



## **THE PROCESS OF CRIMINAL ASSETS CONFISCATION AND CONSTITUTIONAL GUARANTEES**

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### **Abstract**

*The criminal assets confiscation is the most important legal tool for the depriving perpetrators of criminal offenses of illicit profits. The provision of confiscation in Albanian legislation as a means of preventing and combating organized crime and money laundering through the confiscation of assets deriving directly or indirectly from criminal activity is based on the Anti-Mafia Law. According to this model, confiscation is presented as a combination of American practice and some European countries by borrowing elements of these systems and those provided for in the UN International Convention against Organized Crime. For these reasons it is necessary to analyze and complete treatment of this issue, make a comparative study. An issue of importance for the study has to do with the relationship between the legal framework on confiscation and the protection of fundamental human rights and freedoms, and in particular the observance of the European Convention for the Protection of Human Rights and Fundamental Freedoms, especially the principle of presumption. of innocence, the right to a fair legal process, legal certainty, practical obstacles in confiscating the proceeds of crime, etc. Exactly these problems are the object of the analysis and the study of this paper.*

*Keywords: Confiscation, presumption of innocence, money laundering, constitutional guarantees*

## INTRODUCTION

In criminal justice systems, seizures of property as a result of their association with a criminal offense have traditionally been recognized. Confiscation can be defined as an official decision through which property rights can be removed as a result of a criminal offense. Article 1 (point f) of the United Nations Convention against Drugs, Vienna 1988, defines confiscation as: "... a fine where applicable and implies the permanent seizure of property by a court decision or other competent authority " (Ratified by Law no. 8722, dated 26.12.2000, "On the Accession of the Republic of Albania to the" United Nations Convention against Illicit Trafficking in Narcotic Drugs and Psychotropic Substances ". Article 1 (point f) of the Convention). Whereas, Article 1 (point d) of the European Convention on Laundering of the Proceeds of Crime, Strasbourg, 08.XI.1990, defines confiscation "... as a punishment or a measure ordered by a court following a court proceeding in relation to one or some criminal offense, punishment or measure that ends with permanent deprivation of property" (Ratified by law no. 8646, dated 20.7.2000 on the ratification of the European Convention "On the Laundering, Screening, Seizure and Confiscation of the Proceeds of Crime"). Meanwhile, Article 36 (point 1) of the Criminal Code of the Republic of Albania, provides that "... confiscation is compulsorily granted by the court and has to do with the receipt and transfer in favor of the state of the means of committing the criminal offense and the proceeds of crime criminal ". It should be noted that the Vienna Convention allows any competent body authorized to issue confiscation orders, while the Council of Europe Convention restricts this right only to courts. Thus, the European Convention excludes administrative seizures ordered by administrative authorities, customs or tax authorities. The same is provided in the Criminal Code of the Republic of Albania, which explicitly provides that "confiscation is mandatory only by the court ...", (Article 36, point 1 of the Criminal Code of the Republic of Albania). From this point of view, we can conclude that the system chosen by the Republic of Albania offers more guarantees for the respect of the rights of the persons affected by confiscation. The purpose of this study is to describe the process of confiscation of criminal assets as the most important legal tool for depriving perpetrators of criminal offenses of illicit profits. The primary objective of this study was to provide a comparative overview of Albanian and American legislation and practice, as well as the legislation of some European countries on the process of confiscation of criminal assets.

## METHODOLOGY

Through this paper, authors managed to use a qualitative research methodology, with primary and secondary data which are the result of reviewing a fairly extensive contemporary and archival literature regarding to the purpose of the study that this topic will follow to the

researchers. The implementation and realization of the goals and objective, this study tries to achieve through the implementation of a scientific Methodology where the base is in-depth research and comparison, and analysis through the facts arising from archival sources in the historic area, review of domestic, European, American, Swiss etc. code and legislation on the topic, documentary collections, as and utilization of assets, documentary material and published domestic and foreign historical literature.

## RESULTS

Confiscation of property related to the criminal offense consists in the transfer of title to ownership. The moment of transfer of ownership usually coincides with the moment when the decision for confiscation becomes final. The United States adheres to the doctrine that the transfer of title to property must occur at the time of the commission of the offense. The court decision ordering the confiscation has only declarative force. This doctrine was enshrined in 1984 through the Comprehensive Confiscation Act and is now applicable to almost every confiscation in the United States. According to this legal conclusion, the state is considered to be the owner of the property related to the criminal offense from the moment when the offense was committed. The United States Supreme Court has conditioned retroactive effect on title to property as self-enforceable. In accordance with the American doctrine, Article 3 (point 4) of the Albanian law "anti-mafia" provides that the confiscation of criminal property also applies to the assets of persons created before the entry into force of this law, provided that the assets are placed during their involvement in criminal activity. But, until the judicial bodies have made a decision to confiscate the object of the criminal offense, someone else can own the property and in this case he has the right to claim innocence (Cassara, 2016). An important obstacle to the confiscation of proceeds of crime is the fact that the property, subject to confiscation at the time of the court decision, has been consumed or can not be traced and thus escapes confiscation. On the other hand, confiscation can have fundamentally unfair consequences for third party beneficiaries, as their rights may be violated due to the "blind" implementation of confiscation. Confiscation of proceeds of crime deprives the person who committed the offense of any property rights that may arise from that proceeds. This is logical and fair, he may not have any rights in relation to the property acquired from the offense, but this conclusion cannot be extended. But how to deal with third parties who have property rights in relation to criminal proceeds? European Court of Human Rights, as an integral part of the right to a fair trial stipulates that if third parties have not been able to defend their rights during the trial phase, the law should allow them to defend their rights after the execution of the confiscation. (European Court of Human Rights, judgment of 25 February 1993, *Funke v. France*). The rights of third

party beneficiaries can only be guaranteed through special procedures requested by the third parties themselves, at the trial stage or at the stage of enforcement of the confiscation order. In accordance with these standards, our legislation in the law "anti-mafia" stipulates that "... when during the main trial it turns out that the seized assets belong to third parties, the court, with a reasoned decision, summons them to intervene in process. The third person, within the deadline set by the court, has the right to present his claims at the hearing, as well as to request the receipt of other necessary data", (Law no. 10 192, 2009). Swiss law provides that property consisting of the proceeds of crime may not be confiscated if a third party has acquired the property under applicable law (Article 59 (1) of the Swiss Code). A similar requirement exists in Dutch law (Article 33 (2) of the Dutch Penal Code). In respect of the confiscation of the proceeds of crime, Belgian law has ruled that it is not possible to confiscate the proceeds of crime which have benefited from third parties (The controversy surrounding Belgian laë in this respect: Belgian Supreme Court, judgment of 18 March 1997, Tijdschrift voor milieurecht (1997), 270 and judgment of 10 February 1999, Recente Arresten van het Hof van Cassatie (1999), 341). Albanian legislation conditions the confiscation of criminal property of third parties, if they have acquired it through fictitious or incentive legal actions (Article 22 (point 5) of the Law "Antimafia"). In these cases the court finds the invalidity of these legal actions and the property is considered to belong to the perpetrator of the criminal offense. According to this law, there is a presumption that even in these cases we are dealing with assets illegally acquired by the suspect. In this way, the presumption is formed, that assets which are formally in the name of other persons, are in fact in direct or indirect possession of the person suspected of committing the crimes defined in Article 3 (point 1) of the law. Nr. 10 192, dated 03.12.2009. In the event that it turns out that the suspect owns a number of assets, the confiscation of assets is not decided "blindly" on all his assets, but is valued and decided for each of them and only for those assets that from the investigation and trial results that their origin, legal origin is not justified. This is because the possibility cannot be ruled out that a person suspected by law can dispose of legally acquired property. Is confiscation possible if the proceeds of crime have been transformed or recorded in the name of a third party? The importance of answering this question is clear, as criminals will try as soon as possible to conceal the property, which constitutes the main proceeds of their crimes, in order to thwart any attempt by law enforcement agencies. law to discover. Article 5 (point 6 (a) of the Vienna Convention) answers this question by affirming that when profits are transformed into other assets, they should be subject to confiscation, while the Money Laundering Convention remains silent on this. According to the Vienna Convention (Article 5 (point 6 (b)), (Law no. 8722, 2000) when the profits are mixed with assets obtained from lawful sources, those assets should be subject to confiscation until the value of the profits

mixed with them is assessed. Criminal Code of the Republic of Albania. gives a positive answer to this question, Article 36 (points 2 and 3) provides that if the proceeds of crime have been transformed or transformed in part or in full into other assets, the latter shall be subject to confiscation. When combined with legally acquired assets, the latter are confiscated up to the value of the proceeds of crime (Criminal Code of the Republic of Albania, 2014). Despite concluding that only net proceeds should be confiscated, practice has shown that many jurisdictions tend to extend the concept of confiscation of proceeds of crime. Property which has facilitated the laundering of proceeds of crime should be confiscated. This theory is based on a broad interpretation of 18 USC & 981 (a) (1) (A) which contains the fact that all assets involved in money laundering would be confiscated. This punitive nature of confiscation leads to the conclusion that confiscation of the proceeds of crime is a criminal sanction (Crimes and Criminal Procedure - 18 USC Section 981). These sanctions are always imposed in the course of a criminal proceeding, precisely as a sanction for a criminal offense. Confiscation of proceeds of crime should be ordered when a person is found guilty of a criminal offense. This fact constitutes a weak point for confiscation proceedings. Regarding to the constitutional guarantees and the confiscation process the Constitutional Court has interpreted the presumption of innocence in the sense that ordinary courts should not begin the process with the conviction that the defendant has committed the crime charged, that the burden of proof lies with the accusing party, that any suspicion should go in his favor. defendants, that the court should base the decision on direct and indirect evidence to be proved by the prosecution (See in the decisions of the Constitutional Court No. 9, 2004; Nr. 23, 2009). The Constitutional Court specifies that this interpretation of Article 30 (presumption of innocence) of the Constitution is closely related to criminal proceedings, while confiscation is a separate proceeding independent of criminal proceedings, so the guarantees of criminal proceedings can not be applied in the confiscation process (Decision no. 4 Constitutional Court, 2011). The burden of proof initially falls on the prosecutor to argue reasonable suspicion based on indexes, that a person is a participant in organized crime and trafficking, to show in turn that there are grounds for reasonable suspicion and sufficient data for the effect of preventive judgment, that they are not assets acquired in a lawful way, which motivates the existence of the presumption of their illegality and as a result, passing the burden of proof of the suspect. After that, the burden of proof passes to the suspect, to justify the lawful origin of his assets, to argue the lack of connection of the assets with the qualification as products of criminal offenses or their investment (Cassara, 2016). So, in this process, the burden of proof is divided between the prosecutor and the person whose property will be seized or confiscated. Following these justifications and arguments for the need to distinguish between the criminal process and the

preventive process, the guarantees of the criminal process for the presumption of innocence are not applicable in the preventive process, sanctioned by the law under review. This technique for the burden of proof defined in the Albanian law "anti-mafia" in this perspective, according to the Decision of the Constitutional Court does not contradict the principle of the presumption of innocence (Decision no. 4, Constitutional Court, 2011). In essence, confiscation, as provided in the Criminal Code (Article 36) is a criminal punishment, regardless of its preventive or punitive purpose. In this view it violates the right of the defendant not to incriminate himself. Often these techniques in one way or another lead to negative conclusions from the defendant's silence at trial, therefore in some legal systems these techniques are considered incompatible with the right to remain silent (On the status of the privilege against self-incrimination: G. Stessens, 'The Obligation to Produce Documents Versus the Privilege Against Self-incrimination: Human Rights Protection Extended Too Far', ELR, Human Rights Survey 1997, and on the notion of derivative application of the privilege: I. Dennis, 'Instrumental Protection, Human Right or Functional Necessity: Reassessing the Privilege Against Self-Incrimination', 1995). Article 94 (d) of the Dutch Code of Criminal Procedure gives the prosecution the power to declare invalid any legal transaction of the perpetrators provided that the prosecution proves that he was not obliged to do so and acted in bad faith. The rights of third parties are protected through the revocation of confiscation, provided in Article 552 / c of the Dutch Code of Criminal Procedure. However, deprivation of income can only be done if the third person may be aware of the criminal offense or money laundering offense. Once the legal transactions are declared invalid, the property is considered to belong again to the perpetrator, so that it can be confiscated. Many legal systems allow the confiscation of the proceeds of crime, even after a person has died or been found not guilty of a criminal offense. Article 6 (2) of the European Convention on Human Rights, presumption of innocence, prevents the confiscation of income after the owner has died. The European Court of Human Rights explicitly states in relation to punitive fiscal sanctions that "the inheritance of the guilt of the dead is not in line with the standards of criminal justice in a rule of law society (European Court of Human Rights, 1997). In the Albanian law "anti-mafia" (Article 3 point (3) it is provided that confiscation may be requested in any case and against the heirs of the person subject to the application of this law, but not later than 5 years from the date of death. In this case the confiscation of the proceeds of crime is independent of the completion of a criminal proceeding, however essentially confiscation is a preventive criminal measure (Law No. 10 192, 2009). Confiscation is applied according to the Albanian legislation if the way of gaining, the origin of the property of the suspect or other persons (Article 3), which is directly or indirectly owned by the suspect, is not legally justified and is related to participation, commission by the suspect of a certain category of crimes. In this sense, confiscation cannot be

implemented, if the investigation and adjudication of the prosecutor's request for a decision to confiscate the assets show that the property was acquired in a legally justified manner. Confiscation of property is a civil confiscation, as it represents an action against the property, proceeding in rem and not against the person, the owner of that property. This process is based on the legal presumption that the property represents before the law the party that has violated the law. According to customary law, the innocence of the owner is not enough to protect him from the civil confiscation of his property by the state (*Bennis vs Michigan, Calero - Toledo against Pearson leasing firm*. 416 US 663 (1974)). This position has been reconfirmed by the United States Supreme Court, which finds that the Constitution does not protect the interests of an innocent owner from confiscation by the state during the execution of its decisions, guaranteed by legal provisions. The innocent owner can escape the confiscation of his property by requesting the cancellation of the confiscation or the reduction of the confiscation value. The annulment includes the pardon of the property and the restitution of the complainant's interests. The dismissal of the basic criminal charges, the innocence of the criminal offenses, the allegations of the risk of double trial for the same criminal offense, do not constitute sufficient protection against the civil confiscation of property. According to the legal provisions, the representatives of the state have the legal obligation when undertaking the action of civil confiscation to create the conviction that there are sufficient reasons for the confiscation. As a rule, the legal provisions authorizing the seizure and confiscation of property must be very strict. According to the articles of the Law on Control and Money Laundering (LCPP), the legal provisions on civil confiscation make possible the confiscation of "any property related to violations in the field of money laundering" (18 U.S. Code § 981 - Civil forfeiture, also [www.law.cornell.edu/uscode](http://www.law.cornell.edu/uscode)). The process of civil confiscation is aimed at compensation and not punishment, but in essence this procedure is of a criminal nature, therefore some fundamental rights may be endangered, such as the presumption of innocence, the right of the defendant to remain silent, the right to do not incriminate yourself, etc. Such fundamental rights do not preclude the possibility of confiscation, nor can they prevent the U.S. government from committing confiscation if it (the government) can document its share of the burden of proof. US Constitution does not "immunize property from confiscation" (*United States v. Greber*. United States Court of Appeals, Third Circuit. Apr 30, 1985. 760 F.2d 68 (3d Cir. 1985)). Restrictions on Certain Amendments to the US Constitution "... not required when confiscated property is secured by illicit proceeds or when it has been wholly involved in criminal activity." (Supreme Court Case: *Austin v. United States - Forfeiture Endangers American Rights*, 113 S.Ct. 2801, 125 L.Ed. 488 (1993)). In accordance with these practices, the Constitutional Court of Albania has interpreted the presumption of innocence in the sense that ordinary courts should not begin

the process with the conviction that the defendant has committed the crime for which he is charged that the burden of proof lies with the accusing party, that any doubt should go in favor of the defendant, that the court should base the decision on direct and indirect evidence to be proved by the prosecution (decision of the Constitutional Court No. 9, dated 28.04.2004; Nr. 23 dated 23.07.2009). The Constitutional Court clarifies that this interpretation of Article 30 (presumption of innocence) of the Constitution is closely related to criminal proceedings, while "... confiscation is a separate proceeding independent of the criminal process, so the guarantees of the criminal process can not be applied in the confiscation process"( Decision no. 4, dated 23.02.2011, of the Constitutional Court, paragraph 37). In the process of civil confiscation, proceeding in rem, the state can obtain the title of property through an administrative procedure or a court procedure. This is a process through which foreclosure agencies obtain title to property after the implementation of certain procedures, the purpose of which is to force the complainant to relinquish the right to property or to retaliate. The agency has a duty to notify the parties, who have any interest in the property, at risk of confiscation, by assigning a period of time within which they can challenge the confiscation, to request recognition of their right to the property (Robinson, 1996). The administrative confiscation process must meet the minimum legal requirements, which means that the agency must have control over the property to secure jurisdiction. The seizure and confiscation must be based on the conviction that there are sufficient reasons to believe that the property can be confiscated under the relevant law. So, there must be sufficient reasons that the property was obtained illegally. "Interested parties must be notified, explaining the procedure to be followed and the deadline within which the owner must take action to challenge the confiscation in court." (19 U.S. Code § 1607 - Seizure; value \$500,000 or less, prohibited merchandise, transporting conveyances (a)). Our legislation (Article 22 (3) (4) Law "Antimafia") stipulates that when during the main trial it turns out that the seized assets belong to third parties, the court mainly with a reasoned decision summons them to intervene in the process. "The third person, within the deadline set by the court, has the right to present his claims at the hearing, as well as to request the receipt of other necessary data (Law no. 10 192, dated 03.12.2009 "On the prevention and crackdown on organized crime and trafficking through preventive measures against property". Article 22 (3) (4). The U.S. Congress has established procedures for administratively confiscated property with a limitation of jurisdiction based on value for economic reasons. Initially, only property that had a low value could be subject to administrative confiscation, while today this limitation of jurisdiction is \$ 500,000 ((19 U.S. Code § 1607 - Seizure; value \$500,000 or less, prohibited merchandise, transporting conveyances (a)). However, where the seized property is a "monetary instrument", e.g. currency, there is no limitation of jurisdiction on the



basis of value. The monetary restriction of jurisdiction does not exist either in vehicles that have been used for criminal trafficking or in smuggled goods. Administrative confiscation is an efficient and economical way to obtain the title of property related to criminal activity, where no requests for its return have been registered. Real estate under US law is confiscated only through court proceedings (19 U.S. Code § 1615 - Burden of proof in forfeiture proceedings, see also: [www.law.cornell.edu/uscode](http://www.law.cornell.edu/uscode)). Under this law, a confiscation order issued by a federal law enforcement agency authorized by law to confiscate property has the same legal force and effect as a confiscation order issued by a federal district court. The civil court confiscation process is similar to any other civil process. The procedures followed in this case are civil and not criminal. The confiscation process, meanwhile, is in rem and requires the court to secure jurisdiction over the property and not its owner. So, the court provides the "arrest warrant" in rem. The government has a duty to first prove the "sufficient reason" that the property may be confiscated or should provide another protection against this process (19 U.S. Code § 1615 - Burden of proof in forfeiture proceedings, see also: [www.law.cornell.edu/uscode](http://www.law.cornell.edu/uscode)). The appellant in the civil confiscation process has the right to a trial in the presence of a jury. The place of trial, which has to do with civil confiscation, is the judicial district where the property was seized, or where the criminal prosecution of the owner was registered (42 U.S. Code § 1395 - Prohibition against any Federal interference, see also: [www.law.cornell.edu/uscode](http://www.law.cornell.edu/uscode)).

## CONCLUSIONS

Confiscation is applicable according to the Albanian legislation if the way of gaining, the origin of the property of the suspect or other persons (Article 3), which is directly or indirectly owned by the suspect, is not legally justified, and is related to participation, the commission by a suspect of a certain category of crimes. In this sense, confiscation cannot be enforced if the investigation and adjudication of the prosecutor's request for a decision to confiscate the property shows that the property was acquired in a legally justified manner. Constitutional Court interpreted the presumption of innocence in the sense that ordinary courts should not begin the process by believing that the defendant has committed the crime he is accused of, that the burden of proof lies with the accusing party, that any suspicion should go in favor of the defendant, that the court must base the decision on direct and indirect evidence to be proved by the prosecution (decision of the Constitutional Court No. 9, dated 28.04.2004; no. 23 dated 23.07.2009). The Constitutional Court clarifies that this interpretation of Article 30 (presumption of innocence) of the Constitution is closely related to criminal proceedings, while confiscation is a separate proceeding independent of the criminal process, so the guarantees of the criminal process can not be applied in the confiscation process. The Constitutional Court clarifies that

this interpretation of Article 30 (presumption of innocence) of the Constitution is closely related to criminal proceedings, while "... confiscation is a separate proceeding independent of the criminal process, so the guarantees of the criminal process can not be found implementation in the confiscation process " (Decision no. 4, dated 23.02.2011, of the Constitutional Court, paragraph 37). The burden of proof initially falls on the prosecutor to argue reasonable suspicion based on indexes, that a person is a participant in organized crime and trafficking, to show in turn that there are grounds for reasonable suspicion and sufficient data for the effect of preventive judgment, that they are not assets acquired in a lawful manner, which motivates the existence of the presumption of their illegality, and as a result, the passing of the burden of proof to the suspect. After that, the burden of proof passes to the suspect, to justify the lawful origin of his assets, to argue the lack of connection of the assets with the qualification as products of criminal offenses or their investment. So, in this process, the burden of proof is divided between the prosecutor and the person whose property will be seized or confiscated. Following these justifications and arguments for the need to distinguish between the criminal process and the preventive process, the guarantees of the criminal process for the presumption of innocence are not applicable in the preventive process, sanctioned by the law under review. This technique for the burden of proof defined in the Albanian law "anti mafia", in this point of view, according to the Decision of the Constitutional Court does not contradict the principle of presumption of innocence. The objective of this study was to describe the process of confiscation of criminal assets as the most important legal tool for depriving perpetrators of criminal offenses of illegal profits in Albania and beyond. The primary objective of this study was to provide a comparative overview of Albanian and American legislation and practice, as well as the legislation of some European countries on the process of confiscation of criminal assets. Despite the great work that has been done by the legislative and law enforcement institutions in Albania, it is worth mentioning that as long as criminal groups try to find their own ways and ways to carry out illegal activities, these institutions will continue their work to identify illegal activities as well as the improvement of legislation or mechanisms for confiscation of illegally accumulated assets. Therefore, this study will be of constant interest to deepen and study in other scientific papers and studies in the future.

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- 42 U.S. Code § 1395. *Prohibition against any Federal interference*, see also:[www.law.cornell.edu](http://www.law.cornell.edu)