Sequestration and Right to Effective Appeal Under the OFL Normative Act1

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Abstract

In Albania, the Council of Ministers adopted the OFL law in 2020 to strengthen the rule of law by enabling the sequestration and confiscation of assets from individuals suspected of serious crimes, including organized crime and terrorism. Although intended to complement existing laws like the Anti-Mafia law, the OFL law is characterized by its temporary nature and urgent enactment. Despite its survival of a constitutionality challenge affirmed by the Constitutional Court in 2022, criticisms persist regarding its infringement on constitutional rights such as the right to an effective appeal and equality before the law. The law allows for asset sequestration without the presence of the affected party and provides a formal right to appeal that lacks substantive judicial review, thereby raising concerns about the violation of property rights as per the Constitution of Albania. This article explores the implications of the OFL law on fundamental rights and legal processes.

Keywords: OFL, sequestrations, effective appeal, property right, right to due process.

Introduction

Albania, in the framework of reforms, to strengthen the rule of law and to fight not only organized crime, terrorist acts, but also particularly serious crimes, adopted the normative act, with the force of law, with no. 1, of 2020, of the Council of Ministers

[1] Normativ act no. 1/2020 "*On preventive measures in the framework of strengthening the fight against terrorism, organized crime, serious crimes and consolidation of public order and security*, or OFL, the Operation Force of Law".

"On preventive measures in the framework of strengthening the fight against terrorism, organized crime, serious crimes and consolidation of public order and secu/rity", also called the OFL law. The purpose of this law was to sequester and confiscate the assets of persons suspected of having committed particularly serious crimes. This law, although considered as a continuation of reforms in the fight against serious crimes, had overlaps with existing laws, such as the Anti-Mafia law, since both laws aimed at taking measures of a pecuniary character, the seizure and confiscation of assets that were presumed to be the product of serious crimes such as organized crime, terrorist acts, trafficking, but not only. The OFL normative act also acted against particularly serious crimes, such as murder, etc., which do not necessarily produce assets. But quite unlike the Anti-Mafia law, the OFL law had as its characteristic, the temporality of its action, the need of urgency in its adoption. Since this law was temporary, overlapping with a partially existing law, the request for its constitutionality was raised. But this normative act with the force of law passed the test of un-constitutionality, since by decision no. 4 of 2022 of the Constitutional Court, it was affirmed as a constitutional act. Regardless of the constitutionality of this normative act, the minority opinion in this decision seems more accurate and argumentative, considering the act itself unconstitutional. One of the constitutional rights that this act infringes is also the right to an effective appeal, the principle of equality of parties and contradictory. The sequestration of property, according to this act, is placed in the counseling room without the presence of the party to whom this measure is assigned. Formally, the OFL normative act provides the right for appeal against this sequestration measure. But even though it is foreseen, this means of appeal remains formal, as the court of appeal does not have the opportunity to review the case and does not give you the opportunity to provide evidence, because there is no judicial review. Under these conditions, the sequestration measure is destined to remain in force until the request for confiscation is reviewed. Under these conditions, the right of ownership, provided for in Articles 41 (qbz.gov.al, Constitution of Albania) and 42 , is violated without due legal process, as the property rights, disposition and enjoyment are limited, preventing even the rental/use of this property, sequestered. These elements will be part of this article, which will be analyzed in more detail in the article.

Methodology

In the realization of this article, the focus of which is the sequestration and effective means of appeal against this pecuniary measure, we have applied several methods:

- **Analytical Method** – Particular attention will be paid to the analysis of national and international legal provisions and acts that sanction methods in the fight against serious forms of crime.

- **Statistical method** - Analysis of data obtained from the Court for Anti-Corruption and Organized Crime[1] regarding seizure and confiscation.

Two words for normative act, OFL.

Albania, in the framework of the fight against crime, had taken some legal measures. One of them was the adoption of the Anti-Mafia law (qbz.gov.al, Law no. 10192, dated 03.12.2009 "On Prevanting and Striking at Orginised Crime, trafficking, corruption and other crimes through preventive measures against assets), as a continuation of the law against Organized Crime adopted in 2004 (qbz.gov.al, Law no. 9284, dated 30.04.3004 "On preventing and striking organized crime"). This law had as its purpose the fight against Organized Crime, Terrorist Acts, trafficking, and other criminal offenses that produce products, through pecuniary measures, such as sequestration and confiscation. In the first years of its implementation, this law had its own successes, but during its implementation in continuity, it lowered its expectations related to this for several reasons.

In the course of the justice reform and the fight against crime, the Council of Ministers adopted the normative act no.1/2020, "On preventive measures in the framework of strengthening the fight against terrorism, organized crime, serious crimes and consolidation of public order and security", based on Article 101 of the Constitution[2], in which it is determined that the Council of Ministers, in case needed and urgency, under its responsibility, may issue normative acts that have the force of law for taking provisional measures.

This normative act, as well as the previous law, the Anti-Mafia, provided measures of pecuniary character such as the sequestration and confiscation of assets originating from or related to some of the most serious criminal offences. This kind of special proceeding, of a preventive nature, is considered a very effective tool against these criminal phenomen.

But the adoption of this normative act, which is temporary in its application, contradicts its purpose, which was to strengthen order and security in[3] the fight against serious crimes. The fight against crime has no temporal character and cannot have such a character because the criminal offences are being always present and also the risk to be committed such ana action is present. Therefore, the temporality of this

[1]From now one CAOC.
[2]In cases of necessity and emergency, the Council of Ministers may issue, under its own responsibility, normative acts having the force of law for taking temporary measures. These normative acts are immediately submitted to the Assembly, which is convened within 5 days if it is not in session. These acts lose force retroactively if they are not approved by the Assembly within 45 days.
[3]The purpose of this normative act is emergency and temporary intervention in conditions of need to strengthen the fight against organized crime, structured criminal organizations and groups, as well as any other criminal and terrorist group, armed gangs, individuals involved in serious crimes, with the aim of consolidating security in the country, through increasing the capacity and level of detection and prevention of organized crime, serious crimes, terrorism and use of organized crime properties of illegal origin.

act cannot bring the effects and achieve its purpose, in this case the establishment of order and security, only within one year[1].

Debate on the constitutionality of the normative act with the force of law no.1, 2020, OFL.

The normative act with the force of law, were approved by the Parliament of Albania, taking the form of law, with law no.18/2020. However, rightly this normative act with the force of law, was much contested in relation to its constitutionality, one of the elements was the temporality, the principle of legal certainty, un-clearness, as some criminal offenses overlapped with the Antimafia law. There were 2 acts in force, Anti-Mafia and OFL, which provided for the same measures with penecuary character, property, sequestration and confiscation, for the same criminal offenses, such as the fight against organized crime, terrorist acts and various trafficking.

Other elements of unconstitutionality are, the violation of the right to property, without a due legal process, not appropriate , not proportional, limitation of the human rights not with a law and not according to law not by law, separation of powers and other elements, but despite the debate on unconstitutionality, this act started to be implemented and to give its effects, due to the standard , low standard proof, on reasonable suspicion based on elements of fact it turns out that they possess illegal assets[2]. Applications for sequestration could be made by 31.12.2020, while confiscation could continue, which continues today into 2023, for the assets which are sequestred.

Meanwhile, the Constitutional Court, for the constitutionality of this act with a delayed decision, with no.4, of February 2022 had her position, but this decision had no legal surprise, as the act was left in force, being considered constitutional.

The scope of the normative act with the force of law no.1/2020

Scope of action of normative act no. 1, 2020, is larger than the Anti-Mafia Act in force, as it acts against all persons who have been convicted by a final criminal decision, inside or outside the territory of the Republic of Albania, for:

a) participation in and commission of crimes by criminal organizations, armed gangs and armed groups structured criminal groups.

b) participation and commission of crimes by a terrorist organization and crimes for terrorist purposes, provided by Chapter VII of the Criminal Code.

It is further provided that this normative act also acts against the subjects who have committed the following crimes, such as premeditated murders, blood feud, murder in qualifying circumstances, exploitation for prostitution, pornography, theft, theft of banks and savings deposits, trafficking in works of art and culture, theft by violence,

[1]Article 38 "This normative act has temporary effect and will be implemented until 31.12.2020"
[2]Article 18 of the normative act.

armed robbery, theft resulting in death, destruction of property by fire, with explosives, as well as the criminal offenses provided by Article, 278/a, 282/a, 283, 283/a, 284 and 284/a, of the Criminal Code, related to trafficking of weapons and ammunition as well as trafficking of narcotics. (qbz.gov.al, Albanian Criminal Code).

Meanwhile, measures of a pecuniary character apply when the person is under investigation for all the above criminal offenses, inside or outside the territory of the Republic of Albania, with the exception of persons for whom there is a decision to dismiss the charge or criminal case.[1]

At the same time, this normative act also acts against persons involved in terrorist activities. (qbz.gov.al, Normativ act no. 1/2020 "On preventive measures in the framework of strengthening the fight against terrorism, organized crime, serious crimes and consolidation of public order and security, or OFL, the Operation Force of Law".)

In meantime, this normative act has not included within its scope the criminal offenses of corruption, which contradicts the justification of the purpose given to this act or the objectives it aims to achieve.

On the other hand, it expands the scope of application for the criminal offense, here we mention the criminal offenses against life, namely the murders committed in the form of premeditated intent and murder in other qualifying conditions, deciding the sequestration and confiscation of assets. But this expansion of the scope of action also for these criminal offenses brings the problem of sequestration and confiscation of legal assets, in an informal economic reality, such as Albania, as these criminal offenses do not produce products, but due to an informal economy, the subjects cannot prove the legal origin of the property.

But what do international acts provide for regarding measures of a pecuniary character?

Provision in international acts of measures of a pecuniary character.

The UN Convention are provided also pecuniary measures as an effective means of combating serious crimes (Nations, n.d.).

This convention, in accordance with its purpose, defines pecuniary measures. What is noted in this international act is that measures of a pecuniary character are not defined in measures of a preliminary character, such as sequestration and final measures such as confiscation. But the Convention forseens the final measure, such as confiscation (Nations, n.d.), providing for the confiscation of assets that are the product of criminal activity of criminal offences covered by this Convention, even when this asset is mixed with legal assets.

But even though the convention does not provide sequestration as a preliminary measure, it means this type of measure, as it obliges a State Party to provide for the sequestration of any object, blocking for the purpose of confiscation (Nations, n.d.).

Convention of Warsaw, May 2005 (qbz.gov.al, Law No.9646, dated 27.11.2006 On ratification of the Council of Europe convention "on the cleaning, search, seizure and confiscation of crime products and on financing of terrorism)

In the same line as the UN Convention, the Warsaw Convention also provides for measures of a pecuniary nature, with the amendment that this Convention is focused more in criminal cooperation in the penal area.

This convention forseens confiscation as a final measure, making it possible to remove from civil circulation those assets that are product of criminal activity[1]. But at the same time this convention foresees other precautions such as freezing and blocking assets[2].

So, what is noted is that in both international acts, the measure for sequestration is not explicitly foreseen, but blocking the assets and freezing is foreseen, despite the different concept used, the goal is the same, these are precautions that precede the final measure, confiscation.

Establishment of sequestration according to normative act no.1, 2020 OFL.

Sequestro as part of preventive measures of a pecuniary character shall apply to individuals and to all persons who have been convicted by a final criminal decision referred to in Article 5, which is the area of coverage of this law, for those criminal offenses defined there (qbz.gov.al, Normativ act no. 1/2020 "On preventive measures in the framework of strengthening the fight against terrorism, organized crime, serious crimes and consolidation of public order and security, or OFL, the Operation Force of Law".); as well as for those persons related (spouses, children, pre-borns, newborns, brothers and sisters, cohabitants for the period of the last 5 years), for whom false registration is presumed, unless proven otherwise;

ii. natural or legal persons, for whom there is sufficient data that their assets or activities are owned, in part or in full, indirectly by the persons provided for in Article 5, as subjects of this normative act, or have been used, facilitated, or influenced in a certain form in illegal activities by them as well as for natural or legal persons financing terrorism[3].

[1]Article 3 Confiscation measures.
[2]Article 5 Freezing, blocking and confiscation.
[3]Article 16 The provisions of this Chapter on preventive measures of a pecuniary character shall apply: a) to the entities referred to in Article 5; b) to natural and legal persons notified by the United Nations Sanctions Committee or another competent international body to order the freezing of funds or economic resources, where there are reasonable suspicions to believe that funds or resources may be distributed, wiped out or used for the financing of terrorist organizations or activities, including international ones; c) to the assets of persons provided for in Article 5 of this normative act, owned or indirectly owned by: i. related persons (spouses, children, pre-born, post-born,

This preliminary measure against the property is taken by a decision of the court, after the p investigation made by the police under the direction of the prosecution, when the latter submits the request at the court[1].

This measure is taken in case preliminary verifications leads to reasonable suspicion based on the elements of fact it results that they possess, directly or indirectly, assets, rights or economic activities, wholly or partially unjustified in relation to the level of income or profits deriving from the legal activities declared[2].

The OFL, within 48 hours, requests the presentation of the declaration regarding: a) the lawful sources of insurance of assets; b) the cause of possession and the determination of the measure of the right or legitimate interest it enjoys over the assets, subject to review; c) the explanation of the manner of gaining the property (in particular the source of income in case of purchase); ç) determining whether the property has co-owners or is in use of third parties or they benefit from it in another way; d) the legal annual income; dh) any other information related to the property[3].

The request for sequestration is initiated by the General Director of the State Police (GDSP), who refers the prosecutor and asks him to submit the request for sequestration on the court. In the application for sequestration, the GDSP presents in detail the property subject to measure, the individual subject to the law and the data related to the property.

The prosecutor, after receiving the request, does not necessarily have to take it to court, as he himself verifies the merits of the request. When it finds it incomplete, it returns it for completion to the GDS Police. When it is unsupported, is not subject or has a lawful income it is rejected. When the prosecutor finds the application supported, he deposits it at the court[4].

The court decides on the sequestation within a period of 15 days in the counseling room without the presence of the parties[5].

Appeal against the measure of sequestration and the problems of this tool.

brothers and sisters, cohabitants for the period of the last 5 years), for whom false registration is presumed, unless proven otherwise; ii. natural or legal persons, for whom there is sufficient data that their assets or activities are owned, in part or in full, indirectly by persons provided for in Article 5, as subjects of this normative act, or have been used, facilitated or influenced in a certain form in the performance of illegal activities by them.

[1]Article 15 General Preventive measures of a pecuniary character may be initiated, proposed and taken by the State Police, the prosecutor or the court according to the provisions of this normative act.

[2]For more, see Article 18, first paragraph of the normative act with no.1/2020

[3]For more, see Article 18, second paragraph of the normative act with no.1/2020

[4]For more, see Article 18, third paragraph
of the normative act with no.1/2020

[5]*According to Article 18 of the Normative Act, when there are reasonable information or suspicions based on the elements of the fact that the assets of the subjects are acquired unjustifiably in relation to the level of income or profits from the lawful activity, the seizure of these assets is decided by a court decision.*

The decision to sequestr the assets of the subject of the normative act, taken by the special court of first instance, is a decision which can be appealed. The time limit within which this right is exercised is 15 days, from the moment of notification of the reasoned decision for sequestration of assets[1]. In this appeal, the complainant must convince the special court of appeal that the complainant is not subject of law and /or that the assets have legal origin and cannot be sequestered.

Considering that the process in the first instance does not take place in the presence of the individual whom measure has been taken, but in the counseling room, the individual has the burden of proof to prove before the court of appeal, his claims regarding the sequestration, his non legal base and this he must do by taking evidence, to prove that although he may be subject to the law his assets are legal. In the trial in the first instance, the individual cannot bring evidence, because the trial in this instance is in the counseling room, without parties' presence, so these evidence will be submitted at the court of appeal. In this type of special trial, the normative act OFL and the provisions of the Civil Procedure Code regarding the burden of proof will apply. In this proceeding, the burden of proof is on the individual[2] to prove the legal origin of the property, for which he must provide evidence from what the Civil Code provides to prove the legal origin of the sequestred assets.

In this way, the subject must apply to the Court of Appeal for reinstatement of the judicial investigation and filing new evidence according to the Code of Civil Procedure (qbz.gov.al, Albanian Civil Code of Procedure)[3].

The Court of Appeal is a court of fact and law, it looks at the case as a whole and under such conditions being a court of fact it has the right to obtain new evidence, therefore the provisions of the review on appeal provide for the resumption of the judicial investigation. This request is intended to obtain those new evidence, which the interested party proves that he could not have been aware of and/or new evidence during the trial in the first instance appears.

This is the typical case that the Court of Appeal should reconvene the judicial review, in order to obtain new evidence that the complaining party could not take to the court of first instance, because this trial was held in the counseling room without the presence of the party.

[1]For more, see Article 18, paragraph h 4 of the normative act no.1, 2020.

[2]The provisions of the Normative Act, namely Article 24, refer us as a legal basis to address to the competent Court of Appeal the Code of Civil Procedure

[3]*Article 465 Limits of review of the case on appeal* 1. The Court of Appeal shall review the case within the limits of the appeal.2. In considering the case under appeal, the provisions on the trial procedure in the first instance shall be considered in so far as they are applicable. 3. At the request of the parties or mainly, the court of appeal partially or completely opened the judicial investigation. 4. In the trial on appeal, no new research can be presented, elements of the lawsuit can be added or changed, except for the search for costs of trial on appeal. 5. The Court of Appeal may accept for review new facts and evidence, if: a) the interested party proves that, through no fault of his own, during the examination of the case before the court of first instance was not able to present these facts;

But despite the normative act with the force of law recognizing the right to appeal, the Court of Appeal does not accept the request for reconsideration of the judicial investigation and the deposit of new evidence, because according to the position of the Court of Appeal, there is no judicial review (Appeal, n.d.)[1]. As long as there is no judicial review, there is no judicial investigation. Under these conditions, the failure to conduct a judicial investigation/review and the failure to present new evidence makes the appeal purely formal and not an effective means to control the decision of first instance.

This results in the lack of effective control of the sequestration measure, resulting in the imposition of the first instance decision.

This wrong practice of the Court of Appeal is manifestly contrary to Article 43 of the Constitution, the right to an effective appeal[2], in violation of Articles 41[3] and 42[4], violating the right to property, the right to dispos and enjoy, without due process of court. The individual not only does not participate in the first instance, but also does not effectively control this decision in a higher court. This practice is also contrary to Article 4 of the normative act no.1, 2020, in which the basic principles are provided for: 1. Respect of fundamental human rights and freedoms in the interpretation and application of ECHR definitions and the ECHR's consolidated practice.

This decision of the Court of Appeal is also contrary to the jurisdiction of our Constitutional Court.

The right to an effective appeal is part of the right to due process of law, especially in the present case, when the person has not participated in the first instance. The trial on appeal must enable the person to be heard, he must be guaranteed the principle of equality of legal means and contradiction.

In the constitutional jurisprudence, it is emphasized that according to this principle (Court, n.d.)[5] each party to the process should have equal opportunities to present its case. The right to participate in the trial is not formal, where the parties are guaranteed only the physical presence during the trial, but procedural legislation must, in the first place, and, afterwards, the judge during the trial, give equal opportunities to the parties to present arguments and evidence in defense of their

[1]Decision No. 56, Date of 24.02.2021; decision no. 118, dated27.05.2021, decision no. 112, dated 30.04.2021; Decision no.151, Date of 23.06.2021; decision nr. 89, dated 06/04/2021; decision no.146, Date of 09.09.2020, of the Special Court of Appeal, against Corruption and Organized Crime.

[2]Article 43 Everyone has the right to appeal against a court decision to a higher court, unless otherwise provided by law for minor criminal offences, civil or administrative matters of minor importance or value, in accordance with the conditions provided for in Article 17 of the Constitution.

[3]Article 41.1. 1. The right to private property is guaranteed.

[4]Article 42.1. Freedom, property, and rights recognized by the Constitution and the law may not be violated without due process of law. "In the determination of his constitutional and legal rights, freedoms and interests, or in case of charges against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. "

[5]For more, see Decision No.4, 2022, paragraph 65 of the Constitutional Court.

interests. If there were no equality of arms at trial, then the arguments of one side would prevail over the arguments of the other side, therefore the right to participate in the trial would be stripped of its constitutional function to guarantee due process of law (Court, n.d.)[1].

The practice established by the special appell court, by not controlling the sequestration decision taken from the first instance and leaving it in force until the decision on confiscation is taken, violates not only the right to an effective appeal, but also the constitutional right to private property guaranteed by Article 41 of the Constitution, as well as the constitutional right to due process, guaranteed by Article 42 of the Constitution, paragraph 1 of which provides, among other things, that property cannot be violated without due process.

Results in practice of restricting the right to an effective appeal

The position of the Special Court of Appeal, which did not conduct the judicial investigation and did not take evidence during the review of the appeal, has led to a violation of the right of ownership of the subjects under jurisdiction of the normative act. In its desicion, the Court of Appeal states that the complaining party has the possibility to provide evidence and debate about them during the review of the request for confiscation. This violates the right of ownership, keeping the assets sequestred until a decision for confiscation is taken. The measure of sequestration brings infridges the right to own the property as long as this asset is excluded from civil circulation. Prosecutor removes the sequestration only if during the investigation is proved the legal origjin of the asset. Court statistics and practice have shown that sequestration measures are more numerous than those of confiscation.

This is also shown by statistics obtained from the Special Court of First Instance for Corruption and Organized Crime. For 2020, we have 124 decisions for sequestration; for 2021, we have 28 decisions; for 2022, we have 0 decisions. According to this report, the decisions taken in 2020-2021 by the Special Court of First Instance for Corruption and Organized Crime with the object of sequestering the property, are 148 decisions for confiscation. So, we have about 45 decisions for sequestration that were not approved, this indicates a violation of the right of ownership through sequestration. Meanwhile, there are 130 appeals submitted at Special Court of Appeal, from which 0 appeals have been approved and all decisions of sequestration taken by the special court of first instance, have been affirmed.

Conclusions and Recommendations

Adoption of normative act with the force of law no.1, 2020, "On preventive measures in the framework of strengthening the fight against terrorism, organized crime, serious crimes and consolidation of public order and security**",** had as its purpose the fight against serious crimes and consolidation of public order and security, also

[1]See *decisions no. 8, dated 23.02.2021; no.34, dated 29.05.2015 of the Constitutional Court)*.

through measures of a pecuniary character. But this purpose contradicts the very nature of this act, which was its temporary nature, as the effects of this normative act extended only within a year, until December 2020.

One of the measures that this normative act provided for was sequestration. But this decision was not taken in the presence of the persons subject under the normative act, but in the counseling room without the presence of the party. The decision by the court was taken only based on the evidence deposited by the prosecution office, which was brought by the police. In practice, it has been noted that requests for sequestration and approval decisions were not in compliance with the law. The provision of the right to appeal remained formal due to the position taken by the appell court, which did not reconsider the judicial investigation and did not take evidence, since the trial in the first instance was in the counseling room and there was no judicial investigation. As long as there is no judicial investigation, there is no real judicial investigation. The party shall submit evidence during the examination of the claim for confiscation. The appeals court's review was formal and not effective.

This position of the Court of Appeal violated the constitutional right to an effective appeal, because according to the statistics of the Court of Appeal, 130 appeals were made, and no appeal was affirmed.

Meanwhile, another alternative would be to change the decisions of the Special Court of Appeal, by the Supreme Court, which as a court of law and would make the final interpretation of this law.

This misapplication of the law by this court violated the constitutional right to due process of law, its principles, such as equality of parties, contradiction, the right to effective protection and the constitutional right for property.

Statistics have shown that 45 sequestratiopn decisions have been cancelled. This shows that these individuals were violated the right of ownership, its rights, such as enjoyment, use or eventransfering to others through legal acts. In conditions where there are no more applications for sequestration, the only thing that remains available to the parties is to request the payment of the non-contractual damage caused due to the wrongful retention of the sequester, based on the decisions of the courts.

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