1. INTRODUCTION

1.1. Historical Background

Confiscation is an old institution in France. It has gained new importance with recent legislative changes; the new Penal Code and the money-laundering legislation. Confiscation dates back to before the French Revolution of 1789. In fact, confiscation was codified during the Old Regime to sanction lèse-majesté crimes. It was, however, briefly abandoned in 1790, when it was held to violate the human rights principle that punishment should penalise only the offender and not his family.

1.2. Two Types of Confiscation

The 1810 Penal Code, which was in force until 1994, reintroduced confiscation. It institutionalised two types of confiscation: general (or total) confiscation ('confiscation générale') and special confiscation ('confiscation spéciale').

Under a general confiscation order, all of the offender’s property is declared forfeit to the government. This instrument was mostly used to punish political crimes, such as treason, espionage or acts of collaboration after the Second World War. The new Penal Code of 1994 (NPC) does not consider the general confiscation to be a penalty. However, general confiscation still penalizes particular offences such as genocide, crimes against humanity and drug trafficking.

Under a special confiscation order, particular parts of the offender’s property may be declared forfeit to the government. According to the 1810 Penal Code this measure may be used to punish all types of crimes and misdemeanours. It is directed at hazardous goods, instruments used to commit the crime if owned by the offender, things directly derived from the offence and finally, instruments of the offence.
1.3. The Legal Character of Confiscation

In general, there are two types of confiscation available which have a different legal character: confiscation as a penalty and confiscation as a security measure. Moreover, in its punitive capacity, confiscation may be imposed as a primary penalty, as a supplementary penalty, or as an accessory penalty upon the offender. Since 1975, special confiscation, when imposed as a primary penalty, can even substitute a regular prison sentence; this applies for prison sentences up to ten years. However, this possibility does not apply to all offences and excludes, e.g., press offences. Special confiscation, ordered as a primary penalty, targets personal property of the offender which has no direct connection with the crime, such as cars, weapons, securities, business interests, etc.

According to the body of judgments based upon the former Penal Code, special confiscation had also the character of a security measure (or a police measure). The new 1994 Penal Code explicitly emphasizes this preventive function of confiscation especially with respect to seized drugs. In general terms, however, the 1994 Code attributes confiscation more of a penal character than a preventive character. This is underlined by the fact that the law permits the confiscation of property of an equivalent value, if the tainted property cannot be seized. Therefore, it can be said that the new Penal Code emphasizes the penal character of confiscation.

Apart from this criminal action, special confiscation is also available as an administrative sanction, which allows customs to seize suspicious goods ('amende douanière'). This administrative confiscation imposed by custom authorities may be ordered in addition to the imposition of a conventional penalty of up to two years imprisonment. It may be enforced through contempt arrest. It is of considerable importance, in particular with regard to drug offences. Moreover, confiscation is also available as a civil sanction, which can be imposed in the field of patent and artistic rights.

1.4. The Enforcement of Confiscation Measures

According to the 1993 National Statistics of Convictions, the courts imposed special confiscations in 27,417 cases, whereas general confiscation was ordered in three cases only (see table 1). Special confiscation has been enforced in 25,910 cases as a supplementary penalty and in some 1,507 cases as a primary penalty. About 78% of all cases, in which special confiscation was imposed as a primary penalty, were crimes of violence, offences with weapon use or cases of drunk driving. Special confiscation measures as supplementary sanctions were also used to punish offences with violence or weapon use. These, however, make up...