

Review of confiscation decisions under the Anti-mafia Law-preventive procedure

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Abstract

The review of final decisions is regarded as an unusual means of appeal aimed at countering a final decision that is considered adjudicated (*res judicata*). This means of appeal has been provided for in the European Convention on Human Rights, the Constitution of Albania, and the national laws of the Albanian state. Thus, at first sight, the review seems to be in contravention of Article 4 and 34 of the Constitution, the principle of legal certainty. But, in essence, this extraordinary means of appeal attempts to establish effective justice by overturning a wrong decision, despite the fact that this decision has been executed, suspended or terminated. To combat dangerous criminal activities Albania has adopted the Anti-mafia Law, which provides the confiscation of proceeds that are obtained from some of the most dangerous criminal activities such as organized crime, terrorist acts, trafficking, corruption and laundering of crime proceeds. This kind of civil confiscation constituted a novelty in the procedural law and it was imposed when the person was not able to prove the lawful origin of these proceeds obtained from criminal activities. But can these confiscation decisions about the final transfer of property to the state be reviewed? If so, which law shall be applied, the civil or criminal one? This and other answers will be provided in this paper.

Keywords: review, principle of legal certainty, confiscation, Anti-mafia Law, criminal activities.

1. Review as an exception to the principle of legal certainty

The European Convention on Human Rights, protocol 7, Article 4, provides for the review of a final criminal decision. In harmony with this Convention, Article 4, provides that: "The law constitutes the basis and the boundaries of the activity of the state" and Article 34 of the Constitution of the Republic of Albania stipulates that: "No one should be sentenced more than once for the same criminal offense or be tried again, except for cases when the re-adjudication of the case is ordered by a higher court, in the manner specified by law". In compliance with this constitutional norm, there is the provision of Article 7 of the Code of Criminal Procedure: "No one shall be tried again for the same criminal offence, for which he has been finally sentenced, except for cases when re-adjudication has been decided by the competent court".

These constitutional and procedural norms provide for three of the most important principles: *i*) the principle of not being tried twice for the same offence (*ne bis in idem*) *ii*) the principle of legal certainty (*res judicata*) and *iii*) the possibility of reopening the criminal case as a possibility of deviation from the principle of legal certainty.

As regards the third principle, it can be allowed according to the rules provided for by the law, namely by the Code of Criminal Procedure or the Code of Civil Procedure.

The Albanian procedural law provides for the "review" as an extraordinary tool of overturning a final decision, i.e. one for which all means of appeal have been exhausted, including the appeal and recourse. The "extra ordinary" character of the review is clearly observed in a number of elements: its consideration as a means of appeal outside and beyond the ordinary means of appeal; the exercise of this means beyond the normal deadlines of appeal; it is sufficient to meet the legal criteria of the code; the exercise of this right by a wide range of subjects, such as the convict and his heirs, when he has died; and the exercise of this right when the decision has been terminated or executed.

The review as a deviation from the principle of legal certainty in the provisions and cases set forth by the law aims to rectify the judicial error providing justice. This serves effective justice as it opposes a final decision, which, upon the emergence of new evidence, may result to be wrong.

Even the rich jurisdiction of the European Court of Human Rights (hereinafter referred to as ECHR) has accepted the possibility of reviewing decisions, as a tool of providing effective justice. In some cases adjudicated by ECHR, it has stated that: *"The court deems that the requirements of legal certainty are not absolute. Departures from that principle are justified only when made necessary by circumstances of a substantial and compelling character, or when there are serious legitimate reasons of greater importance than legal certainty"*(Ryabykh against Russia no.52854/99, pg.52, ECHR 2003-IX).

The Supreme Court of Albania, in the Unifying Decision no. 3 of 2013, of the United Collegues, has stated that: *"The basis of the review is the principle that justice must be true, by breaking the procedural framework of finally terminating adjudication"* (UDUCSC, no. 3, 2013, pg. 6).

Thus, the Albanian procedural law comprises and regulates in detail the request for review, the cases and legal requirements. We find it interesting to examine the request or possibility for the review of decisions of the confiscation of crime proceeds under the Anti-mafia Law or the preventive procedure. Before elaborating on the request for review, let us briefly describe confiscation according to the Anti-mafia Law.

2. What is the confiscation of crime proceeds outside criminal procedure (according to the law against Organized Crime and the Anti-mafia Law)?

The Anti-mafia Law was adopted in December 2009 and entered into force in January 2010, as a continuation of the legal, institutional, and international obligations of Albania in the fight against organized crime, trafficking, terrorist acts, and corruption. The scope of this law also comprised the confiscation of crime proceeds. Confiscation is a final measure against crime proceeds enabling the transfer of ownership to the state. Due to the preventive character of these measures, the whole procedure is frequently called preventive. The scope of the law is also preventive, because through confiscation as a final measure, the persons (suspect, relatives, natural and legal persons, and their heirs) set forth in Article 3 of the law are deprived of their proceeds and they are transferred to the state, thus preventing the future commission of criminal offences or activities providing proceeds.

This measure of property character transfers the property to the state in a final form

when the confiscation decision is final.

Being a very repressive measure, depriving a person of the right to property, guaranteed by the constitution, confiscation is imposed when all of the following conditions are met:

1. *The existence of reasonable doubt based on indicia for involvement in criminal activities set forth in Article 3 of the law, which is about the scope of the law;*
2. *Unlawful origin of the property or unjustified ownership regarding the level of income, profit, or other declared lawful activities;*
3. *Full or partial ownership of property by the person directly or indirectly proceeded.*

Thus, confiscation is imposed when the lawful origin of the property of the person suspected of having committed the criminal activities set forth in the law is not proved and that this property is fully or partially owned by the person who is directly or indirectly preceded. When the first instance court of serious crimes considers a confiscation request by the prosecution and it proves the fulfillment of the 3 above-mentioned conditions, it decides for confiscation. When this decision is final, property is finally transferred to the state.

However, this does not rule out the possibility that new evidence showing that the decision was wrong may emerge later. In other words, there is always a possibility for review. But what does the Anti-mafia Law provide for the possibility of reviewing confiscation decisions? Let us elaborate on this below.

3. Civil confiscation and the possibility of review

As stated above, the purpose and scope of the Anti-mafia Law is the acquisition of crime proceeds and their final transfer to the state.

Confiscation, as explained above, is imposed when the three following conditions are fulfilled:

1. The existence of reasonable doubt based on indicia for involvement in criminal activities set forth in Article 3 of the law, which is about the scope of the law;
2. Unlawful origin of the property or unjustified ownership regarding the level of income, profit or other declared lawful activities;
3. Full or partial ownership of property by the person directly or indirectly proceeded.

The possibility for review exists even after the decision has become final and the assets are under the administration of the Agency for the Administration of Seized and Confiscated Assets (AASCA). This is so when new evidence emerges, which alone, and/or together, shows that the decision does not fulfill the three cumulative conditions and this may bring about the change. If we analyze the three cumulative conditions, they clearly include the probability that the situation may change and new evidence may drop or change the fulfillment of the three cumulative conditions mentioned above.

The first cumulative condition is - The existence of reasonable doubt based on indicia for involvement in criminal activities set forth in Article 3 of the law, such as organized crime, terrorist acts, trafficking, corruption, etc.

The question to be asked in this case is: Can there emerge new circumstances that may change or not fulfill this condition? Certainly, and such a case could be the final

criminal decision acquitting the person of the above-mentioned criminal offences. *The same question can be asked about the second condition - Unlawful origin of the property or unjustified ownership regarding level of income, profit or other declared lawful activities. This condition may change upon the emergence of new evidence certifying the lawful origin of assets.*

As for the third condition, it may change upon the emergence of new evidence certifying the absence of direct or indirect ownership by the proceeded person.

To file a review request, it is sufficient to have new evidence enabling the review of only one of the cumulative conditions. In principle, this would legitimize the subjects who have a lawful interest in filing a review request at the competent court. But what does the Anti-mafia Law, as a special law, provide for the review? Let us see below.

4. The request for review under the Anti-mafia Law

From a close reading of the provisions of the Anti-mafia Law, either nominally, literally, or by purpose, no provision provides or regulates in detail the request for the review of the confiscation decision. In other words, the request for review is not explicitly expressed, let alone the cases of subjects to be legitimized. Nevertheless, although the Anti-mafia Law does not provide for it, it does not prohibit the filing of the review request. In contrast, a provision of the law, Article 29, provides that:

- 1. Assets confiscated by a court decision, under this law, are transferred to state ownership.*
- 2. The final decision for the confiscation of assets is promptly delivered to AASCA.*
- 3. When the confiscation decision becomes final, the assets are finally transferred to state ownership. In this case, the owner is entitled to a fair compensation if confiscation is later provided to have been imposed in an unlawful or ungrounded way.*

Although the possibility for review is not explicitly provided for, an interpretation of Article 29/3, according to purpose or content, provides for the possibility of reviewing the decision, because only through the review can a second decision be taken, showing that previous decision is unlawful. Moreover, this provision recognizes the right to compensation or damages when the previous decision is proved not to be based on law and evidence.

Therefore, it is clearly evident that the possibility to review a confiscation decision exists. But what will be the implementing provisions in cases when the special law, i.e. the Anti-mafia Law, does not regulate this institute?

4.1. Implementing legal provisions when considering the review request

As stated above, although the request for review is not explicitly provided for by the legal provisions, a content interpretation allows the filing of the review request. But what will the implementing provisions be in the case of legal vacuum, in the hypothetical situation of filing a review request? Let us elaborate on the Anti-mafia Law and its provisions.

The Anti-mafia Law is a novelty for the Albanian procedural law as it sanctioned the application of property-related measures such as confiscation for the first time. However, these measures were applied outside the criminal procedure and were not

related to it because the procedure of imposing and implementing preventive measures, under this law, is autonomous in terms of state, degree, or termination of the criminal procedure against the persons subject to this law. Therefore, this procedure, otherwise called preventive procedure, does not follow the criminal procedure, i.e. the person may be acquitted due to reasons of impossibility of punishment or insufficiency of evidence, but confiscation can be imposed because it has no connection with the criminal procedure and is imposed outside the rules provided by the material and criminal procedural part. It is so because even the standard used in the preventive procedure is reasonable doubt based on indicia, which is much lower than the standard used in the criminal process where confiscation is imposed when the person is declared guilty beyond any reasonable doubt. This brings about the confiscation of assets, thus considering them proceeds of the criminal offence for which the person is declared guilty of.

The legal provisions of the special law of Anti-mafia, the Unifying Decision of the UCSC no. 1 of 2007, and the other decisions of the penal college of the Supreme Court clearly specify that the provisions of the Anti-mafia Law are first applied during the preventive procedure, and when these provisions are insufficient, the rules provided for in the Code of Civil Procedure are applied (Anti-mafia Law, Article 5).

Therefore, since the Anti-mafia Law, as a special law, does not provide for the review request, the court must refer to the provisions of the Code of Civil Procedure, which, according to the special law, are complementary when special regulatory provisions are missing. But what does the Code of Civil Procedure provide for the request for review?

Article 494 and the rest of the Code of Civil Procedure provides for the cases, circumstances, and subjects to be legitimized and the competent court.

The cases of review (reconsideration) include cases when:

- a) New circumstances or new written evidence pertinent to the case, which could not have been known by the party during the consideration of the case, are discovered;*
- b) It is proven that the testimonies of the witnesses or experts statements contributing to the decision have been false;*
- c) The parties, their representatives or any member of the adjudicating body, who have participated in the trial of the case, have committed criminally punishable acts influencing the decision;*
- ç) It is proven that the decision is based on forged documents;*
- d) The decision is based on a decision of the court or of another institution which was subsequently revoked;*
- e) The decision has been taken in clear contradiction with another irrevocable decision taken for the same parties, the same subject and for the same cause.*

Everyone who has a direct interest can submit to the Supreme Court, within 30 days as of the day of notification about the cause of the review, but in any case no later than a year as of the day the cause for the review emerged, the request for review.

In the case of submitting a request for the reconsideration of a confiscation decision to the Supreme Court, it will apply the provisions of the Code of Civil Procedure. It is so because the Anti-mafia Law considers confiscation a civil confiscation, rather than a criminal one. The reason for this is that this kind of confiscation applies some of the

civil procedure principles such as the burden of proof, which in this procedure falls on the person, who must prove the lawful origin of the assets. The standard of the confiscation is reasonable doubt based on indicia, rather than reasonable doubt based on evidence. The person is not required to have been declared guilty and it is not done at the end of the criminal procedure. The rules of notification and the evidence used in the evidence provision process are those of the Code of Civil Procedure. The situation concerning the competent court has been clear, with the Supreme Court having reviewing jurisdiction, as also stipulated by the Constitution. But how has the Supreme Court acted when requests for review under the Anti-mafia Law have been submitted to it?

4.2. Requests for review, cases adjudicated by the Supreme Court

As analyzed and explained above, if a request for review were submitted to the Supreme Court, it would undoubtedly apply the provisions of the Code of Civil Procedure, as this is stipulated by the Anti-mafia Law and the decisions of this court. Moreover, the special law prevails over the general one.

In a case adjudicated by the Supreme Court by decision no. 00-2013-1548 (83), dated 06.03.2013, this court has decided: acceptance of the review and request and accordingly the revocation of decision no. 14, dated 14.12.2011 of the First Instance Court of Serious Crimes Tirana, on: "confiscation of the assets of 4 persons", decision no. 06, dated 27.01.2012 of the Court of Appeal of Serious Crimes, and decision no. 00-2012-238 of the Penal College of the Supreme Court, and sending the case for re-adjudication to the First Instance Court of Serious Crimes, with another adjudicating body. Subject of the above decisions of the Court of Serious Crimes was confiscation of the assets of 4 persons, who at the time of the consideration of the request for confiscation by the First Instance Court of Serious Crimes were charged with the criminal offence of involvement and creation of organized crime structures, trafficking in persons, and laundering of crime proceeds, as delivered by the Greek authorities. For the criminal offence of laundering crime proceeds, the persons were being adjudicated by the court of Tirana judicial district, whereas for the other two offences they were adjudicated by the Greek authorities. Upon completion of the penal adjudication by the Court of Tirana judicial district, the criminal chamber decided to declare the four defendants, A. Sh, S Sh, C. M and F Z, innocent of the criminal offence they were charged with under Article 388/1/b of the Code of Criminal Procedure, arguing that the evidence does not constitute a criminal offence. At the same time, the removal of preventive seizure has been ordered for the seized assets under Articles 274 and 275 of the Code of Criminal Procedure. The assets were confiscated under the Anti-mafia Law and administered by the Agency of Seized and Confiscated Assets.

Taking into consideration the above-mentioned decision of acquittal for the four defendants, now final and acting as new evidence, the persons made a review request to the Supreme Court. Upon administering this new evidence, the Supreme Court decided to revoke the previous decisions and send the case for re-adjudication to the First Instance Court of Serious Crimes, with another adjudicating body.

In essence, the solution provided by the Supreme Court is just because new evidence has been obtained, namely a final decision of acquittal for the person. But during the consideration of this request for review, the Supreme Court has referred to and has applied the provisions of the Code of Criminal Procedure, which regulate the request for review. In my opinion, the reference to the provisions of the Code of Criminal Procedure seems to be wrong because the special law, i.e. the Anti-mafia Law, has clearly specified that this law is the implementing law during the preventive procedure, and in case of its absence, the provisions of the Code of Civil Procedure are applied, but there is no reference to the provisions of the Code of Criminal Procedure.

Nevertheless, in essence, the solution is the same because the final criminal decision of acquittal is new evidence, which brings about the acceptance of the request both in accordance with the provisions of the *Code of Civil Procedure Article 494/a, new circumstances or new written evidence pertinent to the case, which could not have been known by the party during the consideration of the case, are discovered; and in accordance with the provisions of the Code of Criminal Procedure Article 450/c,- discovery of new evidence after the final decision has been given.* In this case, the decision constitutes new evidence because it has been taken in accordance with the rules specified by Article 149 (evidence) and 191 (document – as evidence) of the Code of Criminal Procedure and in accordance with the provisions of the Code of Civil Procedure, Article 11 (evidence), 253 (official acts) and 451/a (its mandatory power). But how have requests for review been considered and what was the result in the First Instance Court of Serious Crimes?

4.3 Cases in the First Instance Court of Serious Crimes

The re-adjudication of confiscation decisions by the Court of Serious Crimes, initiated by the Supreme Court, upon the request for review, is low in number, not to say inexistent.

The re-adjudication of a final confiscation decision is of interest, as in addition to the general rules of re-adjudication upon acceptance of the review request, the court must administer the new evidence and analyze it in relation to the other evidence, and refer once again to the legal provisions specified by the Anti-mafia Law on the imposition of confiscation.

In this case, as mentioned above, there is a decision of acquittal because the evidence does not constitute a criminal offence, and it has been administered during re-adjudication at the Court of Serious Crimes. Let us see what this new evidence will bring about during administration and evaluation?

This evidence is certainly subject to debate and judicial scrutiny, both on its own and in relation to other evidence administered in the previous judicial process, in order to see how it can affect or alter the cumulative conditions for confiscation.

Confiscation under this law is imposed when all of the 3 following conditions are fulfilled:

1. The existence of reasonable doubt based on indicia for involvement in criminal activities set forth in Article 3 of the law, which is about the scope of the law;
2. Unlawful origin of the property or unjustified ownership regarding the level

of income, profit or other declared lawful activities.

3. Full or partial ownership of property by the person directly or indirectly proceeded.

As a result, during adjudication, the Court of Serious Crimes will once again analyze whether upon the administration of this evidence, the 3 cumulative conditions are met, with the first condition being: The existence of reasonable doubt based on indicia for involvement in criminal activities set forth in Article 3 of the law, which is about the scope of the law. *This Article specifies that the provisions of this law are applied to the property of persons against whom there is reasonable doubt based on indicia for:*

d) The commission of crimes intended to obtain unlawful proceeds, as provided for in Article 287 of the Criminal Code.

As stated above, the person was declared innocent by a final decision because the evidence does not constitute a criminal offence. *In these circumstances, the essential and necessary condition is not met, i.e. the commission of criminal offences intended to make profits such as the laundering of crime proceeds, because the competent court acquitted the person of the charges and this should have therefore brought about the unlawfulness of the confiscation decision, but this has not been declared by the First Instance Court of Serious Crimes. On the contrary, it has upheld the decision of confiscating the proceeds of persons who were acquitted of the criminal offence of laundering the crime proceeds even after re-adjudication.*

The Court of Serious crimes has argued that although the person has been acquitted of the criminal offence of laundering the proceeds of crime, he remains a person suspected of having committed the criminal offence of trafficking in persons and the establishment of a structured criminal group, subject to this law, with reference to the procedural acts delivered by the Greek authorities. If this claim is proven by the administered evidence, the court decision is then based on the Anti-mafia Law.

What consequences would there be if the Court of Serious Crimes had decided the unlawfulness of the decision for confiscation? Let us see below.

5. The regulation of legal effects following the declaration of the unlawfulness of the confiscation decision after re-adjudication through review

As explained above, there is a possibility that the re-adjudication of a confiscation decision, initiated by the Supreme Court through the review, may result in declaring it unlawful. But how will the consequences be dealt with in this case, on account of the fact that a confiscation decision has had its effects?

The law provides that proceeds confiscated under the Anti-mafia Law, i.e. the preventive procedure, are finally transferred to the state. Therefore, the state acquires ownership of these proceeds in accordance with the Anti-mafia Law. But has it acquired ownership according to the provisions of the Constitution and the Civil Code?

Article 41 of the Constitution provides that ownership is acquired by sale, gift and the other means provided for by the Civil Code. Article 163 of the Civil Code specifies that the ways to acquire ownership also include special laws. In our case, ownership of these assets by the state has been acquired lawfully, namely by a special law such

as the Anti-mafia Law.

However, there is a probability that after these assets have been lawfully acquired by the state following a confiscation decision, the emergence of new evidence may declare the unlawfulness of this confiscation decision. What solution would the law provide in such a case and what would be the right one?

The right to private property, as a fundamental human right, is a constitutional right guaranteed by Article 41 and 42 of the Constitution and it enjoys full legal protection. The Constitution provides that no one can be deprived of the right to property save by a regular legal process and for public interest. Even in cases of public interest, the state guarantees the right to fair compensation.

The Anti-mafia Law expressly provides that: *“When the confiscation decision becomes final, the ownership of the assets is finally transferred to the state. In such a case, their owner is entitled to requesting fair compensation if confiscation is later proved to be unlawful or unsupported.*

Thus, the Anti-mafia Law provides for not returning the assets to the individual but they continue to be under state ownership despite the fact that the decision is considered unlawful. At first sight, this seems to be unfair because since the decision of confiscation proved to be unlawful or unsupported, the parties must return to the previous situation by also regulating the effects produced by the decision for confiscation. In other words, the assets must be returned to the individual who owned them prior to the confiscation. However, this would be in contravention of the principle of legal certainty.

As a result, the Anti-mafia Law has not provided for the return of the parties to the previous state, but a fair compensation of the person, whose assets have been confiscated. We find this solution fair because the person is deprived of his property for public interest by nationalizing it, in accordance with both Article 41 of the Constitution and Article 42, because, in essence, the person has not been deprived of his property, but he has received compensation for the property he is deprived of. This is somehow considered to be expropriation in the public interest.

Thus, when the unlawfulness of the decision has been proved, the individual will be provided a fair compensation for the property confiscated in an unfair way. When the individual considers the compensation measure unfair, he can go to the court, as also provided for in Article 41 of the Constitution.

This solution is acceptable because in the situation when the state has become lawfully owner, loss or renunciation of the right of ownership should be made solely by the free will of the state, which is certainly lacking in this case, as the state does not have the will to lose its ownership rights.

6. Conclusions and recommendations

The request for review is an “extra-ordinary” means of appeal, provided by the European Convention on Human Rights, the Constitution of the Republic of Albania, the Code of Criminal Procedure, and the Code of Civil Procedure. The Supreme Court and the Constitutional Court also have wide jurisdiction over the request for review.

By their decisions, these courts have provided that the request for review, as an extraordinary means of appeal, is an exception to the principle of legal certainty and aims at overturning wrong decisions and providing effective justice.

In 2004, the preventive procedure was first adopted in Albania through the law against Organized Crime, to be followed later by the Anti-mafia Law. For the first time, these laws provided the confiscation of crime proceeds outside criminal procedure, when these proceeds were derived from a number of dangerous criminal activities such as organized crime, trafficking, terrorist acts, corruption, laundering of crime proceeds, etc.

Confiscation is a final property-related measure whereby property is transferred to the state. But can this final confiscation decision be reviewed?

Can this property be returned to the individual from whom it was confiscated, when this decision is proved to be unlawful?

The Anti-mafia Law does not expressly provide or regulate the request for review, but at the same time it does not prohibit it. In a hypothetical situation of filing this request, the parties having a legal interest must refer to the provisions of the Code of Civil Procedure, as the Anti-mafia Law itself considers these provisions complementary when not regulated by this law.

6.1 Problems and recommendations

The Anti-mafia Law should explicitly provide for and regulate the possibility to review final decisions of confiscation, specifying the legal causes, subjects, cases, deadlines, and the regulation of effects. Otherwise, it should clearly specify that in cases of a request for review, the provisions of the Code of Civil Procedure should be applied. The attitude of the Supreme Court in the consideration of requests for review, applying the provisions of the Code of Criminal Procedure, seems contradictory. In the Unifying Decision of the United Colleges of the Supreme Court, it has stated that preventive procedure – the Anti-mafia Law, is an autonomous procedure in terms of the state and procedure, and has no relation to the criminal procedure. The provisions applied during this special adjudication include the Anti-mafia Law provisions and the provisions of the Code of Civil Procedure, and we find no cases when the provisions of the Code of Criminal Procedure are applied. Therefore, in this case, the application of the provisions of the Code of Criminal Procedure is not supported.

As regards the case when, upon review, the confiscation decision has been declared unlawful, the law has regulated the effects by providing fair compensation to the persons whose property has been unfairly confiscated, following expropriation in the public interest.

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