

沒收、追徵、追繳與抵償法理詮釋系列(一)

沒收與追徵之法律效果定性

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關鍵字：沒收，追徵，追繳，抵償，主刑，從刑，不法利益剝奪。

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摘 要

刑事制裁手段對於犯罪的抗治作用，應能兼顧及犯罪結構的整體面向，不論是對行為人的制裁，或是對因犯罪所取得與創設利益的剝奪，都必須有一定對應的手段，以免造成犯罪防治出現漏洞。基本上，對抗犯罪所採取的刑事制裁手段，應從二面向觀察：1、對於犯罪行為人的制裁，此即傳統刑罰的作用；2、對於犯罪利益的完全剝奪，使得任何人都不會因犯罪而獲得利益，以作為犯罪抑制的因素。而傳統刑事制裁的觀念，大多聚焦在對犯罪行為人的制裁上，而忽略對於犯罪所產生不法利益的剝奪，即使有顧及不法利益的剝奪，其設定的法律效果，也多屬於從屬於刑罰的效應。向來刑法將沒收作為從刑，從屬於對行為人制裁手段的刑罰，在屬性與對應的事項的性質上，已產生質疑，蓋沒收既非是因行為可罰性而生，其判斷的基礎，本就與刑罰不同，其屬性從屬於主刑，在制裁手段的關連性上，本存有本質性的疑慮，也因此沒收的具體運作上，問題叢生，甚至會有應沒收卻因其從刑屬性而難以剝奪的現象。故重新檢討沒收與追徵等手段的屬性，有其本質性的必要。

The jurisprudence explanatory comment series of confiscation, levy, pursuing the payment and compensation (一)

The deciding legal effects of confiscation and levy

Ke, Yaw-Cheng

The resistant action of criminal sanction against the crimes should be considered the wholeness of the crime structure — no matter the sanction against the criminal or the deprivation of the benefits which were acquired due to the crime — and there should be certain corresponding methods in order to avoid the loopholes of the crime prevention and cure. Basically, the criminal sanction against the crimes should be observed in the following two dimensions: 1.the sanction against the criminal, or the traditional action of crime. 2.the complete deprivation of crime benefits, and it makes anyone can not acquire the benefits due to the crime for being the factor to restrain the crime. However, the traditional concept of criminal sanction is focused on the sanction against the criminal and the deprivation of the benefits which were acquired due to the crime is neglected. The criminal law takes the confiscation as the accessory punishment all the times and there are queries about the properties of its attributes and corresponding circumstances. Since the judging foundation of the confiscation is different from that of the crime. Therefore, it is necessary to examine the attributes of the confiscation and the levy again.