzin & Lincoln (1994) pointed out that the word 'qualitative' implies an emphasis on processes and meanings that are not rigorously examined, or measured in terms of quantity, amount, intensity, or frequency. Qualitative researchers stress the socially constructed nature of reality, the intimate relationship between the researcher and what is studied, and the situational constraints that shape inquiry. Such researchers seek answers to questions that stress how social experience is created and given meaning. In contrast, quantitative studies emphasise on the measurement and analysis of causal relationships between variables, not processes (p. 4).

Dey (1993) distinguished between quantitative and qualitative data in terms of the difference between meanings and numbers. Qualitative data deal with meanings, whereas quantitative data deal with numbers. This has implications on this analysis, for the way we analyse meanings is through conceptualisations, whereas the way we analyse numbers is through statistics
and mathematics (p. 3).

By articulating concepts through description and classification, and the analysis of relationships through the connections which we can establish between them, Dey asserts that one can conceptualise qualitative data accordingly (Ibid., p. 3). There are a variety of perspectives concerning the conceptualisation of meaning and the practical problems associated with it. For example, the interpretative approach discussed by Patton (1980) *Qualitative evaluation and research methods*, emphasises the role of patterns, categories and basic descriptive units; the network approach discussed by Bliss and her colleagues (1983) *Qualitative data analysis for educational research*, focuses on categorisation; the quasi-statistical approach presented by Miles and Huberman (1984) *Qualitative data analysis* emphasises a procedure called 'pattern coding'; and the 'grounded theory' approach of Strauss and Corbin (1990) *Basics of qualitative research: Grounded theory procedures and techniques*, centres on a variety of different strategies for 'coding' data. Dey believes that despite the differences in approaches and languages, the common emphasis is on how to categorise data and make connections between categories. These main two tasks constitute the core of qualitative analysis (p. 5-6).

Qualitative analysis is essentially an iterative process (Dey. p. 231). It involves repeated returns to earlier phases of the analysis as evidence becomes more organised and ideas are clarified.

The Statistical Package for the Social Sciences (SPSS) is the major means of quantitative analysis used to deal with part of the data. Eight of the questions included in the questionnaire which was used as one of two methods for collecting data in England and Wales (1, 2, 5, 6, 9, 12, 13, 14) (see Appendix I) embrace nominal variables, like for instance, ('Yes', 'No', 'Don't Know', 'No Comment' and 'Others'). Upon this, SPSS has been used to determine the frequencies and percentages of certain views and trends of the respondents. The main purpose and great advantage of using this package is that it enables the researcher to analyse these data very quickly and in many different ways. Patton (1987), for instance, pointed out that it facilitates comparison and statistical aggregation of the data, which gives a broad and generalisable set of findings (p. 9). Many figures and tables were, therefore, produced and the most important ones were selected for analysis.
Triangulation

The Analysis strategy is based upon implementing a comprehensive method of triangulation. Denzin (1978) has identified four basic types of triangulation: (1) data triangulation, which is the use of a variety of data sources in a study, for example, interviewing people in different status positions or with different point of views; (2) investigator triangulation, where several different evaluators or social scientists are used; (3) theory triangulation, multiple perspectives are used to interpret a single set of data; and finally (4) methodological triangulation, which involves using multiple methods to study a single problem or programme, such as interviews, questionnaires, observations, and documents (see Patton 1987, p. 60). For the purpose of our analysis, the last two types of triangulation were adopted. The analysis, therefore, embraces a combination of quantitative and qualitative data which are collected by questionnaires and interviews.

The researcher has assumed that by utilising both the quantitative and qualitative analysis, one can achieve the utmost benefit from the data. Bryman & Cramer (1988) indicate that 'many writers recognise that there is much to be gained from a fusion of the two research traditions' (p. 1). Patton (1990) pointed out also that one important way to strengthen a study design is through triangulation, or the combination of methodologies in the study of the same phenomena (p. 187). The logic of triangulation is based on the promise that

'no single method ever adequately solves the problem of rival causal factors. . . . Because each method reveals different aspects of empirical reality, multiple methods of observations must be employed. This is termed triangulation. I now offer as a final methodological rule the principle that multiple methods should be used in every investigation' (Denzin, 1978, p. 28).

The interview is the only common research method which has been used for data collection in the other three countries approached in this study. The researcher had practised the exploratory interviewing method in all the interviews. The in-depth interview is the most common format for these interviews. By using the interview guide approach with a combination of unstructured and semi-structured (nominal) questions, this has provided the opportunity for the researcher to probe deeply to uncover new clues and to open up new dimensions of the subject matter. Many questions which were asked and led to a valuable recorded answers were not listed in the
researcher's guide of questions. The interviewees did not only answer the questions prepared by the researcher, they themselves formulated a dialogue giving their conceptions of their own world (experience).

In regard to the strategy of analysis, there is a logical sequence in the steps and procedures, used from collecting the data to producing an account. This sequence reflects the logical relationship between different phases in the analytic process. We cannot categorise or link data unless we have first read and annotated it; we cannot connect categories unless we have first categorised and linked the data; we cannot produce an account without first categorising and linking the data. However, although qualitative analysis is sequential in this sense, in practice it rarely proceeds in a direct line from first encounters with the data to finally draw conclusions. Dey indicates that it is more realistic to imagine qualitative data analysis as a series of spirals as we loop back and forth through various phases within the broader progress of the analysis (p. 265).

Finally, Dey points out that we are dealing with probabilities rather than certainties. No facts or explanations are incontrovertible, and the most we can hope for is to present the best possible account of our data. But when complex explanations emerge, which can suffer a 'credibility gap', the researcher will make choices in order to balance conflicting probabilities (p. 232).
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