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THE INSTITUTIONAL FEATURES OF THE JUDICIAL OVERSIGHT ON THE LEGITIMACY OF THE "PRE-JUDICIAL" PHASE OF THE PROCEEDINGS FOR CONFISCATION OF PROPERTY OF ILLICIT ORIGIN

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The legal proceedings for confiscating property of illicit origin represent a novelty in Armenian legal system, and the study of both its comprehensive and individual issues hold significant theoretical and practical importance.

Based on international documents, domestic legislation, and jurisprudence, the authors present an analysis of the general characteristic of the confiscation of property of illicit origin, as well as discuss several practical issues in the existing tools for management of the legitimacy of its "pre-trial" stage. Namely, the necessity for proper judicial oversight of acts, including actions and omissions that fall outside the scope of current oversight mechanisms, its implementation peculiarities, including consequences of recorded infringements are highlighted and as a result, the need for legislative regulations of such issues is raised.

In the article, the authors present several scientific and practical conclusions, such as the need to establish on a legislative level the scope and conditions for oversight of the legitimacy of the decisions, actions, and omissions of the competent authority in the "pre-judicial" stage of the confiscation of property of illicit origin. As a result, it can be stated that the conclusions presented in the article can serve as an indication for the further development of legal practice and existing regulations.

Keywords: *civil confiscation, proceedings for confiscation of property of illicit origin, in rem, right to property, "pre-trial" stage, legitimacy, judicial oversight, direct appeal, "deferred" appeal*

The establishment of effective measures for the confiscation of property of illicit origin is a necessity for every state. For this reason, states make significant efforts to continuously develop such tools.

It is noteworthy that in addition to the institution of confiscation of property of illicit origin in criminal proceedings, there is a growing trend of confiscating property of illicit origin outside of criminal proceedings. In these cases, the confiscation is initiated in the framework of a criminal proceeding but does not depend on the outcome, or the confiscation is imposed on the property regardless of any criminal proceedings.[1] Accordingly, this type of confiscation is commonly known as "civil confiscation", "in rem confiscation", or by other similar names.[2]

While civil confiscation shares some similarities with the institution of confiscation in criminal proceedings, it differs fundamentally in that it does not

[1] See Совет Европы, Использование ареста и конфискации без вынесения обвинительного приговора, 2021, page 10.

[2] See **Теодор Гринберг, Линда Сэмюэль, Вингейт Грант, Ларисса Грей,** Возврат похищенных активов: Руководство по конфискации активов вне уголовного производства; Пер. с англ. — М.: Альпина Паблишерз, 2010, page 35.

necessitate the existence of a guilty verdict.[3] On the other hand, it is directed against a broader range of illicit property. The use of a civil confiscation mechanism is an acceptable tool not only for criminal assets but also for assets obtained through other illegal ways.[4]

Considering the aforementioned, it is evident that this institution is a direct interference with an individual's rights to property, which requires more carefully developed legislation. In this regard, Resolution 2218 of CoE Parliamentary Assembly should be highlighted, according to which such measures have successfully withstood scrutiny by the highest courts of the countries concerned and also by the European Court of Human Rights and were found to be compatible with human rights if legislation establishes appropriate safeguards, such as full judicial review by an independent and impartial tribunal, within a reasonable time, granting compensation to persons whose assets have been frozen or confiscated erroneously, providing for legal aid for judicial review, compensation proceedings for persons who cannot afford a legal representative, etc.[5]

In contrast to many other countries, the civil confiscation procedure is a recent addition to the legal system of Armenia. It was introduced by the law "On confiscation of property of illicit origin[6]," according to which proceedings for confiscation of property of illicit origin is a procedure initiated by a competent authority[7] for the purpose of confiscation of property of illicit origin, which shall start by rendering a decision on initiating an investigation of grounds for initiating a claim for in rem proceedings and shall be completed by a final judicial act, that has entered into legal force, on the claim submitted for confiscation of property of illicit origin, or based on other grounds prescribed by this Law. Meanwhile, the law introduced the notion of "investigation on the grounds for initiating a claim (hereinafter referred to as investigation)" as a procedure aimed at obtaining data on the existence of illicit property, the volume thereof, and the scope of persons concerned.

Thus, it can be inferred that the study and the confiscation proceedings of the property of illicit origin are related as a part and a whole. In other words, the study is the independent stage of the mentioned proceedings, which precedes the judicial proceedings and has a "pre-trial" nature. Moreover, it determines the possibility of filing a lawsuit, identifies the subject of the lawsuit to be filed, and determines the court examination procedure.

However, it is crucial to examine whether the Law provides sufficient substantive and procedural safeguards to achieve a fair balance between the public interests involved and the legitimate interests of persons targeted by confisca-

[3] See **Жан-Пьер Брюн, Ларисса Грей, Кевин Стивенсон, Клайв Скотт,** Руководство по возврату активов для специалистов-практиков; Пер. с англ. — М.: Альпина Паблишер, 2012, pages 28-29, 161-163.

[4] See **Venice Commission**, CDL-AD(2022)048, Amicus curiae Brief for the Constitutional Court of Armenia on certain questions relating to the Law on the Forfeiture of Assets of Illicit Origin, adopted by the Venice Commission at its 133rd Plenary Session (Venice, 16-17 December 2022), para. 25.

[5] See Parliamentary Assembly Resolution 2218, Fighting organised crime by facilitating the confiscation of illegal assets, 26 April 2018 (17th Sitting), para. 5 and 9.

[6] Adopted 16.04.2020. entered into force 23.05.2020: See HHPT 2020.05.13/50(1605) Art.580: Hereinafter referred to as "the Law".

[7] According to the Law - the responsible subdivision of the Prosecutor General's Office.

tion measures.[8]

In this context, first of all, the justification for the adoption of the Law is noteworthy, according to which:

"73. Furthermore, to ensure procedural guarantees for an effective defense, the draft law has provided a certain time limit on the confiscation of the property. This allows the defendant to effectively participate in the proceedings and submit materials related to the case.

106. In addition to the introduction of a mechanism for the confiscation of property of convicted persons, several guarantees have been established to protect fundamental rights, including:

- time limits for the implementation of a study,
- confidentiality about the study and collected materials therein,
- implementing mandatory public notices to provide an opportunity for all interested parties to participate in the case regarding the property,
- providing the opportunity to review the materials, submit statements, and present positions prior to the submission of the claim,
- granting the possibility to appeal judicial acts in accordance with the general procedure outlined in the RA Civil Procedure Code,
- the defendant's opportunity to use free legal assistance,
- allowing for the possibility of releasing a part of the confiscated property from seizure by court decision to cover legal fees, living expenses of the involved party, or to avoid interference with business activities,
- the right to claim compensation for damage caused by the use of the security measure".[9]

Correspondingly, the legislator devoted Chapter 2 of the Law titled "Investigation on the Grounds for Initiating a Claim" to the regulations related to the "pre-trial" stage of the confiscation of property of illicit origin, in the framework of which the following issues were regulated: grounds for initiating an investigation, initiation of investigation and lawfulness of investigation, scope of investigation and time limits for conducting investigation, powers of the competent authority when conducting an investigation, preliminary and final summary of investigation results and other relations. Moreover, for comparison, it should be noted that the Law "On Prosecution"[10], which included the initiation of a claim for confiscation of property of illicit origin in the functions of the prosecutor's office for initiation of a claim for the protection of the state interests, did not provide such detailed regulations regarding the preparation of the initiation of a claim for the protection of state interests on other issues.

Moreover, the Law allowed the implementation of specific actions during the study only with the decision of the court. According to Articles 12,14 and 15, notarial, bank, insurance or trade secrecy, service information prescribed by

[8] See **Venice Commission**, CDL-AD(2022)048, Amicus curiae Brief for the Constitutional Court of Armenia on certain questions relating to the Law on the Forfeiture of Assets of Illicit Origin, adopted by the Venice Commission at its 133rd Plenary Session (Venice, 16-17 December 2022), para. 27.

[9] See https://www.e-draft.am/projects/1931/about

[10] Adopted 17.11.2017. Entered into force 09.04.2018. See HHPT 2017.12.13/74(1349) Art.1213.

the Law on Securities Market, except for the information prescribed by Clause 6 of Part 2 of Article 98 of the Law on Securities Market, credit information or credit history and evidence preliminary securing is possible only by the decision of the court made on the basis of the application of the competent authority.

Meanwhile, the legislator stated in Part 4 of Article 6 that violations of the procedural requirements regulating the initiation of investigation and implementation thereof, as prescribed by this Law, shall only entail consequences that are directly prescribed by this Law, the Civil Procedure Code of the Republic of Armenia, or other laws. The Law, as a matter of fact, provided only one such consequence, namely, according to Part 1 of Article 8, an investigation may last three-year maximum, and according to Part 2 of Article 8, a claim submitted in violation of the time periods prescribed by this Article shall be deemed to be submitted in violation of the statute of limitation.

In light of the above, the question is whether the legitimacy of decisions, actions, and omissions by the competent authority, which are not related to the infringement of the pre-trial investigation period, is susceptible to judicial review. If so, how is such oversight executed. As an example, if the competent authority conducted the study without sufficient legal grounds or in violation of the procedural rules governing relevant decisions, exercised illegal discretion regarding the duration of the study or the amount of property to be transferred pursuant to a settlement agreement, or failed to notify interested parties.

Although the European Court of Human Rights has considered property confiscation proceedings without a conviction to be civil in nature, some legal scholars argue that defendants in these proceedings should be given more rigorous protection measures typically afforded to a criminal litigant since measures of civil proceeding are assumed to be "unfair" when there is a risk of confiscation of the defendant's property. [11] Yet, the Venice Commission stresses that the procedural safeguards in civil confiscation procedures are as essential as those in a criminal procedure, depending on the specific features of the confiscation regime and private circumstances.[12]

In this context, it is noteworthy to mention some of the positions expressed by the Constitutional Court regarding the rights to property and judicial protection, such as the following:

- The right to property not only plays a crucial role in safeguarding the rights and freedoms of individuals in a democratic, social, and legal state but also holds significant constitutional and legal importance in serving as a framework for regulating private and public legal relationships.[13]

- Any legislative regulation related to the right to property, its interpretation and application must comply with the regulations established by the Constitution and the legal positions presented by the Constitutional Court in relation to the fundamental right, in particular, by establishing preconditions for the owner to freely dispose, use and possess the property legally owned by him, as well as

[11] See Совет Европы, Использование ареста и конфискации без вынесения обвинительного приговора, 2021, page 25.

[12] See **Venice Commission**, CDL-AD(2022)014, Kosovo - Opinion on the Draft Law N°08/L-121 on The State Bureau for verification and confiscation of unjustified assets, adopted by the Venice Commission at its 131st Plenary Session (Venice, 17-18 June 2022), para. 19.

[13] See Constitutional Court Decision DCC–1432 of 30.10.2018.

for the free development and equal legal protection of all forms of property, must ensure compliance with constitutional requirements regarding deprivation of property by judicial order in the cases defined by law, as well as guarantee the protection of property rights based on legitimate expectations of acquiring property.[14]

- The rights to judicial protection and fair trial are among the fundamental constitutional rights, and their realization guarantees the respect and protection of several other constitutional rights, therefore; "… the constitutional right to judicial protection gives rise to the positive duty of the state to ensure it in both law-making and law-enforcement activities. This duty entails, on the one hand, the obligation of the legislator to establish the possibility and mechanisms of full judicial protection in the laws and, on the other hand, the duty of law enforcers to accept, without exception, applications made to them in a legal manner, through which individuals seek legal protection against alleged violations of their rights".15

- the institution of judicial appeal of decisions and actions of bodies and officials, carrying out investigation and pre-trial investigation and of prosecutors in pre-trial proceedings (as outlined in Part 2 of Article 278 and Article 290 of the Criminal Code of the Republic of Armenia) serves as a crucial means of protecting the rights and freedoms of individuals involved in criminal proceedings. Its purpose is to ensure the implementation of constitutional norms, such as those laid down in Articles 18 and 19, as well as Articles 3, 14, 14.1, 16 and17 of the RA Constitution, as well as other key articles that reflect the principle of protecting human rights and freedoms. It is designed to safeguard the constitutional and other rights and freedoms of individuals, protecting them from illegal or unlawful decisions and actions by state bodies and officials through judicial oversight of pre-trial proceedings. As such, this is also highlighted in the review of motions from investigative bodies, investigators, or prosecutors regarding the execution of investigative or operational-detective activities and the application of judicial coercive measures that may limit a person's constitutional rights and freedoms (as outlined in Part 1 of Article 278 and Article 282 of the Criminal Code of the Republic of Armenia).[16]

Hence, it can be inferred that the legitimacy of the decisions, actions, and omissions of the competent authority during the "pre-trial" stage of the proceedings in question should also be subject to judicial oversight based on reasons not related to the violation of the study period. This conclusion also follows from the concept of the rule of law, according to which no legal act, including normative (except for the Constitution), can be excluded from judicial review, the purpose of which is the protection of the violated rights of a person, including effective judicial protection, which is provided by an independent and impartial court within a reasonable time, a fair and public hearing. [17]

As for the regime of implementation of the aforementioned oversight, the logic behind the appeal of interim judicial acts can serve as a helpful guideline.

[14] See Constitutional Court Decision DCC–1611 of 28.09.2021.
[15] See Constitutional Court Decision DCC–1249 of 22.12.2015.
[16] See Constitutional Court Decision DCC-844 of 07.12.2009.
[17] See Constitutional Court Decision DCC-1584 of 09.03.2021.

Thus, the legislator differentiates between two fundamental types of appeals for interim judicial acts, that is, an appeal within the framework of the appeal of a judicial act resolving the case on its merits - "deferred appeal" and a direct appeal of an interim judicial act. If the only possible means of legal protection against an interim judicial act suspending the further course of the proceedings is its direct appeal, and accordingly, the law is required to provide a procedure for direct appeal of the given act, then the choice between the two mentioned procedures for appealing an interim judicial act adopted during the pending and ongoing proceedings is left to the discretion of the law. [18] At the same time, according to international jurisprudential practice, there is a general tendency to minimize the possibility of direct appeal of interim judicial acts and to give preference to their "deferred appeal" procedure. [19]

Considering the aforementioned positions and referring to the issue of oversight of the decisions' legitimacy, actions and omissions of the competent authority on grounds not related to the violation of the investigation period in the "pre-judicial" stage of the confiscation of property of illicit origin, it should be noted that, apart from cases of direct oversight explicitly stated in the Law, the remaining issues fall under the purview of the court review. In other words, the "deferred" regime is the most acceptable option for judicial oversight on legitimacy, as there is no need for an urgent appeal. The opposite approach would create opportunities for artificial obstructions in the normal course of investigation, which would significantly reduce the effectiveness of the institution of illicit property confiscation.

Moreover, this position, even in connection with a narrower range of issues, was also stated in the Constitutional Court Decision DPJCC - 64 of November 21, 2022, according to which: "The legitimacy of the facts underlying both the decision to start the study and the conclusion regarding the results of the study can be referred to during the judicial examination of the relevant case. Moreover, the mentioned facts can become the subject of judicial review and assessment also within the framework of the appeal of the judicial act that resolves the case on its merits.".

Nevertheless, it is important to emphasize that the limits and conditions of such oversight require legislative regulation because, as mentioned, the Law lacks certain legal regulations in this regard, and perhaps the only relevant rule of the Civil Procedure Code of the Republic of Armenia[20] pertains to the admissibility of evidence, which prohibits the use of evidence obtained by violation of rights or violating the right to a fair trial. Therefore, it is evident that it sets an extremely high threshold for effectively countering potential violations of legality.

Thus, based on this study, we can draw the following conclusions:

1. The proceedings for the confiscation of property of illicit origin is an effective mechanism for confiscating property obtained through criminal or other illicit means and comprise two stages: the pre-trial and judicial stages.

[18] See Constitutional Court Decision DCC–922 of 02.11.2010.

[19] See Constitutional Court Decision DCC–1191 of 24.02.2015.

[20] Adopted 09.02.2018. Entered into force 09.04.2018. See HHPT 2018.03.05/16(1374) Art.208.

2. The "pre-trial" stage of the proceedings for confiscation of property of illicit origin holds significant importance for the entire proceedings because it firstly determines the possibility of filing a lawsuit and, subsequently, establishes the subject of the lawsuit and the scope of the judicial examination.

3. In the "pre-judicial" stage of the confiscation of property of illicit origin, the legitimacy of individual actions of the competent body (request of confidential information provided by law, application of measures for preliminary securing of the claim, and preliminary securing of evidence) is subject to direct judicial review and is carried out by examining the relevant applications submitted by the competent authority.

4. During the "pre-trial" stage of the proceedings for confiscation of property of illicit origin, the legitimacy of the decisions, actions, and omission of the competent authority, apart from the ones subject to the immediate judicial control, are subject to a "deferred" judicial review within the framework of the court proceedings.

5. It is necessary to establish on a legislative level the scope and conditions for oversight of the legitimacy of the decisions, actions, and omissions of the competent authority in the "pre-judicial" stage of the confiscation of property of illicit origin.

ՎԱՀԵ ՀՈՎՀԱՆՆԻՍՅԱՆ, ՏԻԳՐԱՆ ՄԱՐԿՈՍՅԱՆ – ***Ապօրինի ծագում ունեցող գույքի բռնագանձման վարույթի «մինչդատական» փուլի օրինականության նկատմամբ դատական վերահսկողության ինստիտուցիոնալ առանձնահատկությունները*** – Ապօրինի ծագում ունեցող գույքի բռնագանձման վարույթը նորույթ է հայրենական իրավական համակարգում, և դրա ինչպես համապարփակ, այնպես էլ առանձին հարցերի ուսումնասիրությունն ունի տեսագործնական մեծ կարևորություն։

Միջազգային փաստաթղթերի, հայրենական օրենսդրության և դատավարագիտության մեջ ձևավորված մոտեցումների հիման վրա հեղինակները ներկայացնում են ապօրինի ծագում ունեցող գույքի բռնագանձման վարույթի ընդհանուր բնութագիրը, ինչպես նաև քննարկում դրա «մինչդատական» փուլի օրինականության նկատմամբ վերահսկողության առկա գործիքակազմին առնչվող մի շարք գործնական խնդիրներ։ Մասնավորապես փաստվում են ապօրինի ծագում ունեցող գույքի բռնագանձման վարույթի գործիքակազմի ծածկույթից դուրս գտնվող մի շարք ակտերի, այդ թվում՝ առանձին գործողությունների և անգործության պատշաճ դատական վերահսկողության անհրաժեշտությունը, դրա իրականացման ռեժիմի առանձնահատկությունները, ներառյալ արձանագրված խախտումների հետևանքները, և հիմնավորվում է այս հարցերի լուծման ուղղությամբ օրենսդրական կարգավորումներ նախատեսելու հրատապությունը։

Հոդվածում հեղինակները ներկայացնում են գիտագործնական մի շարք եզրահանգումներ, որոնցից է օրենսդրական մակարդակով ապօրինի ծագում ունեցող գույքի բռնագանձման վարույթի ընթացքում իրավասու մարմնի որոշումների, գործողությունների և անգործության իրավաչափության վերահսկողության սահմանները և պայմանների հստակեցման անհրաժեշտությունը։ Հոդվածում ներկայացված եզրահանգումները կարող են ուղենիշային լինել ի-

բավակիրառ պրակտիկայի, ինչպես նաև առկա կարգավորումների հետագա զարգացման համար։

Բանալի բառեր – *քաղաքացիական բռնագանձում, ապօրինի ծագում ունեցող գույքի բռնագանձման վարույթ, in rem, սեփականության իրավունք, «մինչդատական» փուլ, դատական վերահսկողություն, անմիջական բողոքարկում, «հետաձգված» բողոքարկում*

ВАГЕ ОГАНИСЯН, ТИГРАН МАРКОСЯН – *Институциональные особенности судебного надзора в отношении законности «досудебной» стадии конфискации имущества незаконного происхождения* – Производство о конфискации имущества незаконного происхождения является новшеством в отечественной правовой системе, и ее как комплексное изучение, так и изучение отдельных вопросов имеют большое теоретико-практическое значение.

На основе подходов, выработанных в международных документах, отечественном законодательстве и процессуальном правоведении, в работе авторы представляют общие характеристики производства о конфискации имущества незаконного происхождения, а также обсуждают ряд практических проблем существующий инструментарий контроля за законностью его «досудебной» стадии. А именно аргументируется факт необходимости надлежащего судебного контроля над рядом актов, которые находятся за рамками данного инструментария, включая отдельные действия и бездействие, особенности их реализации, включая последствия обнаруженных нарушений и, как следствие, отмечена необходимость законодательного регулирования подобных вопросов..

В статье авторы представляют ряд научно-практических выводов, таких как необходимость установления на законодательном уровне объема и условий контроля за законностью решений, действий и бездействия компетентного органа на «досудебной» стадии конфискации имущества незаконного происхождения. В результате можно констатировать, что выводы, изложенные в статье, могут стать ориентиром для дальнейшего развития правоприменительной практики, а также действующих регулирований.

Ключевые слова: *гражданская конфискация, производство о конфискации имущества незаконного происхождения, право собственности, «досудебная» стадия, судебный контроль, непосредственная обжалование, «отложенная» обжалование*