

Seizure of property earned with criminal offenses, namely unjustifiably in Kosovo

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Abstract

Property benefit obtained through criminal offense or unjustifiably can be defined as any property benefit or illegal income, which consists of any type of property, whether movable, immovable property or rights realized by various actions abusive.

The examination of the problems of material gain, acquired through a criminal offense, is conditioned by the preliminary determination of the meaning of property according to the criminal law, which accepts the wording regulated in the civil law. The truth is that the meaning of property benefit, gained through a criminal offense, belongs to the category of criminal law, which to a certain extent enters the field of civil law.

Therefore, confiscation of material gain gained through criminal offense or unjustifiably is an important issue related to preventing and combating corruption and organized crime.

Keywords: Confiscation, sequestration, organized crime, corruption, real estate, movable property, etc.

1. Introduction

The accumulation of immovable and movable capital in the possession and ownership of criminals and criminal groups has enabled the creation of a layer of abusers, who develop their economic and financial power, who use it ruthlessly and thus threaten any physical and legal entity, which also means the rule of law itself. Organized crime and corruption stimulate special interest in contemporary criminal law, criminology and in the policy of combating crime. Organized crime has been one of the topics addressed at the XVI Congress of the International Association of Criminal Law, held in 1999 in Budapest. The adopted resolutions have also included the problems of confiscation of property, so for the general part of the criminal code it is determined that criminal-legal sanctions must necessarily be adequate to the certain risk of organized crime for the general values, protected by criminal law and must also belong to the confiscation of material gain gained through criminal offense, although, material benefit - orientation in the acquisition of material benefit, is an integral part of the contemporary understanding of organized crime.

Property gain is one of the basic motives for criminal organizations and the activity of individuals within such organizations. The main tool for fighting organized crime is the confiscation of illegal property, which will affect the termination of the "chain" investment of illegal benefit in further legal and illegal activities.

An important feature of organized crime is that the property gain gained through a criminal offense is "sheltered" in a safe place, to prevent its confiscation. There are cases when members of criminal organizations are arrested and judged in the

territory of one state, and the property to be confiscated according to the court decision is located in the territory of another state. To this end, the United Nations has established a mechanism for international co-operation, under which States parties are obliged to provide each other with the greatest possible legal assistance in investigations, prosecutions and judicial proceedings in such cases.

The spread of this form of organized crime causes major abuses of power, promotes the spread of corruption, forgery of documents and money laundering, which hinders the effective implementation of justice, sanctions and criminal law measures, such as confiscation and seizure of items or assets by the court. Research shows that we are dealing with a high degree of blockage of the courts and this is manifested in the minimal number of solved cases in which it is concerned a criminal offense, despite the empirically based or fact-based knowledge - of existence and extent their mass (Latifi, Beka, 2013, p.189).

2. Understanding, confiscation and identification of property gain obtained through a criminal offense

The criminal-legal meaning of confiscation has its origins in the ancient history of criminal law. It consists of the confiscation of all movable and immovable property by a person convicted of a certain criminal offense, in which case this property does not mean that it was acquired through a criminal offense, but illegally.

One of the main policy orientations for the fight against crime at the international level is to hit the benefits realized from the commission of criminal offenses. This policy aims not only to punish crime, but also to prevent it, and even the latter is being given special emphasis because by depriving criminals from benefits, it also deprives them of the motivation and means to engage in criminal activity. The concern of criminals that their benefits from crime may be confiscated is a major factor motivating them to launder the benefits of crime. An effective foreclosure system is a necessary component of any anti-money laundering measures taken in any country. Money laundering itself is a criminal offense in the field of corruption and it is also possible to confiscate the benefits of this crime (Mustafaj, 2007, p.31).

Some legislations mainly provide only for the confiscation of a certain part of property, related to the committed criminal offense. The issue of confiscation of criminally acquired property is not uniquely and precisely regulated in many legislations, so these legal loopholes are exploited by the perpetrators of these crimes, to avoid prosecution or criminal liability. Unlike confiscation, which has a permanent character and which means the final receipt of a certain case, sequestration, as a temporary measure of securing confiscation can be:

- probatory seizure - as a means of gathering evidence in the proceedings;
- preventive seizure - to prevent further disposal of certain property acquired through criminal offenses or illegal activities; and
- conservative seizure - which is determined when there are fundamental reasons for the suspicion that the defendant will evade (avoid) the guarantee of compensation for the payment of the debt, ie the obligations of the state.

The problem of identification and confiscation of property gain, obtained through

criminal offense, promotes intensive regulation in the national legal order and numerous international documents. The complex forms of criminality of material gain, especially organized crime, impose the need to adapt the criminal legal institution of confiscation of material benefit, acquired through criminal offense in new circumstances (Ivičević, 2004, pp. 1-22).

Meanwhile, the part of the activity, aimed at gaining material benefit, is part of the field of criminal legislation. It is about crime that brings material gain. In addition to "simple crime" driven by the gain of material gain, a special problem is organized crime, which often takes on international proportions (Latifi, Beka, 2013, p.87).

The institute of confiscation of property gain, obtained through criminal offense, was introduced in European criminal legislation at the beginning of the last century. Property benefit obtained through a criminal offense can mean any property, which derives or is acquired directly or indirectly from the criminal offense committed, in which case the property has the meaning of property of all forms, regardless of whether it is material or immaterial, movable or immovable or are legal documents proving possession or any right over such property (Latifi, Beka, 2013, p.6).

In order to be able to confiscate the property benefit obtained through a criminal offense, it is necessary to identify it in advance, to prove the criminal origin of this property. The stage of identifying material benefit must be acted upon quickly, as the passage of time makes it difficult to collect data on relevant facts and evidence, especially in the case of complicated financial transactions, which make it difficult to trace their origin. In addition, through financial transactions, the subsequent property benefit can be increased by transferring it to third parties not related to the criminal offense, thus making it impossible to confiscate its legislation, which makes confiscation by third parties conditional on circumstances that this person has not acted bona fide, which is necessary to prove in advance.

The special criminal-legal measure of confiscation of property benefit, obtained through a criminal offense, is also applied to third parties, to whom it is located, to bring the legal status violated by the criminal offense committed. However, the problem of identifying the material benefit gained from the criminal offense requires the solution of three main issues:

- How to detect and trace the material benefit that has been obtained through a criminal offense or unjustifiably;
- How to prove the causal link between the criminal offense for which a certain person has been charged and the acquisition of property benefit, ie the connection between the abusive act and the acquisition of property in an unjustifiable manner;
- How to ensure in time the complete confiscation of the material benefit obtained through a criminal offense, ie the acquisition of property in an unjustifiable manner.

So, in relation to these issues, some dilemmas arise, such as: In order for the property benefit to be the subject of confiscation, should its direct connection with the committed criminal offense be proven, so that the confiscation does not extend to the whole circle of "property benefit", which may indirectly originate from the criminal offense, ie the measure of confiscation of property benefit does it include only the income that the perpetrator has gained by committing the criminal offense or other income that is indirectly the product of the commission of the criminal offense. To

avoid this dilemma, the institute of civil confiscation of property has been established.

3. Kosovo and dealing with the problems of confiscation of unjustifiably acquired property

Recently in Kosovo, efforts are being made by state institutions to issue a Law on Sequestration and Confiscation of Unjustifiably Acquired Property (Ministry of Justice of the Republic of Kosovo, 2021).

Kosovo as a young state is going through a transition of over two decades, so it faces a large number of unresolved problems, and some even inherited, with institutions that are not well organized and with laws not implemented enough in everyday life and that institutional. All these have contributed to the weakening of the fight against crime and criminality, where to highlight it is that the wealth gained by committing criminal offenses is the main driver of crime in general and at the same time this conducted wealth provides perpetrators with income that guarantees them the continuation of their criminal activity (Beka, 2015, pp.100 - 108).

For this reason, many countries, including Kosovo, are committed to prevent and combat these criminal activities through various institutional and legislative mechanisms, where to distinguish are the three main mechanisms used by European countries and in pursuit of this goal:

- criminal confiscation;
- administrative confiscation; and
- civil confiscation.

Despite these three forms of confiscation of property, assets derived from criminal activities, it is necessary to intensify legislative processes for faster and more efficient enforcement of confiscation of any immovable and movable property created by criminal activities, especially in the field of criminal offenses related to organized crime and corruption, where the perpetrator or co-perpetrator is directly or indirectly public officials, but not ignoring other economic-financial and physical entities with which criminals have cooperated for material gain from various criminal activities. Only in this way is it possible to attack the various "white collar" criminal groups, financial and economic crime. This is emphasized by the fact that these groups have managed to create a large financial capital, so much so that they endanger the financial and economic system of Kosovo, through corrupt actions and criminal activities that have all the features of organized crime.

Kosovo's institutional framework regarding the confiscation of illegally acquired property consists of some of the most important institutions, such as:

- State Prosecutor;
- Kosovo Police;
- Courts;
- Anti-Corruption Agency;
- National Coordinator Against Economic Crimes;
- Agency for Administration of Sequestered or Confiscated Assets, etc.

Whereas, each of these mechanisms performs its duties and competencies based on the legal framework in force in the field of confiscation of unjustifiably acquired

property. This framework consists of the following legal acts:

- Code no. 06 / L-074 Criminal Code of the Republic of Kosovo;
- Code no. 04 / L-123 of Criminal Procedure;
- Law no. 06 / L-087 on Extended Powers for Confiscation of Assets;
- Law no. 03 / L-141 on the Administration of Sequestered or Confiscated Assets;
- Administrative Instruction MoJ No. 05/2017 on the Manner and Procedure of Sale of Sequestered Movable Assets;
- Administrative Instruction MD / No.04 / 2017 on the Manner of Determining the Expenses of Preservation and Retention of Sequestered and Confiscated Assets;
- Concept Paper on the Issue of Unjustifiably Acquired Property;
- National Strategy of the Republic of Kosovo for Preventing and Combating the Informal Economy, Money Laundering, Financing of Terrorism and Financial Crimes 2019-2023.

From the analysis made for the purpose of legislative advancements in Kosovo it has been noticed that the established and most acceptable mechanism for confiscation is confiscation carried out through criminal procedure or traditional criminal confiscation where after issuing a conviction, the court, at the request of the prosecution and depending on facts and evidence of the case, decide whether the property of the convicted person should be confiscated or not¹.

This procedure is in fact the usual course of the process in the vast majority of states, not excluding Kosovo, and is therefore considered the dominant option, if there are opportunities to support prosecution. However, there are cases when such a course of action may not be available to the state prosecution. It often happens that the prosecution does not have enough evidence to link the property of the convicted person with the crime committed, or it happens that the investigation is blocked and as a result the perpetrator manages to escape or distribute his property. There are also cases when the lifestyle of certain persons does not correspond to the publicly declared income of the Anti-Corruption Agency in Kosovo and although there is a suspicion that the unjustifiable wealth of these persons is related to criminal activities, it is extremely difficult to prove such a thing.

All these reasons make it impossible to confiscate property according to the usual criminal procedure, which is being implemented in Kosovo, but with a level of efficiency that is for every critic, since in the last six years, the value of freezes and seizures captures the value of 180,000,000.00 Euros, while the value of the final confiscations falls to only 3.5 million Euros (Ministry of Justice of the Republic of Kosovo, 2021, pp. 7 - 8).

Therefore, in order to increase efficiency in the field of preventing and combating organized crime and corruption in Kosovo, the option of civil confiscation has emerged

¹ Regarding the total of 2020, the justice system in Kosovo has generated figures on freezing/sequestration and this is illustrated by the fact that we have € 19,182,157.01 while the confiscation figures are in the amount of €476,490.38€. So about 20 million euros of seized property and about half a million assets eventually confiscated. For more details see: QUARTERLY REPORT (October - December 2020) on the activities and recommendations of the National Coordinator for Combating Economic Crime, Kosovo Prosecutorial Council, February 2021.

as a more efficient form as this procedure can be initiated even in the absence of a conviction. Despite the good sides of civil confiscation in the existing circumstances in Kosovo, there are obvious factors that make it difficult to implement this option, ie the intention of institutional entities. Some of such factors are:

- Kosovo is a new state, established in 2008;
- Kosovo is a society that has been out of the war for two decades;
- Kosovo is unfortunately a society still in transition;
- Kosovo still faces many different property problems, especially in the area of transfer of ownership (still real estate transactions here and there are done in cash / by placing a fictitious price in the sales contract) and property registration immovable in public cadastral books;
- In Kosovo it is still evident (to a lesser extent than in the past) the conclusion of an informal contract with potential contractors when the object of sale is especially real estate;
- Kosovo faces serious problems in the field of heritage, especially when the object of consideration is real estate;
- Kosovo is a country where economic informality is still high;
- Kosovo has a large number of diaspora in various European countries, the US and beyond, who work "illegally" and generate income, contrary to the legislation of the countries where they live and operate;
- In Kosovo, remittances are sent from the diaspora to illegal channels (not through the banking system, but cash, being transported by various means of travel), etc.

While the factors that promote the advancement of the legislative installation of civil confiscation in the Kosovo legislation are:

- Deficiencies of confiscation according to the Criminal Code and the Code of Criminal Procedure;
- Weaknesses of the Law on Extended Powers for Confiscation of Property;
- Procrastination of lawsuits;
- Defective indictments and judgments related to confiscation of property;
- Lack of specialization of judges and prosecutors in the field of confiscation;
- Lack of coordination between relevant actors;
- Reluctance to pursue persons with strong political connections, etc. (Ministry of Justice of the Republic of Kosovo, 2021, p.24).

Therefore, Kosovo must in any form find institutional mechanisms and space for incorporation into legislation and implementation of the provisions of the Conventions (Rakipi, 2003, pp.37 -38) that facilitate international cooperation and mutual assistance in the investigation of crime, and in the detection, seizure and confiscation of proceeds from this crime. Conventions ² aim to help countries achieve

² United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1988, Article 5; United Nations Convention against Transnational Organized Crime, Articles 12-14, governing the confiscation and seizure of property, international co-operation in connection with confiscation, and confiscation of proceeds of crime or confiscated property; United Nations Convention against Corruption⁴, adopted by the United Nations General Assembly by Resolution 58/4 of 31 October 2003; International Convention against the Financing of Terrorism, Article 8; Recommendations of the Financial Action Task Force that was established in 1989 during the G7 Summit in Paris as an intergovernmental body and international instrument in the fight against

a degree of efficiency and in conditions of complete lack of legal harmony and where the competent entities are engaged in particular to penalize money laundering and confiscate assets and income (or real estate, value of which does not correspond to the revenues realized from the legal activity.

The conventions provide for various forms of investigation such as:

- assistance in gathering evidence, providing information to another country without a request from that country, application of joint investigative techniques, removal of banking secrecy, etc. ;
- freezing bank accounts, seizing goods to prevent their transfer;
- measures to confiscate proceeds of crime, enforcement in one country of a confiscation claim made by another country, initiation in one country of proceedings leading to confiscation based on a claim of another country, etc.

United Nations Convention against Corruption (UN General Assembly, 2003) exclusively provides that all states are obliged to prevent corruption and the necessity of mutual cooperation. One of the provisions of this convention defines the meanings of certain terms as "civil servant" (any person holding a legislative, executive, administrative or judicial office in a State which has been appointed or elected for a fixed or indefinite term, paid or unpaid, regardless of hierarchical level; any other person performing a public function, including a state body or public organization, or providing public services, as these terms are defined in national law; and any other person defined as "civil servants" in the national law of a state, and any person performing a public function for a foreign country, including a state body or public organization). "official of the international public organization" (international official or any a person authorized by such an organization to act on its behalf), "proceeds of crime" (any property that has a direct or indirect origin from an offense or has been acquired through the direct or indirect commission of this offense), "confiscation" (permanent receipt of profit based on a court decision or other competent body, etc., "controlled shipments" (a method that allows exit from the territory, passage through the territory or entry into the territory of one or more states, in an unauthorized or suspected manner, under the control of the competent authorities of those States, for the purpose of conducting investigations into any offense and identifying the person involved in their commission, etc. (Latifi, Beka, 2013, pp. 218 - 219).

It follows from all this that it is possible to make an exception to the principle that confiscation is possible only within the scope of criminal proceedings, which means that states may use different procedures from criminal proceedings to deprive the perpetrator of the proceeds of the offense (Ministry of Justice of the Republic of Kosovo, 2021, p.12).

Conclusions

In modern society, gaining material wealth is often considered as an indicator of business ability and success. In addition to regular activities, aimed at gaining material benefit, some of them are illegal, which eventually promote the moral judgment of the social environment in which they take place, but remain outside the scope of "money laundering", etc.

criminal-legal norms.

Problems of fighting corruption and organized crime, especially those where public / state officials are involved can be addressed to the state, its bodies and institutions that can not, do not dare, do not know or do not want to eradicate the factors and causes of these types of crimes and criminality in general, as well as to punish and prevent the perpetrators of these crimes.

Regarding the issue of confiscation of immovable and movable property in Kosovo unjustifiably acquired, it turns out that Kosovar society is facing serious problems, especially in the field of implementation of current legislation, where the inefficiency of institutional mechanisms for sequestration and confiscation of property acquired through criminal offenses or unjustifiably acquired.

The reluctance to prosecute, especially the "white-collar crime" in Kosovo is a special problem faced by Kosovar society and the justice system in Kosovo for two decades. In other words, the responsible persons lack the will and courage to wage a more effective fight against these criminal phenomena. For this reason, it is more necessary to find alternative modalities besides criminal confiscation, in order to prevent and fight crime and criminality, especially in the field of organized crime and corruption and confiscation of their illegally created property, ie in unjustifiably. The current confiscation processes in Kosovo (criminal confiscation) and what is alleged to be installed (civil confiscation) are facing numerous and serious obstacles from various interest groups.

In addition, Kosovo is dominated by an extreme polarization of the debate on the concepts related to the need or not and the way of its realization in practice, for confiscation of unjustifiable property, which is a topic of discussion among senior public officials, not excluded even among various experts in the field of criminal, criminological and civil.

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