

Azem Hajdari, PhD*
Egzonis Hajdari, PhD**

CONFISCATION OF UNLAWFULLY ACQUIRED ASSETS, WITH SPECIAL EMPHASIS ON KOSOVO

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The subject of this study is confiscation of unlawfully acquired assets', with special focus on Kosovo. The study centers in handling of the notion and types of confiscation, purpose of confiscation, confiscation decision making authorities', confiscation procedure and administration of confiscated assets. Moreover, this study presents and elaborates few pertinent data on confiscation of assets and highlights some challenges, problems, and advantages of the confiscation institute. The results of this study confirm that confiscation of assets in Kosovo impacted directly in fighting and dismantling of few organized criminal groups and activities, however, there are yet multiple tasks to be completed, few of which are rather challenging. Further in this study are prescribed the activities of Courts and other relevant institutions in Kosovo related with confiscation of unlawfully acquired assets, in addition there are specific measures prescribed to promote their effectivity in this matter while addressing the requirements of the law and Kosovo society in overall. For purposes of this paper were used legal, comparative, descriptive, case study and statistical methods.

Key words: *Confiscation, Court, Law, Convention, Agency*

1. INTRODUCTION

Confiscation of unlawfully acquired assets constitutes an important legal mechanism for promotion of the professional profile and overall efforts of the society in the goal of combating organized crime and corruption.

For Kosovo and other countries, that recognize and practice the criminal confiscation model only, to be successful requires setting this instrument on the right track, implementing best practices of other countries and even those that refer to creation of legal basis as to the implementation of various confiscation forms' currently available (civil, administrative, or other).

* Azem Hajdari, Faculty of Law, University of Prishtina "Hasan Prishtina", Prishtina, Kosova, azem.hajdari@uni-pr.edu, ORCID: <https://orcid.org/0000-0002-8426-4024>

** Egzonis Hajdari, Faculty of Law, AAB College, Prishtina, Kosova, egzonishajdari@gmail.com. ORCID: <https://orcid.org/0000-0002-3013-1576>

Kosovo has basic legislation which provides for relatively good possibilities in addressing the matter of asset confiscation, however for purposes of enhancing these legal mechanisms there are amendments and supplementations of the laws required on top of new laws that should be enacted, including the Law on inquiring on the origin of assets of senior state officials. Though Kosovo is in possession of proper institutional capacities to handle the matter of confiscation of assets, including administration, there is also an emerging need in promoting the work of these institutions. This includes promoting the professional profile of public officials, providing working conditions and increasing their level of accountability.

Kosovo stands face to face with multiple challenges and problems, still it has a range of advantages in hand, in the matters that relate to the confiscation of assets, of which few are considered as more prominent and shall be treated in this study. This study shall also handle several other matters that are deemed valuable to its enrichment.

2. THE NOTION OF CONFISCATION

The interests in knowing and explaining the meaning of the legal instrument of confiscation are as ancient as there are various and multidimensional types. Thus “from a historical point of view confiscation was considered a mechanism of seizure and retention of the items used by the perpetrator in commission of criminal offenses and assets that derived from commission of criminal offenses. Whereas another historical point of view that weighs more accurately the confiscation implied that involuntary waiver from a property without compensation as a consequence of a violation, prohibited act or activity barred by the law, as well as when this property was a benefit or facilitator in commission of barred activities.”¹

According to the current Albanian language dictionary the expression confiscation means “acquiring state ownership over the property without compensation to anyone’s property or items”²

According to the United Nations Convention against Transnational organized Crime, the word “Confiscation”, means the permanent deprivation of property by order of a court or other competent authority.”³ Whereas from the Warsaw Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism the definition Confiscation

¹ Cukaj Lirime, Sequestration and confiscation of products of criminal offenses, extra criminal proceedings in Albania, in a comparative aspect with the American system of confiscation, administration of these products, Ph.D. thesis defended in the Law Faculty, Tirana University, Tirana 2014, pg. 20. Link: <http://www.doktoratura.unitir.edu.al/ep-content/uploads/2014/04/Doktoratura-Lirime-Cukaj-Fakulteti-i-Drejtësisë-Departamenti-i-te-Drejtës-Penale.pdf>. Accessed 30 December 2020.

² Current Albanian dictionary (second edition) Publishing House Toena, Tirana 2002, pg. 597.

³ See: United Nations Convention against Transnational Organized Crime (Article 2, item g) (definitions). Link: http://www.pp.gov.al/ëeb/konventa_e_kombeve_te_bashkuara_kunder_krimite_organizuar_nderkombetar_774.pdf. Accessed on 1 January 2021.

means “means a penalty or a measure, ordered by a court following proceedings in relation to a criminal offense or criminal offenses resulting in the final deprivation of property”.⁴

According to the Law on Extended Powers for confiscation of assets the expression confiscation means “the permanent forfeiture of property, ordered by a final decision of the competent court”⁵ Whereas according to the definition provided in the Kosovo scientific literature, confiscation means a special measure imposed upon the defendant who has generated material benefit by a criminal offense.⁶ It constitutes a sui generis measure based on principle fairness, according to which no one shall hold the material benefit acquired from the criminal offense.⁷

Based on the aforementioned notions (normative and theoretical) it is easily inferred that confiscation represents a special means of legal feature⁸ which, following the implementation of respective procedures, is ordered (imposed) by the court or another competent authority, which consists in “seizure of unlawfully acquired assets (including the items used or intended for commission of the criminal offense, or which are proceeds that directly derive from unlawful acts.)”⁹ This asset could have been acquired directly (resulting from criminal activities, other unlawful activities, or is purchased from such activities) and indirect (through interests, gross earnings, increase currency exchange rates and others).¹⁰

3. TYPES OF CONFISCATION

Respective international conventions and criminal legislation of modern states distinguish few types of confiscation. These types, notwithstanding theoretical existing views hereto, are deemed necessary to be illustrated in a brief form in the framework herein. Thus, in further addressing initially shall be handled the two more classical types (models) of confiscation, namely a) confiscation of items from commission of the criminal offense and b) confiscation of proceeds of criminal

⁴ See: Warsaw Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism (Warsaw on 16 May 2005) Article 1, item d. Link: Për ratifikimin e Konventës së Këshillit të Evropës “Për pastrimin, kërkimin, kapjen dhe konfiskimin e produkteve të krimit dhe për financimin e terrorizmit”. - Ligje, Ligj - ikub.al, accessed on 1 January 2021.

⁵ See: Law on extended power for confiscation of assets, Law No. 06/L-087, Article 3, paragraph 3.1. Link: <https://md.rks-gov.net/desk/inc/media/30F82D3E-3312-4AC5-A25F-366E98B963B4.pdf>, Accessed on 1 January 2021.

⁶ Ismet Salihu, Hilmi Zhitija, Fejzullah Hasani, Commentary of the Criminal Code of Republic of Kosovo, Prishtina, 2014, pg. 248.

⁷ Škulić Milan, Komentar Zakona o Krivičnom Postupku, Beograd, 2011, pg. 290.

⁸ Compare: Lukić Tatjana, Oduzimanje imovine stečene krivičnin dela – značaj finansijske istrage, Zbornik radova Pravnog fakulteta u Novom Sadu, 2/2009, pg. 382.

⁹ Sahiti Ejup, Murati Rexhep, Elshani Xhevdet, Commentary of the Criminal Procedure Code of Republic of Kosovo, Prishtina, 2014, pg. 701, Hajdari Azem, Commentary of Criminal Procedure Code, Prishtina, 2016, pg. 735 etc.

¹⁰ Sahiti Ejup, Murati Rexhep, Criminal Procedure Law, Prishtina, 2015, pg. 2015.

offense and derivate of unlawful activities, and then for some other types of this legal instrument.

3.1. Confiscation of instrumentalities (means) from committed criminal offense

Instrumentalities (means) from commission of the criminal offense shall mean anything used by the perpetrator when committing the criminal offense, respectively committed the criminal offense with.¹¹ For the means to be forfeitable it is required for it to have been used in commission of the offense or used for undertaking of acts in commission of the criminal offense.¹² Thus, for instance, subject of confiscation shall be the ax used in commission of the criminal offense of murder, the item used for prohibited fishing, and others. As means for commission of the criminal offense subject of confiscation are considered the ones used by the perpetrator intending to perpetrate the criminal offense. First and foremost, such items are those that the perpetrator procured for purposes of the criminal offense or has constructed (created) them for such a purpose or has rendered them capable but has not made use thereof. For the item to be forfeitable in such cases is required by the Court to have established undoubtedly the fact that it was destined for commission of the criminal offense. Such items may be various weapons, instruments prepared for overcoming obstacles, for instance keys, hammers, chisels, and others.

Thus, few items are subject of confiscation automatically. These items are substantially dangerous and regardless of the Court's finding upon the defendant's guilt, are subject of confiscation. "Such are weapons, chemicals, instruments, laboratory substances or equipment created or used for commission of the criminal offense, for instance cultivations of narcotics, falsified instruments or money"¹³

3.2. Confiscation of proceeds of the criminal offense and those deriving from other unlawful activities

With proceeds of the criminal offense is meant the material benefit acquired by crime. "Material benefit acquired from criminal offense firstly shall be considered the property (building, immovable property, movable property or assets) acquired directly with acts that constitute a criminal offense or that such a property results from or is purchased from such acts.¹⁴ Material benefit acquired by criminal offense are also considered the means obtained indirectly which also result from acts

¹¹ As a rule, the confiscated items are to be sold and the money obtained for their sale is deposited in the state budget, confiscated money are used for compensation of injured parties or deposited in the budget, smuggled weapons and things are destroyed save from those to be used by the society, vehicles may be transferred to the government, etc.

¹² Salihu, Zhitija, Hasani, op., cit., pg. 248.

¹³ Sahiti, Murati, op., cit., pg. 219.

¹⁴ Compare: Hajdari Azem, Criminal Procedure Law, General part, Prishtina, 2014, pg.196.

that constitute criminal offense, which may be related to interests, gross earning, increasing the currency exchange rates, etc., but only if the indirect benefit would not be created without the means acquired directly from the criminal offense”¹⁵ Actually in these cases (notwithstanding other cases) comes in question the confiscation of assets acquired through other unlawful activities, though the basis of such assets stands precisely on the perpetrated criminal offense.

In regards to the confiscation of proceeds of crime the UN Convention on Transnational Organized Crime talks for two types of confiscation of proceeds of crime: a) Narrow mandatory confiscations, related to the proceeds of crimes perpetrated by organized criminal groups, with laundering proceeds of crime related offenses, corruption and obstruction of justice¹⁶, b) Optional confiscation, related only to a category of criminal offenses, allowing for discretion to the state party to opt for broad or narrow confiscation in line with their economical and legal situation. On the other hand, referring also to the confiscation of proceeds of crime, the Council of Europe Warsaw Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism refers to confiscation of instrumentalities and proceeds or assets, whose value corresponds to the proceeds. Article 3, item 1 of this Convention reads “Each Party shall adopt such measures to enable it to confiscate instrumentalities and proceeds or assets the value of which corresponds to such proceeds. In accordance with this provision is authorized confiscation of only the property that has unlawful origin or which is proceeds of crimes stipulated in the convention. Thus, according to the Warsaw Convention, the subject of confiscation may only be the unlawful asset that is a proceed of crimes or other unlawful offenses provided for in the domestic legislation. The only exclusion here is made to the assets of terrorist groups who discharge terrorist activities. In such a case both, the movable and immovable property, shall be confiscated regardless of the location.”¹⁷

3.3. Few special types of confiscation

In the legal theory, in legislation and practice of some states, in particular the USA, in addition to the two aforementioned types of confiscation, in relation to the above are addressed and treated also the following types of confiscation:

a) Criminal confiscation. - Represents a more typical type of confiscation which is also more frequently referred in legal theory, treated by respective law and is part of the practical decision making. Criminal confiscation draws in the confiscation of the means from commission of the criminal offense and the proceeds of the criminal offense in connection with the fact of having declared the accused guilty for the

¹⁵ Ibid, pg. 218.

¹⁶ For more details, see: Articles 2/b,5,6,8 and 23 of the UNCTOC

¹⁷ Article 2 Warsaw Convention.

prosecuted offense.¹⁸ As we will see below, there are already countries which do not necessarily link this type of confiscation with fact of having declared the accused guilty for the criminal offense that deals with confiscation of the property.¹⁹

b) Civil confiscation. - This type of confiscation is more prominent in the USA, contrary to the criminal confiscation it is directed towards the item or any other thing that served, facilitated, or was used in perpetration of a prohibited activity. Thus, it is directed against the object used for perpetration of the prohibited activity. This type of confiscation consists in seizure of asset or any other benefit with the mere suspicion that the concerned asset was used, involved in, or has facilitated in perpetration of the activities prohibited by law. It is neither related to the criminal matter nor depends on the criminal sanction.²⁰ The confiscation act may be filled out prior to the charges, after or even when there are no criminal charges at all. This happens because of the civil confiscation is in rem directed towards the “guilty” asset that is subject of confiscation. The biggest difference or distinction between the two, civil and criminal confiscation, is because in the civil confiscation the proceedings are against the asset and not the owner of the concerned asset. The owner’s guilt is not a condition when ruling on confiscation of the asset or not, confiscation is not conditioned from the guilty of owner of alleged property.²¹

c) Administrative confiscation. - In the USA along with the criminal and civil confiscation is recognized and implemented also Administrative confiscation. This type of confiscation can be used by federal law enforcement agencies in the course of an investigation, when it is possible or with probable cause that this property will be subject of civil confiscation based on custom law and statutes and it does not necessarily require implementation of a judicial process. Indeed, in the civil federal confiscations’ the administrative confiscations reach the highest volume. In the entirety of confiscations in the USA they take part with 60% of their realized total. That is so because majority of these confiscations’ cases are neither objected nor disputed.²² Subsequently, this type of confiscation does not necessarily need a court ruling. It deals with confiscation of assets that derive from a criminal offense or that are used for commission of a criminal offense for which there is no conviction ruling for a particular person either because the prosecution reached statutory limitation or other grounds, for instance death of the perpetrator, or other. This refers to assets

¹⁸ Compare: Zaiton Hamid, Normah Omar, Muhammad Muaz, Abdul Hakim, When property is the Criminal: Confiscating Proceeds of Money Laundering and Terrorist Financing in Malaysia, *Procedia Economics and Finance* 31 (2015), pg. 793. Link: <https://pdf.sciencedirectassets.com/282136/1-s2.0-S2212567115X00141/1-s2.0-S2212567115011685/main>. Accessed on 02 January 2021.

¹⁹ Discussions for this approach to confiscations have started also in the scientific and practical’s journals and elsewhere, including Kosovo.

²⁰ For more details, see: *United States V. One-Sixth Share*, 326 F.3d 36, 40 (1st Cir. 2003).

²¹ For more details, see: *United States V. Certain Real Prop.* Located at 2525 Leroy Lane, W. Bloomfield, Mich., 910 F.2d 343, 355 (6th Cir. 1990).

²² For more details, see: *United States v. Gonzalez-Gonzalez*, 257 F.3d 31(1st Cir. 2001); *United States v. \$57,960.00 in U.S. Currency*, 58 F. Supp. 2d 660 (D.S.C. 1999); *United States v. \$50,200 In U.S. Currency*, 76 F. Supp. 2d 1247 (D. Wyo. 1999); *United States V. Deerjack*, 27 F. Supp. 2d 1300 (M.D. Fla. 1998); *Concepcion v. United States*, 938 F. Supp. 134 (E.D.N.Y. 1996).

whose legal origin cannot be proved and which among others refers to the so-called official graft but not limited only to the latter.

4. PURPOSE OF CONFISCATION

Confiscation is considered to be the oldest instrument which the human society, since genesis, has used for purpose of combating crime. Initially it served as a negative phenomenon fighting tool in the society, such as: Piracy, contraband, and other harmful phenomena, while in the modern societies it is used for purpose of fighting modern forms of crime.

Subsequently, the purpose of confiscation is to hit the organized crime in their stronghold, in their wealth, thus decriminalize the economy, decrease the informality and unlawful investments in lawful businesses by increasing trust in the legal system. In fact, confiscation of assets as a criminal law measure is one of the most important institutes of deterrence and fighting against organized crime by depriving professional criminals from buying political power through the force of economy. Put succinctly, the purpose of confiscation is the fighting of criminal activities with measures directed against assets and things, depriving various criminal organizations from possession, use and ultimately from disposal of revenues from criminal activities and proceeds of crime by giving criminals a good lesson, once and forever, that crime does neither pay nor there may be lawful interests in unlawful activities²³ or allowing space for them to continue commission of criminal offenses to infinity.

5. CONFISCATION DECISION MAKING AUTHORITY

The decision-making authority in regards to the confiscation has been entrusted to the respective state bodies²⁴, mainly to the Court. This approach, from any point of view is rightly in my consideration acknowledged in international respective acts as well as in the states' domestic legislation. Thus, the provision under Article 13, item b) of the United Nations Convention against Transnational Organized Crime and the provision under Article 23, item a. of the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism, explicitly require from state parties to bind the decision making on confiscation with the existence of a court decision. For meeting such a recommendation, Kosovo's lawmaker, with the provision of Article 92, paragraph 2, of the Criminal Code has stipulated that the decision-making authority for

²³ Compare Ćukaj, op., cit., pg. 40.

²⁴ Spasić Dušan, Oduzimanje imovinske koristi proistekle iz krivičnog dela izazovi u sidskoj praksi, pg. 4. Link: <https://pars.rs/images/biblioteka/Oduzimanje-imovinske-koristi--proistekle-iz-krivcnog-dela-izazovi-u-praksi.pdf>. Accessed on 5 January 2021.

confiscation of the assets belongs to the competent court.²⁵ The jurisdiction of the court to rule upon confiscation of assets is explicitly stipulated also in the Criminal Procedure Code of Kosovo. The Code deals with the matter in a range of provisions (268 0 283), in particular under Article 284, paragraph 1, wherein it provides for the Single trial judge or Trial panel, along with the conviction judgment for the accused to pass also the justified order of confiscation.²⁶

The matter of authority of the court in deciding upon the confiscation of assets in Kosovo is regulated also through the Law on extended powers of confiscation of assets.²⁷

Finally, it is worth noting that in principle the competent court is authorized to place the matter of confiscation of assets as a subject of the decision making only after it sentenced the accused for given criminal offense. The court may do so in the same judgment where it found the accused guilty for the charges filed against him or through a special ruling which is passed after the judgment upon the guilt of the accused becomes final, in adherence with all procedures that regulate this matter. Notwithstanding this, there are countries that allow for confiscation of assets even without having it bound to the existence of a court ruling that finds the accused guilty. Such situations are found in cases when the prosecution meets the statutory limitation, the defendant passed away in the course of the criminal proceedings, the inability to prove the origin of property by state senior officials when it is suspected that it has been acquired during their discharging of the mandate, etc. I maintain therefore that Kosovo should pursue this approach by providing the legal means per se.

6. CONFISCATION PROCEDURE

Respective international acts, the United Nations Convention against Transnational Organized Crime and the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism respectively, leave the matter of the procedure to be employed in regards to the confiscation of the assets to be regulated by the states in their domestic legislation. In this regard Kosovo has regulated this matter, first and foremost, with the Criminal Procedure Code as well as with the Law on Extended Powers for Confiscation of Assets. Thus, pursuant to Article 275, paragraph 1 of the Criminal Procedure Code, the confiscation procedure is initiated by the competent Prosecutor, who clearly with a justified and specific request in the indictment filed before the competent court seeks, along with the decision to be ruled upon the alleged

²⁵ See: Criminal Code of Kosovo, Code no. 06/ L-074, Article 92. Link: <https://gzk.rks-gov.net/ActDetail.aspx?ActID=2861>. Accessed on 02 January 2021.

²⁶ See: Criminal Procedure Code of Kosovo, Code no. 04/ L-123, Article 268– 284. Link: <https://gzk.rks-gov.net/ActDetail.aspx?ActID=1841>. Accessed on 02 January 2021.

²⁷ See: Law on extended powers for confiscation of assets, Law No. 06/ L-087, Article 20. Link: <https://gzk.rks-gov.net/ActDetail.aspx?ActID=8651>. Accessed on 02 January 2021.

charges for commission of the criminal offense, respectively the judgment on the guilt of the accused, or through a special ruling²⁸ (when there are special reasons) for a decision on confiscation of the assets. The Court rules on this in compliance with the standard and specific rules of procedure included in the Criminal Procedure Code. Whereas, in view of Article 4, paragraphs 1 and 2, of the Law on Extended Powers for Confiscation of Assets²⁹ the confiscation procedure may be initiated by the competent prosecutor who for that matter files a justified request to the Court that passed the judgment which has found the accused guilty for any of the criminal offenses enlisted in Article 2, paragraph 1.³⁰ With such a request is sought from the Court in question to verify the specific assets within a five year period after the guilty judgment against the accused becomes final and effective. The State Prosecutor shall serve with a copy of the request for verification of assets also the defendant and any other known third party that may have a legal interest in the asset that is subject of the request. Subsequently the Court shall hold the hearing session within 30 days from the receipt of such a request by ensuring the presence of the State Prosecutor, the defendant and third parties with legal interest in the asset that is subject of the request, requesting from them to declare and prove their allegation concerning the asset in question. Thereafter the Court shall rule on verification of the asset within 30 days from the hearing session. "The Court in such a situation shall single out each and every asset by proving if it is acquired lawfully or not and establish the existence of the casual link between such assets and the criminal activity"³¹ Further the court is bound to rule upon the confiscation. It shall rule for confiscation of the asset when it is found that it is related with the accused or acquired by the criminal offense or used for commission of the criminal offense. This means that confiscation in Kosovo is neither directed towards the unlawfully acquired asset before the involvement of the suspected person in criminal activity nor the asset that derives from other unlawful activities. Otherwise, if deemed necessary, the court may issue provisional and final restriction orders which enable the conducting of the investigations by the State Prosecutor. Finally, it is worth noting that during this decision-making process the Court needs to deal also with the third-party requests³² while proceeding and ruling also on confiscation of assets in cases of death, absence, mental disorder, or incapacity of the defendant or third party, etc.

²⁸ Article 281, paragraph 2 CPCRK.

²⁹ Article 2 paragraph 2 LEPOC.

³⁰ Such are criminal offenses against organized crime; criminal offenses of official corruption and criminal offenses related to official duty; criminal offenses against public health; criminal offenses of trafficking in human beings, slavery and abduction; sexual offenses; criminal offenses related to armed conflicts outside the territory of the country; criminal offenses of money laundering and terrorist financing; criminal offenses related to terrorism; drug-related offenses; criminal offenses related to weapons; cybercrime; criminal offenses against the economy; criminal offenses against property; criminal offenses against the environment; attempting, inciting, aiding and abetting or any of the offenses set forth above; or any criminal offense that has brought material benefits in excess of ten thousand (10,000) euro.

³¹ Çukaj, op., cit., pg. 53.

³² Accounting the rights of third interested person in the matter of confiscation is provided in Article 12, paragraph 8 of the UN Convention against Transnational Organized Crime and Article 8 of the Warsaw Convention and Article 11 of the Law on extended powers for confiscation of assets.

7. ADMINISTRATION OF CONFISCATED ASSETS

Administration and usage of confiscated assets as proceeds of criminal activity extra criminal proceedings is a novel institute in Kosovo's law. It emerged from the need to administer such assets in compliance with legal and other requirements the state has. For this reason, but not only, in 2016 was established the Agency.³³ The Agency has exclusive power on proper administration of sequestered and confiscated assets through efficient use of concerned assets. As a new Agency it went through various legal reforms that intended to enhance its work by expanding the scope of administration, increasing of staff and different reforms in the very Law on sequestration and confiscation, which apparently resulted in increase of sequestered and confiscated assets.

Pursuant to Article 5, paragraph 1 of the Law on administration of sequestered and confiscated assets, the Agency is central body of the state administration that operates under the authority of the Ministry of Justice. These powers, though rather wide, mainly refer to administration, evaluation, maintenance, and destination of confiscated assets.³⁴ The agency provides professional and technical assistance to all authorities in charge for execution of court decisions related to sequestration or confiscation of assets. Upon receiving of the asset, the Agency undertakes complete execution of all claims provided for in the respective ruling of the competent court, which provide for the manner of disposition of the respective sequestered or confiscated asset.

In cases when the Court issues a confiscation order, for an asset that is not yet under control of the Agency, the Police officer in charge of the execution of the court judgment shall be present during the reception - hand over of the confiscated asset to the Agency. The Agency upon receiving of the asset shall preserve and control the asset that was ordered for confiscation while ensuring its safety. The agency is authorized to undertake necessary measures for adequate preservation and safety of the confiscated asset and preserve the value of the asset. The Agency may undertake the sale of things or hand them over to the Government for use.³⁵

³³ The Agency for administration of sequestered and confiscated assets was established with the Law no. 03/L-141 on administration of sequestered and confiscated assets, in 2010 Since 2016 it discharges the powers in compliance with the new law. Law no, 05/L-049 on Administration of sequestered and confiscated Assets, which rescinded the previous law and Instruction No. 1/2010 on the functional and organizational structure of the Agency for Administration of sequestered and confiscated assets. See the law and solutions therein. Link: <https://gzk.rks-gov.net/ActDetail.aspx?ActID=12360>. Accessed on 9 January 2021.

³⁴ Article 4 of the LAMSCA.

³⁵ Article 19, paragraphs 1–4 of the LAMSCA.

8. FEW DATA ON THE VALUE OF CONFISCATED ASSETS IN KOSOVO

The presentation of data for confiscated assets in Kosovo aims to inform the wide public on the degree of functioning of relevant institution in their activity in regards to the responsibilities they bear in addressing this matter, including provision of guidelines for their action in the future. Most certainly the accuracy of data that are presented below in this study constitutes a complex, challenging and currently unsolvable matter. That is so because currently in Kosovo there are missing genuine and overarching statistics that would provide for a clear overview on the value of confiscated assets. Lack of such statistics hinders even further the possibility of doing in depth analysis and drawing sustainable conclusions on the degree it affected the fight upon the organized crime in Kosovo. Nevertheless, for purposes of this study, though with questionable data, in the table below, with the aim of dealing with the existing problems, shall be illustrated the partial data which civil society bodies published frequently.

Table no. 1. Value of confiscated assets

| Year | Number of confiscations | Value of confiscated assets |
|-------------|-------------------------|-----------------------------------------------------------------------------------------|
| 2010 – 2019 | 76 + 68 = 144 | $1.392.863.42^{36} + 3.800.678.50^{37} = 5.193.541.92$ (2010 - 2014) + (2015 - 2019) |

According to these data during 2010-2019 are registered 144 cases of confiscation that resulted in confiscation of assets in amount of 5.193.541.92 euro. I maintain that in this amount are included the assets resulting from commission of criminal offenses, assets used or intended for commission of the criminal offenses (for instance the vehicle used for theft), and a substantial value of items used for commission of criminal offenses, but not the things which “ex lege” should be destroyed. Consequently, this amount of confiscated assets is deemed rather symbolic³⁸ in view of numerous international and local reports that represent Kosovo as a country with rather high incidence of organized crime and corruption. However, these data, as aforementioned, in terms of their accuracy should be seen with significant reserves. That is so because of the fact that they do not represent

³⁶ Organization for Democracy, anticorruption and Dignity, Çohu, Confiscation of assets in Kosovo, Prishtina 2016, pg. 25 – 26. Link: Konfiskimi i Pasurisë Në Kosovë (scribd.com). Accessed on 02 January 2021.

³⁷ Money and confiscation or assets may be transferred to safety and justice bodies. Link: <https://www.evropaelire.org/a/konfiskim-pasuria-kosove-/30272239.html>. Accessed on 02 January 2021.

³⁸ The amounts of confiscated assets also in other Balkan region countries and wider are symbolic. For more details, see: Global Initiative – Against Transnational Organized Crime, Illicit Financial Flows in Albania, Kosovo and North Macedonia, Report, 2020. Link: Prurje-Financiare-Të-Paligjshme-Në-Shqipëri-Kosovë-Dhe-Maqedoninë-E-Veriut-Faktorët-Kryesorë-Dhe-Prirjet-Aktuale.pdf. Accessed on 05 January 2021.

data published from relevant authorities but data published from non-governmental organizations who might have a limited access in such data.

According to some also questionable accuracy data, the value of confiscated assets is for a high percentage below the level of value of items and sequestered assets. According to these data, the value of items and sequestered assets during 2013 - 2015 is 26,928.81 Euro, a period during which the value of confiscated assets is 6,302.80 Euro.³⁹ Indeed a variation between confiscated and sequestered items and assets is always expectable, I maintain that such levels of difference are unacceptable. That is due to the fact that Kosovo is considered a country where organized crime and corruption are at rather high levels.

In view of the existing situation, there is a pressing need for the Agency for purposes of transparency to publish periodic and annual reports that would reflect the value of confiscated assets, data on whom it conveyed the value of such assets for disposition and use, for what reasons it did so and information whether such given items are used for the intended destination. In such a situation the perpetrators of organized crime and corruption would receive clear messages that respective state authorities are determined in confiscation of crime related assets.

9. CHALLENGES, PROBLEMS, AND ADVANTAGES OF CONFISCATION

Confiscation as an important instrument is created for furthering the fight against criminality in a society that is confronted with various challenges and problems. Regardless of this fact, confiscation provides the states as well with a range of advantages that lead to the need of the latter to either jointly or separately to undertake and enhance lawmaking policies and other court practices that ensure promotion of this mechanism in the first against crime. Such an approach is a must as different countries have dealt and practiced this matter differently. In this regard, there are states that lag evidently in the process of confiscation (the Balkan region states), states that marked some progress in this direction and states that advanced significantly in this matter (the USA and few of the EU countries). Further in this study I shall firstly refer to few of the challenges and problems that Kosovo is facing in terms of confiscation of assets and then talk about the advantages that the country has in relation to this mechanism.

Kosovo is a new state declared thirteen years ago⁴⁰ simultaneously with the challenges and other problems it is facing a series of challenges and problems in terms of confiscation of assets. Among the main challenges concerning this justice mechanism are considered the following:

³⁹ ODAD, op., cit., pg. 26.

⁴⁰ Kosovo is declared an independent state on 17th of February 2008. Among others see Link: https://sq.wikipedia.org/wiki/Shpallja_e_Pavar%C3%ABsis%C3%AB_s%C3%AB_Kosov%C3%ABs. Accessed on 06 January 2021.

- 1. Altering the modus operandi of state authorities** - As aforementioned, Kosovo faces relatively high levels of presence of organized crime and corruption that represents the most typical and substantially dominant type of criminal offenses that are related to the unlawfully acquired assets.⁴¹ This presence of these crimes is linked, predominantly, indeed with approach of state authorities as far as it concerns the fight thereon. This approach in the public and professional opinion perception appears as negligent, lacking courage, will as well as unprofessional and fragmented. Though viewed in this regard the main responsibility herein falls on the justice system authorities (Police, Prosecution and Courts), this in fact is present also in other authorities of the state (Assembly, Central and local government). The responsibility of the former relates to their failure to discharge the legal responsibilities they have in the fight of crime, while the latter for the interference exerted on the former through threats and blackmail for caution in handling of these crimes when it draws in senior state officials. Shifting from this approach constitute one of the fundamental aspects that would enhance the course of the fight against crime and the mechanism of confiscation of unlawful assets. Based on this fact, I am of the opinion that undertaking of a genuine vetting of the investigative Police, Prosecution and Courts as a means for assessment of transparency, performance and integrity of Investigative Police, Prosecutors and Judges is more than necessary.
- 2. Functionality of the activities of the Agency for administration of sequestered and confiscated assets.** Though the agency is established in 2016 (Law no. 05/L-049) yet it continues to remain dysfunctional in performing its tasks. This non-functionality mainly is due to lack of required staff, or experience and professionals, lack of respective business development programs and strategies, political interferences et cetera. All of the aforementioned influenced in the non-publication of periodic and annual reports, that would reflect the value of confiscated assets, their destination, and the source of benefits from usage of such assets. Thus, it is incumbent on the responsible state stakeholders to undertake all the measures that enable the functioning of the Agency, on the contrary not only they run the risk of abusing with the values of confiscated assets but will manifest their non-responsiveness for advancement of the fight against crime, in particular organized crime and corruption.
- 3. Creation of respective and enhanced legal basis for confiscation of unlawful assets.** With regards to the confiscation of assets Kosovo in terms of the legal aspect stands relatively well. Nonetheless, in view of the concerned existing problems and experiences of few modern countries who

⁴¹ For more details, see: Hajdari Azem, Corruption a phenomena that challenges Kosovo's future, Telegrafi, on 02. 01. 2012, pg.12. Link: <https://telegrafi.com/korrupsioni-nje-fenomen-qe-sfidon-te-ardhmen-e-kosoves/>. Accessed on 10 January 2021.

marked visible progress in terms of legal solutions for this mechanism⁴² I consider that our country needs immediately to undertake respective reforms in this matter. Thus, I maintain that it is mandatory that Kosovo's legislator either through amendments - supplements of the Criminal Code or enactment of a special law to provide for the legal basis for confiscation of unlawful assets for those situations when there is lacking judicial decision-making that declares the accused guilty for the criminal offense that interferes in such an asset. This refers to those cases in which the prosecution met the statutory limitations, when the accused passed away in the course of criminal proceedings, but not excluding other specific cases too.

4. **Enactment of the law for inquiring the origin of property of senior state officials** - I consider a problematic challenge in regards to the confiscation of assets the inquiry on the origin of property of senior state officials. In various international reports as well as in public opinion perception in Kosovo are manifested concerns in which senior state officials in discharging their public office have augmented their property values beyond their salary capacities provide for. In addition, there is a perception that among senior state officials there are those who deposited money in different offshore banks, or have registered the properties in the name of third persons, or are in disposition of such unregistered properties in respective municipal services. Thus, I believe that enactment of a law that would be built upon the inquiry of the origin of the assets of former and current senior state and public officials would capacities provide for a good chance in the fight of organized crime and corruption, particularly would enhance the confiscation mechanisms.⁴³
5. **Altering the profile of burden of proof for cases related to addressing of the unlawfully acquired assets.** - One of the difficult challenges related to confiscation is the one connected with the shifting of burden of proof profile in cases related to unlawful assets' matters. I believe that in these cases the burden of proof should be shifted to the accused or the person going through any process in proving the fact of the origin of his/her asset. Certainly, this issue too should be addressed in the pertinent amendments and supplementations of the Criminal Code or within the scope of a new law that would handle this matter.

In addition to these challenges Kosovo has also a range of advantages that refer to the matter of confiscation of assets. Among the main advantages I believe are the following:

1. **Existing elementary legal basis that handles asset confiscation mechanisms.** Despite of the fact that Kosovo disposes few laws and solutions

⁴² It is considered that Kosovo needs to create the legal grounds also for mixed confiscations (criminal-civil), civil and administrative, by taking in account all the experiences of the countries which successfully implement them in practice.

⁴³ Though it was tackled by individual political players yet a tangible action in enactment of such a law was not undertake every by the entities with the right of undertaking legal initiatives.

contained therein to address the matter of asset confiscation, such as the Law on extended powers on confiscation of assets and the Law on administration of sequestrated and confiscated assets, nonetheless it is considered that those fail to provide proper soil for functionality of such mechanisms. In this regard it is incumbent the enhancement of the current legal framework even with enactment of new laws.

- 2. Existing institutional hub responsible for confiscation of unlawfully acquired assets.** The existing laws that handle the matter of confiscation of assets have engineered and given the authorities a solid range of institutions to handle the matter of confiscation of assets. This refers to the authority that is extended to the Police, Prosecution, and the Court but also the Agency for administration of sequestrated and confiscated assets. These institutions carried out valuable activities but insufficient in terms of confiscation of assets. Therefore, they should be made functional by taking into account the successful state's experiences or to create additional mechanisms whenever it is deemed reasonable.
- 3. Existing human and professional capacities for handling of confiscation of assets.** In those state institutions whose activities are related to the matter of confiscation (Police, Prosecution and Courts) and within non-governmental organizations there is an entirety of officials equipped with knowledge and experience in the confiscation's domain. However, this complex of officials is deemed insufficient for a proper functioning of this mechanism. This is proved by some of the problems handled in the scope of this paper. Therefore, it is considered necessary to increase these capacities, either in the number of officials, by increasing their professional education or enabling better working conditions.
- 4. Existing will within some political approaches that see the rule of law in Kosovo as one of the governmental priorities.** - In the recent years was witnessed a will in political approaches in favor of the rule of law in the country. This will, with few distinctions, is observed almost in all political entities in Kosovo. In their program publications, among others, they place the emphasis also on the rule of law, however so far none of them have listed the rule of law as their top governmental priority.⁴⁴ Change is possible when governing stake holders become aware of the fact that without rule of law prioritized for fighting organized crime and corruption no desired results for economic growth or other sectors can be expected.
- 5. Existing several international capacities in Kosovo with their programs and activities tackling the matter of confiscation of unlawfully acquired assets.** - Fortunately, in Kosovo at present there are various functioning

⁴⁴ It is already understood the fact that the states that have reached the highest levels of ensuring lawfulness in their countries are verily those countries with highest economic growth and other visible achievements in other areas of the government. For that a typical example are Switzerland, Germany, Nordic countries, etc.

international organizations, among them also such that deal with the matter of fighting crime, including those related to confiscation of assets. Despite of the existing perception for a series of failures for some of them, yet again there is a significant part of the public opinion that considers them as one of the most optimistic factors in forwarding the mechanism of confiscation. In this regard, I believe that this optimism relates in the making of pressure upon relevant domestic stake holders, assistance in completing the lawmaking and implementation of existing law, and others.⁴⁵

10. CONCLUSION

From the results of this study, I have come to the following conclusions:

1. Confiscation of unlawfully acquired assets constitutes one of the most important mechanisms in the wide range of existing mechanisms that relate to the fight of crime, particularly organized crime, and corruption. The responsible institutions in Kosovo have either failed to understand this fact enough, or despite of the understanding, because of their connection with political actors in this sort of crimes they have been unwilling to comprehend it enough. This conclusion is drawn from the extremely low amount of the confiscated assets in the period 2014-2019, which according to some data should be accepted with reserve, that does not exceed 5.193.541.92 euro. Hence, it is incumbent for the Agency in the future to publish specific period and annual reports that are detailed with data on the confiscated assets.
2. Though Kosovo has a relatively good legal framework in regard to the confiscation of assets, the professionals of criminal justice see the existing laws as insufficient in complete functionality of this justice mechanism. Therefore, for purposes of placing confiscation on the right track it is required for the country to undertake amendment and supplementation of existing legislation, especially those related to the burden of proof when the question comes to the decision making in relation to the unlawfully acquired assets, but also the issuance of a Law to deal with the matters of inquiring into the property of state officials', including former senior state officials who by abusing their official duty, beyond their income and other lawful revenues they have, have created assets free of legitimacy.
3. In Kosovo the decision making for lawful confiscation of assets may be granted only in cases when the accused is found guilty for a specific criminal offense, when such assets are used or were intended for use in its perpetration, or it results from the criminal offense. As concluded Kosovo currently has

⁴⁵ International bodies in Kosovo despite of the reduction in their capacities yet continue to remain rather active in dealing with country's main problems. They have progressively remained a player contributing in completion of the legal framework, in human and technical capacity building, but in the rule of law and strengthening of democracy too.

regulated only the matter of criminal confiscation. Hence, knowing that in practice there are cases in which the prosecution meets the statutory limitation, cases when the accused passes away in the course of criminal proceedings, etc., it is incumbent to address also the possibilities of mixed confiscation (criminal-civil) or civil, or administrative, by taking into account the positive experiences that modern countries have marked and have enabled such possibilities legally.

4. Kosovo continues to face relatively high levels of organized crime and corruption, being criminal phenomena that create the cupola from which derives the unlawful asset. These two phenomena when facing random perpetrators are mainly handled by criminal justice bodies and that is associated with significant stagnation when profiles of senior political officials come in question. This approach should be altered in the sense that fighting of these phenomena should be placed at the top of priorities of responsible institutions by placing in the center the charges against senior state officials, since the damages that they may cause to the state and budget is immeasurably high.

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ODUZIMANJE NEZAKONITO STEČENE IMOVINE S POSEBNIM NAGLASKOM NA KOSOVO

Predmet ovoga rada jest oduzimanje nezakonito stečene imovine s posebnim naglaskom na Kosovo. Rad se bavi postupanjem s pojmom i vrstama oduzimanja imovinske koristi, svrhom oduzimanja, tijelima za donošenje odluka o oduzimanju, postupkom oduzimanja i upravljanjem oduzetom imovinom. Nadalje, prikazani su i razrađeni neki relevantni podaci o oduzimanju imovinske koristi te se ističu izazovi, problemi i prednosti ovog instituta. Rezultati istraživanja potvrđuju da je oduzimanje imovinske koristi na Kosovu izravno utjecalo na borbu protiv (i razbijanje) nekoliko organiziranih kriminalnih skupina i aktivnosti, međutim, postoji još nekoliko zadataka koje treba izvršiti, od kojih su neki prilično izazovni. U radu se iznose i aktivnosti sudova i drugih relevantnih institucija na Kosovu u vezi s oduzimanjem nezakonito stečene imovine, te se ističu posebne mjere za promicanje njihove djelotvornosti u skladu sa zahtjevima prava i kosovskog društva u cjelini. Za potrebe ovog rada korištene su pravne, komparativne, deskriptivne metode, studije slučaja i statističke metode.

Ključne riječi: *oduzimanje imovinske koristi, pravo, sud, konvencija, agencija*