

ASSET FREEZING IN THE DRAFT CRIMINAL PROCEDURES LAW



Asset freezing in the draft Criminal Procedures Law

Introduction

The precautionary measures taken against the defendant inherently infringe upon his fundamental rights and freedoms, constituting a clear and blatant violation of a well-established legal principle enshrined in all Egyptian constitutions, relevant international conventions, and both international and national criminal jurisprudence—namely, the presumption of innocence. In addition to infringing on the other rights and freedoms of the defendant, these measures are intended to achieve key objectives during the investigation phase, such as safeguarding evidence, preventing witness tampering, uncovering the truth, and, in some cases, protecting the defendant himself.

Therefore, it is essential to strike a balance, using precise standards, between the personal rights and freedoms of the defendant and the interests of society. Strict rules must be established for each precautionary measure prescribed by law to ensure that one interest does not unjustly outweigh the other.

This research focuses on “freezing the defendant’s assets” as a precautionary measure which is authorized and regulated by several laws, including the Anti-Terrorism Law, the Drugs Law, the Anti-Human Trafficking Law, the Criminal Procedures Law, and others.

First: Asset Freezing in International Conventions

1. United Nations Convention against Transnational Organized Crime

Article 12 states:

“1. States Parties shall adopt, to the greatest extent possible within their domestic legal systems, such measures as may be necessary to enable the confiscation of:

(a) Proceeds of crime derived from offences covered by this Convention or property the value of which corresponds to that of proceeds.

(b) Property, equipment, or other instrumentalities used in or destined for use in offences covered by this Convention.”

2. International Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances

Article 5 (Confiscation), Paragraph 2, states:

“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 paragraph 1 of this article, for the purpose of eventual confiscation.”

3. International Convention for the Suppression of the Financing of Terrorism

Article 8, Paragraph 1, provides:

“Each State Party shall take appropriate measures, in accordance with its domestic legal principles, for the identification, detection and freezing or seizure of any funds used or allocated for the purpose of committing the offences set forth in article 2 as well as the proceeds derived from such offences, for purposes of possible forfeiture.”

4. Rome Statute

Article 93, Paragraph (k), provides:

“The identification, tracing and freezing or seizure of proceeds, property and assets and instrumentalities of crimes for the purpose of eventual forfeiture, without prejudice to the rights of bona fide third parties.”

Second: Asset Freezing in Comparative Legislation

1. Italian Law

The prohibition on the disposal or management of assets in Italian law is outlined in Chapter One under the title of Preventive Seizure, specifically in Article 316, Paragraphs 1 and 2. This provision allows both the Public Prosecution and the civil claimant, at any stage of the criminal proceedings, to request the preventive seizure of real or movable property, sums, or items belonging to the defendant, within the limits prescribed by law. Such a request can be made if there is reason to believe that no guarantees exist to cover the financial penalty, case expenses, or any other amount that must be paid to the state.¹

^{1/} Dr.Mohamed Ibrahim Zaid, Dr. Abdel Fattah Mustafa Al-Saifi, Italy's New Criminal Procedures Law (Translation), Dar Al-Nahda Al-Arabiya, 1990, p. 224.

2. French Law

Under Article 706-30 of the French Criminal Procedures Law, the President of the Court of First Instance, upon request from the Public Prosecution, may impose preventive measures on the movable or immovable property of the defendant during investigations into crimes such as drug trafficking or money laundering. This authority was expanded by a law issued on March 9, 2004, to include transnational organized crime cases. Furthermore, a law enacted on July 4, 2005, allowed the implementation of similar procedures within the scope of international criminal assistance, specifically concerning the freezing of funds or evidence. These measures are designed to prevent the destruction, transfer, or removal of assets that may be subject to confiscation or used as evidence, particularly when such assets are located in another country.

According to Article 142 of the French Criminal Procedures Law, a judge may also require guarantees to secure any compensation or fines that might be awarded. Additionally, on July 9, 2010, Law No. 768 was enacted to facilitate the seizure and confiscation of property in criminal matters, ensuring the execution of supplementary penalties, including confiscation, as outlined by law. This law also granted the investigating judge the authority to take seizure measures.²

3. Palestinian Law

Article 289 of Law No. 3 of 2001 permits the adoption of measures to prevent the disposal of funds and to seize them in cases involving crimes against public funds. This authority is granted exclusively to the Public Prosecutor and applies only in instances where the defendant is a fugitive. The provisions of the article are:

Preventive Measures on the Assets of Fugitives:

- In cases where sufficient evidence of the validity of a criminal charge perpetrated against public funds is established by the investigation, the Attorney-General may, upon deciding that the matter requires conservatory measures against the funds of the fugitive, submit the matter to the criminal court authorized to confiscate these funds and assets to prevent him from disposing thereof.
- The court may, upon the request of the Attorney-General, include in its decision the funds and property of the spouse and minor children of the fugitive, if there is sufficient proof that such assets are the fruit of the crime under investigation.

² / Dr. Ahmed Fathy Sorour, The Mediator in the Criminal Procedures Law, Part One, p. 1124, Footnote 1, Dar Al-Nahda Al-Arabiya 2016, Tenth Edition, Updated.

- (a) The court shall determine who will administer the confiscated funds after they are inventoried in the presence of the concerned parties, the representative of the Public Prosecution, and the court-appointed expert. (b) The appointed person shall preserve the confiscated funds, administer them properly and restitute them, together with their proceeds, at the end of the confiscation period.
- Any interested party may protest the decision of the court referred to under paragraphs 1, 2, and 3 above within three (3) months from its issuance, before the court which issued it.
- During the period in which the funds of the fugitive are confiscated, the spouse, children, parents, and those he is under a legal obligation to support shall be given a monthly allowance from the revenues of his assets in the amount determined by the competent court. A civil claimant may obtain a decision from such court granting him an advance from the damages awarded to him with or without the furnishing of a guarantee.³

Third: The Concept and Limits of Asset Freezing

The Criminal Procedures Law does not provide a specific definition or outline of the nature of preventing a defendant from disposing of or managing their funds. As a result, this issue has been left to legal interpretations and judicial decisions.

1. In International and Regional Agreements:

Asset freezing is generally understood as a temporary restriction on the transfer, exchange, or disposal of property, or as the assumption of custody or control over property based on a court order or the decision of a competent authority.⁴

This definition was similarly adopted by the Arab Convention on Combating Corruption, which states: “Imposing a temporary ban on the transfer, exchange, disposal, or transfer of property, or temporarily assuming custody or control of property, based on an order issued by a court or other competent authority.”⁵

2. In Egyptian Legal Jurisprudence:

Some legal scholars define the freeze as “a temporary precautionary measure imposed for the benefit of society in cases specified by law, and enforced

³ / <https://2u.pw/iob54siH>

⁴ / See the United Nations Convention against Corruption, Article 2, Paragraph (f).

⁵ / See the Arab Convention on Combating Corruption, Article 1, Clause 7.

through judicial rulings on the funds of individuals, independent of the individuals' will."⁶

Others rightly define it as:

"The purpose of seizing something is to take possession of it and place it under the control of public authorities, whether this occurs with the knowledge of these authorities or is voluntarily handed over by an individual or the defendant. Seizing, therefore, is a temporary police procedure that restricts ownership for a specific period without transferring ownership to the state. Its objective is to place certain assets under the scrutiny of the judiciary, either for potential confiscation or for the purpose of uncovering the truth."⁷

3. In the Egyptian Judiciary:

Some in the Egyptian judiciary have defined asset freezing as:

"A precautionary and preventive measure imposed for the benefit of society at large, with the aim of establishing the foundations of social order among citizens and overseeing the movement of capital, particularly when the owner of the funds acts in a manner that threatens the higher interests of society."⁸

From this, it can be inferred that orders preventing the disposal of funds are judicial in nature, meaning they must be issued by an independent judicial authority. Additionally, these measures are temporary; they cannot be imposed indefinitely but must be limited in duration to protect the rights of the individuals affected by them.⁹

Fourth: Legislative Development of the Prohibition of Asset Disposition and Management in Egyptian Law

1. From Issuing the Criminal Procedures Law Until 1967:

⁶ / Dr. Ahmed Mohamed Shehata Toukhi: The Socialist Public Prosecutor's Office in Light of Contemporary Ideological Changes: An Analytical, Comparative and Original Study. PhD Thesis, Faculty of Law, Ain Shams University, 2004, p. 127.

⁷ / Dr. Abdel Maguid Mahmoud Abdel Maguid: "Criminal Confrontation of Corruption in Light of International Agreements and Egyptian Legislation" A Comparative Study, PhD Thesis, Faculty of Law, Ain Shams University, 2010, p. 474.

⁸ / Dr. Rizk Saad Ali Abdel Maguid: The Nature of Restraining Orders in Criminal Procedures, summary of a PhD thesis, published in the Journal of Legal and Economic Studies, Faculty of Law, Sadat University, Volume 2, 2016.

⁹/ See previous reference.

When the Egyptian Criminal Procedures Law was first issued in 1950, it did not contain provisions concerning asset freezing. This form of regulation was first introduced in 1967 through the addition of Articles 208 bis (a)¹⁰, (b), and (c) by Law No. 43 of 1967.¹¹

2. From Issuing the Law on Asset Freezing Until It Was Declared Unconstitutional:

It is evident that the political, economic, and social circumstances of the state following the June 1967 defeat may have necessitated the issuance of a law of this nature, despite its disregard for human rights and basic freedoms, and what it represents as a blatant violation of them.

The situation persisted until the Supreme Constitutional Court ruled that Paragraph 1 of Article 208 bis (a) was unconstitutional. This ruling was based on the fact that the article violated constitutional principles, including the presumption of innocence, equality before the law, and the right to protected private property, which the Constitution guarantees. "The restrictions imposed by the contested article were not consensual but rather mandated by the law. These restrictions went beyond depriving individuals of managing their assets and extended to prohibiting their ability to dispose of them. Additionally, the restrictions affected not only the individuals in question but also their minor children and spouses under the conditions specified in the law. In doing so, these limitations impacted their property rights, undermining their essential characteristics. In essence, the law imposed a form of guardianship on the individuals' assets without a judicial ruling, which is in clear violation of Article 34 of the Constitution, stipulating that private property is protected and that no guardianship may be imposed on it except by judicial decision."¹²

^{10/} Article 208 bis (a) forms the foundation and focus of this chapter. The original text is:

"The Public Prosecutor may, if the investigation reveals sufficient evidence of the gravity of the accusation in crimes listed in Part Four of Book Two of the Penal Code, as well as other crimes involving funds owned by the government, public entities, institutions, or their affiliated units of public legal persons, issue an order to prevent the defendant from disposing of or managing their assets. This measure serves as a guarantee for the enforcement of any fines, the restitution of funds or property related to the crime, or compensation for the injured party.

Furthermore, the Public Prosecutor may extend such measures to the assets of the defendant's spouse and minor children, as a safeguard for the return of funds or property connected to the crime or for compensating the injured party, unless it is proven that these assets were acquired independently of the defendant's funds.

When issuing an order to restrict the management of assets, the Public Prosecutor is required to appoint a custodian to manage the funds. The Minister of Justice will issue a decision outlining the rules for selecting the custodian and defining their responsibilities.

^{11/} Official Gazette, Issue 83, October 12, 1967, pursuant to a decision by the President of the Republic without submission to parliament, pursuant to the provisions of Law No. 15 of 1967 authorizing the President of the Republic to issue decisions that have the force of law.

^{12 /} The ruling of the Supreme Constitutional Court in Case No. 26 of the 12th Judicial Year, October 5, 1996.

3. Criminal Procedures Law and Asset Freezing Following the Supreme Constitutional Court Ruling:

Following the ruling of the Supreme Constitutional Court, the legislator reintroduced similar provisions to the Criminal Procedures Law through Law 174 of 1998. The main change was a revision in the wording. Previously, the unconstitutional article granted the Public Prosecutor exclusive authority to issue orders prohibiting the disposal of funds. In contrast, under the revised article, the Public Prosecution must now refer the matter to the competent criminal court, requesting a judicial ruling on the prohibition.

The role of the Public Prosecutor has been limited to issuing temporary orders in cases of urgency and imminent danger. Additionally, the revised law allows for the appointment of an individual to manage the property in question. It also permits extending the prohibition to the spouse and minor children of the defendant if there is sufficient evidence that the property was acquired from the crime under investigation and subsequently transferred to them by the defendant as part of the request.

The article, in its current form and wording, remains “excessively lengthy and unjustified compared to the repealed text,” continuing to violate constitutional provisions regarding the presumption of innocence, equality before the law, and the protection of the right to private property. “The principle of innocence is intrinsically linked to the criminal charge concerning its proof and is independent of the nature or severity of the crime in question, as well as the type or extent of its punishment. This principle is fundamental to every individual, ensuring their protection during all phases of the criminal trial, including pre-trial, trial, and subsequent proceedings. The contested text permits the imposition of restrictions on the assets of individuals under investigation when sufficient evidence suggests their involvement in specific crimes. This provision prevents them from managing or disposing of their property without constitutional support. Such restrictions create a distinction between these individuals and other citizens, as well as between them and those accused of different crimes. All these individuals share a common legal position based on the presumption of sanity, and the existence of an accusation—whether during an investigation or a trial—does not diminish their inherent right to be presumed innocent. Consequently, there should be no differentiation in the rights they enjoy.”¹³

^{13/} The ruling of the Supreme Constitutional Court, previous reference.

4. Regulating the Draft for Asset Freezing:

Article 143 of the draft Criminal Procedures Law closely resembles Article 208 bis (a) of the current law, while introducing a new category of individuals who may be prohibited from disposing of funds: the heirs of the defendant. One of its paragraphs states: “The court may, upon the request of the Public Prosecution, include in its ruling any funds belonging to the defendant’s spouse, minor children, or heirs if there is sufficient evidence that these funds were obtained from the crime under investigation and were transferred to them by the defendant, after they have been included in the request.” This represents a single addition to the previous text.

It is noteworthy that the current Article 208 bis (a) and the proposed Article 143 have been broadened compared to the original Article introduced by Law No. 43 of 1967. The latter restricted the Public Prosecutor’s authority to prevent the defendant from disposing of or managing their funds. In contrast, the two articles empower both the Public Prosecution and the Public Prosecutor to implement additional appropriate precautionary measures, for which the texts do not provide a definition, concept, or standard.¹⁴

Fifth: Asset Freezing in the Draft Criminal Procedures Law:

By analyzing the content and provisions of the articles on restricting the defendant from disposing of their assets in the draft Criminal Procedures Law:

1. Crimes Where Asset Freezing is Valid:

A. Crimes specified in Chapter Four of Book Two of the Penal Code (including embezzlement of public funds, abuse of public assets, and breach of trust).

B. Crimes involving assets owned by the state, public bodies, institutions, or their affiliated units, or other public legal entities. Examples include:

- Sabotaging means of production or intentionally setting them on fire
- Sabotaging, demolishing, or damaging public property
- Damaging power lines
- Disrupting transportation systems
- Intentionally burning public assets

^{14/} Strangely enough, some legal scholars argue that Article 208 bis (a) provides numerous guarantees to the defendant regarding restrictions on the disposal and management of their assets. The first, perhaps rightly, draws a comparison between this article and those concerning pretrial detention, where few notable guarantees are provided. The second is responsible for adding this article to the law in its current form.

See The Explanation of the Criminal Procedures Law by Dr. Ashraf Tawfiq Shams El-Din, 4th edition, 2015, and The Mediator in Criminal Procedures by Dr. Ahmed Fathi Sorour, Vol. 1, previous reference.

- Stealing tools and equipment used in public facilities
- Illegally encroaching on state-owned property.

C. Crimes for which the law requires the court to independently order the return of funds or the value of items related to the crime, or compensation for the injured party. Examples include:

- Tax evasion of all kinds
- Customs smuggling
- Importing narcotic substances, as outlined in tax, customs, and drug laws.¹⁵

2. Individuals Who May Be Prohibited from Disposing of or Managing Assets:¹⁶

A. The defendant in the aforementioned crimes.

B. The spouse and minor children of the defendant.

C. The heirs¹⁷ of the defendant, provided there is sufficient evidence that the assets in question were obtained from the crime under investigation and were transferred to them by the defendant.

3. The Authority to Issue the Order Concerning Asset Freezing:

A. A request may be made by the Public Prosecution to the competent court, if it deems the order necessary and justified.

B. In cases of necessity and urgency, the Public Prosecutor may issue a temporary order, provided the matter is referred to the competent court within a maximum of seven days from the date of issuance.¹⁸

The draft law does not specify the cases of necessity and urgency that warrant such actions, nor does it establish standards or guidelines to govern them. Instead, it leaves this discretion entirely to the Public Prosecutor, which conflicts with the well-established legal principle outlined by the Supreme Constitutional Court in numerous rulings. This principle mandates that criminal penalty provisions must be clear and well-defined.¹⁹

¹⁵ / Circular No. 5 of 1999 issued by the Attorney General explained that, following the ruling of unconstitutionality, the legislator, through Law 174 of 1998, amended the provisions of Articles 208 bis A and B, broadening the scope of criminalization, a trend that has been continued in the draft Criminal Procedures Law currently under discussion.

¹⁶ / Article 143 of the draft bill, corresponding to Article 208 bis (a) of the current Criminal Procedures Law.

¹⁷ / The addition of heirs was made in Article 143 of the draft.

¹⁸ / Other bodies also hold the same authority, such as the Inspection and Investigation Committee under the provisions of the Illicit Gains Law, although they fall outside the scope of this research. The Supreme State Security Prosecution exercises this authority in terrorism-related crimes.

¹⁹ / The Supreme Constitutional Court ruled that "This includes that laws must be defined with certainty and clarity. This is because such laws compel those subject to them to comply, in order to protect their

4. Funds Subject to Precautionary Measures, Including Prohibition:

The precautionary measures, including prohibiting the disposal and management of funds, apply to the funds of the defendant. “These measures include prohibiting the defendant from disposing of or managing their assets or other appropriate precautionary actions²⁰ deemed sufficient to ensure the enforcement of any fines, restitution, or compensation that may be imposed. Examples of such measures include closing funds, seizing assets, or requiring deposits to cover potential penalties related to the crime under investigation.”²¹

“If assets owned by the defendant, their spouse, or minor children are seized and the law mandates confiscation (whether compulsory or optional), these assets are not included among the funds subject to precautionary measures intended to guarantee the enforcement of fines, restitution, or compensation.”²²

“A temporary order can be requested or issued to prevent the disposal or management of funds to safeguard any financial penalties and compensation that may be imposed. It is presumed that the funds subject to precautionary measures were not directly obtained through the crime itself, as they may otherwise be seized and confiscated according to general legal provisions. This money does not appear to be directly linked to the crime, and this process carries significant risk as it may infringe upon the defendant’s rights to their property. Additionally, it may affect their relatives and result in the imposition of a custodian over the assets, thus it is typically limited to crimes involving public funds and illicit gains.”²³

One noteworthy observation raised by legal scholars regarding this provision is “the difference in the standard of evidence applied to the defendant compared to that for their spouse and minor children. While the legislator requires sufficient evidence to establish the seriousness of the accusation against the

right to life and their freedoms from the risks posed by the corresponding punishments. Therefore, it is essential that penal provisions be drafted in a manner that prevents ambiguity, conflicting interpretations of their intent, or the extension of criminal liability beyond their intended scope, which would otherwise violate the personal freedom guaranteed by the Constitution.” Case No. 49 of the 17th Judicial Year, Session of June 15, 1996.

²⁰ / It is important to note here that the ambiguity of the penal text was further compounded by the ambiguity in Circular No. 5 of 1999 issued by the Public Prosecutor. This circular, addressed to the Public Prosecution offices, instructed them to act in accordance with its provisions but merely used the phrase “appropriate precautionary measures” without specifying or defining these measures for the members of the Public Prosecution.

²¹ / Review Circular No. 5 of 1999.

²² / This paragraph implies that the prevention and seizure of the defendant’s private funds apply to assets not directly obtained from the crime, as funds acquired through the crime itself are subject to the general rules of confiscation.

²³ / Dr. Ashraf Tawfiq Shams El-Din, Explaining the Criminal Procedure Code, p. 467, 2015 edition.

defendant, there is no stipulation that the defendant's funds must have been obtained from the crime. However, when the order concerns the funds of the defendant's spouse or minor children, the law mandates sufficient evidence that the funds were obtained from the crime under investigation and transferred to them by the defendant."²⁴

5. Addition of Another Category Subject to Prohibition of Disposal of Assets:

Despite the serious implications of orders preventing the disposal and management of funds—which represent a clear violation of the constitutional right to property ownership, as well as international conventions—the legislator in the draft law did not limit these restrictions to specific crimes. Instead, the draft extends these prohibitions to anyone convicted in absentia for any felony (Article 368 of the draft law). This provision contradicts the principles of legality in criminalization and punishment by effectively enacting a penalty without a clear legal basis, marking a stark departure from constitutional norms.

This expansion of the law broadens the scope of interference with private property rights by extending criminalization beyond felonies related to public funds. It further widens the application to include all felonies and encompasses anyone convicted in absentia.²⁵

6. Perpetuation of the Freeze Order Beyond its Legal Scope:

Although the draft law permits appeals against orders prohibiting the disposal or management of funds once issued, effectively restricting the defendant's access to their property, it assigns the competent criminal court the authority to rule on such appeals. However, the draft does not specify a time limit for the continuation of the freeze order. Instead, it allows for repeated appeals every three months following the rejection of a previous grievance (Article 144 of the draft law).

The prohibition on disposal and management of funds is an investigative measure issued during the investigation stage, and given its temporary nature—similar to the investigative procedures it accompanies—it should be treated as a temporary action. The draft law requires the investigating judge to complete investigations within six months, and by extension, the Public

²⁴ / Previous reference, pp. 470-471.

²⁵ / Article 368 of the draft law provides that: "Any conviction rendered in absentia automatically deprives the defendant of the right to dispose of or manage their property, or to file any lawsuit in their name. Any actions or commitments made by the convicted person will be null and void.

The court of first instance, within whose jurisdiction the convicted person's property is located, shall appoint a guardian to manage the property upon the request of the Public Prosecution or any interested party. The court may also require the appointed guardian to provide a guarantee and shall supervise the guardian in all matters related to the guardianship and submission of accounts."

Prosecution, including the Attorney-General, should also adhere to this time frame. Upon completion of the investigation, the matter should be transferred to the judiciary, which would naturally result in the termination of the prohibition order.

However, in a departure from these general rules, the prohibition order continues indefinitely. The court, when considering an appeal, has no option but to either uphold or cancel the order. In practice, the court often lacks the power to lift the prohibition until it has conducted its own thorough investigation into the matter. Consequently, it tends to maintain the temporary prohibition order while investigations continue—without being bound by any strict time limit.

Paradoxically, Article 144 of the draft law stipulates:

“In all cases, the prohibition on disposal or management of funds ends with the issuance of a decision that there is no basis for filing a criminal case, or with the issuance of a final acquittal judgment, or upon the completion of the enforcement of financial penalties and compensations.”

However, in practice, this provision may not be adhered to—even under the current law. For instance, we find that the competent criminal court has rejected the appeals of several human rights activists against the decision prohibiting them from disposing of their funds, despite a prior decision by the investigating judge that there was no basis for filing a criminal case against them.

However, in practice, this provision may not be consistently applied — even under the current law. For example, the competent criminal court has rejected the appeal of several human rights activists²⁶ against a decision preventing them from disposing of their funds, despite the investigating judge’s decision that there was no reason to file a criminal case against them.²⁷

This situation highlights the need for intervention through amendments to the relevant articles, ensuring that the time limits for pretrial detention measures are also applied to decisions concerning the freezing of assets.

²⁶ / They are activists Azza Suleiman, Mustafa Al-Hassan, and Hossam Bahgat, despite the issuance of a decision stating that there is no reason to file a criminal case against them due to insufficient evidence, and the order was appended with the cancellation of the decision to freeze their assets. <https://2u.pw/28fpwgZq>

²⁷ / An order was issued that there was no basis for filing a criminal case against the last five human rights centers in the case dubbed by the media as the Foreign Funding Case, on March 20, 2024: An order was issued that there was no basis for filing a criminal case against the last five entities due to insufficient evidence. <https://2u.pw/a410eaFp>

7. Constitutional Rights Violated by the Aforementioned Articles:

Right to Property (Article 35 of the Constitution):

“The orders issued by the Public Prosecutor concerning the funds of individuals affected by the contested text, even though they may be appealed before a judicial authority under Article 208 bis (b) of the Criminal Procedures Law, continue to have serious effects. These orders remain in force based on mere evidence gathered during the investigation, supporting the accusation. This evidence is subject to the independent evaluation of the Public Prosecutor and does not hold the weight of judicial certainty.”²⁸

Presumption of Innocence (Article 96 of the Constitution):

“The principle of innocence applies to the criminal charge in terms of proving it, irrespective of the nature, seriousness, or type of crime or punishment involved. This principle is inherent in every individual, ensuring protection during all stages of the criminal process—from the initial investigation to the trial and its aftermath. The contested text allows for the imposition of restrictions on the funds of individuals based solely on sufficient evidence of their involvement in certain crimes. These restrictions, which prevent the defendant from managing or disposing of their assets, are not rooted in any constitutional provisions. This creates a distinction between these individuals and other citizens, even between them and those accused of crimes not specified in this text, despite all being entitled to the presumption of innocence. The accusation itself, or even the mere investigation, should not invalidate their innocence or strip them of their rights.”²⁹

Legitimacy of Punishment (Article 95 of the Constitution):

“The Constitution, as outlined in Article 66, stipulates that no crime or punishment can exist except under a law, and no punishment can be imposed for actions that occurred prior to the issuance of the law establishing the punishment. This means that every crime must have a material element, without which there is no crime. The material element essentially refers to an act or omission in violation of a penal provision. Criminal law, in its prohibitions, fundamentally relies on the tangible nature of the act being punished, whether it is a positive action or an omission. The relationships regulated by criminal law, in their application to individuals, are centered around the acts themselves, characterized by their external signs, real manifestations, and material aspects. These elements form the foundation of guilt, which can be

²⁸ / The Supreme Constitutional Court’s ruling in Case No. 26 of the 12th Judicial Year, previous reference.

²⁹/ The Supreme Constitutional Court’s ruling in Case No. 26 of the 12th Judicial Year, previous reference.

established or refuted. It is these material characteristics that distinguish crimes from one another.”³⁰

However, the notion of a physical act constituting a crime becomes questionable when criminal judgments are issued in absentia. In such cases, punishing an absent defendant by preventing them from disposing of their assets or seizing their property lacks the materiality of the act.

Sixth: Conclusion

Based on the aforementioned, these conclusions can be drawn:

1. Asset freezing is a severe penalty that should only be imposed by an independent and competent court. The article’s Paragraph 1 reflects this by granting the prosecution the right to refer the matter to the relevant criminal court. However, in Paragraph 2, it permits the Public Prosecutor to issue a (temporary) decision in cases of necessity and urgency, without providing clear criteria for determining such cases.
2. Since the seizure of funds and the prohibition of their disposal or management is a temporary and precautionary measure, it should be legally treated as such. It should be considered equivalent to a pretrial detention order in terms of its duration, with specific time limits for judicial decisions. For example, in misdemeanor cases, the judge should issue a ruling within four months, and in felony cases, within one year. The prohibition or seizure should not extend beyond these timeframes.
3. The lack of a specified time limit in the article effectively transforms what is intended as a temporary order into a permanent penalty, despite the absence of a judicial ruling.
4. The article is unnecessarily lengthy, which conflicts with the principles of proper legal drafting. It should be divided into three distinct articles.
5. The article, in its original form, raises concerns about potential violations of the Constitution. It may conflict with Article 35, which protects private property, and Article 54, which safeguards the presumption of innocence. These concerns are echoed in the ruling of the Supreme Constitutional Court in Case No. 26 of the 12th Judicial Year, which found Article 208 bis (a), added for the first time to the Criminal Procedures Law by Law No. 43 of 1967, to be unconstitutional.

³⁰/ The Supreme Constitutional Court’s ruling in Case No. 49 of the 17th Judicial Year, previous reference.

Seventh: Recommendations

- **Orders preventing the disposal of funds should be treated in the same manner as pretrial detention orders, as both are precautionary measures in the investigation process. Consequently, it is essential to**
- **establish a time limit for this measure, which should expire once the term ends.**
- **Article 143 should be divided into three distinct articles due to its excessive length. Its wording should be amended to eliminate any potential infringement on constitutionally protected rights.**
- **The cases of necessity and urgency that permit the Public Prosecutor to issue temporary orders preventing the defendant from disposing of their funds should be clearly defined, ensuring that these provisions cannot be misused without a clear and legal standard.**
- **Based on the aforementioned considerations, an alternative formulation for Article 143 of the draft law is proposed:**

We suggest dividing the current Article 143 of the draft law into three separate articles and drafting them as follows:

Article 143

In circumstances where substantial evidence is gathered during the investigation concerning the gravity of the accusations related to any offenses enumerated in Chapter Four of Book Two of the Penal Code, as well as other crimes involving assets belonging to the State, public bodies, institutions, their affiliated units, or other public legal entities, and in instances where the law mandates the court to ex officio order the restitution of amounts or the value of property implicated in the offense or to compensate the aggrieved party, should the Public Prosecution ascertain that precautionary measures against the defendant's assets are warranted—specifically, the prohibition on the disposal or management of such assets—it shall be obliged to present the matter to the competent criminal court, seeking a ruling to that effect to ensure the enforcement of any penalties, restitution, or compensation that may be adjudicated. The court shall render a decision on the request submitted by the Public Prosecution only after affording the defendant an opportunity to be heard and thoroughly investigating their defense.

Article 143 bis

The Public Prosecutor may, in cases of necessity or urgency, issue a temporary order prohibiting the defendant from disposing of or managing his assets. This order shall include the appointment of an individual to oversee the management of the seized assets. In all instances, the Public Prosecutor is required to present the order of prohibition to the competent criminal court within a maximum of four days from its issuance, requesting a formal ruling to prevent disposal or management; failure to do so shall render the order null and void.

The competent criminal court shall render its decision after hearing the statements of the interested parties within a period not exceeding fifteen days from the date the matter is presented. The court shall determine the duration of the temporary order mentioned in Paragraph 2 of this article and may decide to defer consideration of the request if warranted.

The ruling must articulate the reasons upon which it is founded, and the prohibition on management shall entail the appointment of a person to manage the seized assets, following consultation with the Public Prosecution.

Furthermore, upon the request of the Public Prosecution, the court may include in its ruling any assets belonging to the spouse, minor children, or heirs of the defendant if there exists sufficient evidence that such assets were acquired through the crime under investigation and were transferred from the defendant to them, provided that they were included in the request.

Article 143 bis (a)

The duration of the order to seize the defendant's property or to prohibit him from disposing of or managing it shall not exceed four months for misdemeanor cases and one year for felony cases. The order must be terminated upon the expiration of these specified periods.

The appointed custodian shall take possession of the seized property and is required to conduct an inventory of it in the presence of the relevant parties and a representative of the Public Prosecution or an expert designated by the court. The appointed custodian shall be responsible for the preservation and proper management of the property, and shall return it, along with any accrued yield, in accordance with the provisions set forth in the Civil Code regarding agency in management, deposit, and custody. This shall be conducted in accordance with the regulations established by a decision issued by the Public Prosecutor.