

The Anti-mafia law and the Constitution of Albania



Law

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Abstract

The Anti-mafia law is a continuation of the law against Organized Crime, which aimed at fighting dangerous criminal activities by imposing seizure and confiscation of the proceeds of this criminal activity outside criminal procedure. These property-related measures are taken against the right to property, provided by Article 41 of the Constitution, thus bringing about the limitation of this fundamental right of the individual. However, during the implementation of the Anti-mafia law, a number of fundamental rights provided for in the Constitution are likely to be infringed, such as: the right to property, the right to a fair legal process and the principle of legal certainty. How are these rights, provided for in the Constitution, guaranteed by the Anti-mafia law? What was the stance of the Constitutional Court to the Anti-mafia law? What about the stance of the European Court of Human Rights? These and other issues will be discussed in this article.

1. A Brief Description of the Anti-Mafia Law

This law aimed at fighting dangerous criminal activities by imposing seizure and confiscation of the proceeds of this criminal activity outside the criminal procedure.

The Anti-mafia law was a continuation of the law against Organized Crime. The adoption of this law aimed at fighting the most dangerous criminal activities through property-related measures, such as seizure and confiscation outside criminal procedure. Seizure and confiscation are undoubtedly considered very efficient means of fighting dangerous criminal activities because the perpetrators of these activities are deprived of the economic possibility to extend and increase them. The Anti-mafia law was approved in a crucial moment for the Albanian state, a time when criminal activities were at a high level and the adoption of this law was both an international obligation and a necessity.

The efficiency of this law was linked to its nature, because it not only distanced itself from widely accepted norms of the international law, but it also rejected them. The reason was that countries became conscious of the fact that the traditional means of the right were not able to fight such dangerous criminal activities, and experience itself had shown the failure of this struggle. This law does not entail most of the principles of criminal procedure, because this procedure is autonomous in terms of state, level and termination of the criminal procedure. The nature of this procedure is considered to be more civil rather than criminal. The deviation from these widely accepted principles of the right caused a debate over the violation of the individual rights and freedoms, guaranteed by the Constitution, but which are likely to be infringed during this procedure.

2. Through property-related measures, the Anti-mafia law acts against the right to property

But what are these measures? Let us discuss them below.

3. Measures of property character under the Anti-mafia law

The Anti-mafia law provides for 2 measures of property character, seizure and confiscation. Seizure is a provisional measure intended against the property presumed illicit, whereby the owner of this property is deprived of the ordinary administration, possession and enjoyment. Seizure is imposed upon the request of the prosecutor and a court decision, against the property of persons, in accordance with Article 3 of the law, when these persons are subject to reasonable doubt based on indicia:

a) for involvement in one of the criminal offences provided for in Article 3 of the law and that this person owns income or assets which do not correspond to the level of income, activities, declared profits, and are not justified by them, and those cases when there is a real risk of loss or alienation of the assets to be seized;

b) where there is reasonable doubt showing that the ownership of assets or the exercise of economic, commercial, and professional activities are at a state of risk or influence by a criminal organization, or they facilitate the criminal activities.

In contrast, confiscation is a final measure against the proceeds from crime, thus enabling the final transfer of the ownership right to the state . Confiscation is imposed when all of the following conditions are met:

1. The existence of reasonable doubt based on indicia for involvement in criminal activities set forth in Article 3 of the law, which is about the scope of the law;
2. Unlawful origin of the property or unjustified ownership regarding the level of income, profit or other declared lawful activities;
3. Full or partial ownership of property by the person directly or indirectly proceeded.

Therefore, confiscation is imposed when there is no proof of the licit origin of the assets of persons suspected of having committed criminal activities, or the persons connected with it, including the natural or legal person.

The goal of the Anti-mafia law should be properly understood, as it acts against assets obtained during and after the commission of criminal activities, and it applies to certain dangerous criminal activities, such as Organized Crime, various illegal kinds of trafficking, terrorist acts, unlawful acquisition of property, and corruption.

The measures of property character are against the property, because the person is deprived of the property although he has not been declared guilty. This is already evident, but shall we consider these property-related measures a limitation of the right to property or a violation of this right? During the preventive procedure, other individual freedoms and rights are likely to be violated? What are these rights? Let us elaborate on them below.

4. The right to property and the Anti-mafia law

Private property is a fundamental condition for the economic development and welfare of a country. Due to its importance, the Albanian lawmakers, just like others, have brought the property right to a constitutional level, considering it a fundamental right of the individual. This right is not solely a positive right provided for in the Constitution and in such international acts as the European Convention of Human Rights, in the formal element, but it is also a negative right, requiring the Albanian state to take legal measures in order to guarantee it. This right is indivisible, inalienable and inviolable.

Nevertheless, in spite of being a fundamental right, it is limited because it is not an absolute right. However, this limitation is made in accordance with the provisions set forth in the Constitution. The limitation of the property right is stipulated by law, in the public interest, necessary in a democratic society, in relation to the situation that has necessitated it.

As explained above, the property-related measures of seizure and confiscation are taken against property and they limit the ownership right. Obviously, this limitation is made by law, as required by the Constitution. But the Constitution requires that this limitation is made by a law approved by a qualified majority, not by a simple majority, as required by Article 81 and 82 of the Constitution. As a result, we can state that the law is controversial in this aspect, although it has passed the test of constitutionality.

One of the criteria set by the Constitution is the proportionality of the chosen tool and the goals achieved. In this respect, we believe that the tool, that is to say the Anti-mafia law, is suitable for the goal, to fight dangerous criminal activities.

As far as the public interest is concerned, it is necessary to state that when it comes to the fight against crime, the public interest is obviously present, because the state and the society have a direct interest in the fight against such a negative phenomenon. Thus, it appears that the limitation of this right has been formally made in accordance with Article 17 of the Constitution, has become necessary by law in a democratic society and defends the public interest.

The stance has also been shown by ECHR in such issues as:

Raimondo against Italy , Arcuri and others against Italy , Agosi against the United Kingdom, on 24 October 1986. It has ruled that:

“the limitation of the property right, that is to say confiscation, follows a general principle, lack of profit from criminal organizations to the detriment of society. Confiscation is an effective means against organized crime and mafia, and it is therefore considered proportional with the goal to be achieved”.

Protocol 1, Article 1, paragraph 2 of ECHR recognizes states the right to approve laws which they consider necessary to control the use of property in accordance with the general interest, always preserving the relation between the means and goals intended to be achieved. As a result, it seems proportional with the intended goals, as it defends the public interest.

The other question raised in this case is: Which property does the Constitution of Albania defend? Certainly, the property acquired lawfully, not the property which must be out of the civil circulation because it has been created unlawfully.

The goal of the Anti-mafia law is preventive, and obtain the illicit properties created by those criminal activities set forth in Article 3 of the law. Let us examine below whether this goal has been provided for in the Anti-mafia law and whether it infringes the right to property.

4.1 The contradictoriness of goal of the Anti-mafia law

It is obvious that the goal of the law is the seizure and confiscation of the illegal property, acquired from criminal activities. This is observed in various provisions of the law, whose reading tells us that the Anti-mafia law acts only against the property acquired from criminal activities created during these activities, and only for those criminal offences entailed in this law, such as organized crime, illegal trafficking, terrorist acts, corruption, and unlawful acquisition of property. Nevertheless, despite this clearly defined goal of the law, there a number of provisions which are contradictory with the goal of the law. For example, Article 24 of the Anti-mafia law provides that this is also applied when: “the person has been proceeded for a criminal offence entailed in the scope of this law, but during the criminal procedure, the legal definition of the offence is changed and the new offence is beyond the scope of this law”.

In other words, the law also acts against assets probably illicit of the person who is not accused, or suspected of having committed those criminal offences set forth in the law mentioned above (such as organized crime, terrorist acts, corruption, etc.). This would infringe the right to property, provided by the Constitution. The goal of the law is to remove from civil circulation those illicit assets produced by the criminal offences set forth by the law, not any kind of property which is probably unlawful. Imagine, for example, that the person, after the change of the charge, is accused, in the best scenario, of a criminal offence which has no connection with the criminal offences set forth in the law, such as deliberate grievous injury, for example. This person was an emigrant and has obtained the property in emigration, but he cannot prove the licit origin of his property. Under this Article, this property will be confiscated.

In this part, we think that the law violates Article 41 of the Constitution, the right to quiet enjoyment of private property. This provision should be changed by allowing at least confiscation for only those criminal offences provided for in the Warsaw Convention, of May 2005.

The Anti-mafia law acts both against the person and third parties who are not involved in the criminal activity, but are relatives of the suspect, as well as against natural and legal persons, who may conceal the property obtained unlawfully or be under the influence of the criminal activity.

But how does the Anti-mafia law guarantee to these persons the right to a fair legal process? Let us examine this below.

5. The right to a fair legal process guaranteed by the Anti-mafia law

The Anti-mafia law was a continuation of the law against organized crime, but unlike that law, this one brought an improvement of the individual freedoms and rights, intended to guarantee the right to a fair legal process. The right to a fair legal process is an important right provided for by Article 6 of ECHR and Article 42 of the Constitution of Albania. This right comprises numerous elements, but those connected with this kind of adjudication are: Measures of a property character must be taken by a court established by law; the right to have a lawyer should be guaranteed; persons should be given sufficient time to bring evidence, exercise the right of appeal against measures of a property character, etc. But how are these elements guaranteed by the Anti-mafia law?

Adjudication by a court established by law is a condition for the validity of every decision, including the preventive adjudication under the Anti-mafia law. The Anti-mafia law has specified the Court of Serious Crimes as the competent court. But I think that the constitutionality of the law is questioned in this case. A court established by law implies, among other things, that the powers of this court have been granted by a law approved by a qualified majority, not a simple one, as the Anti-mafia law has been approved.

It is true that the person's right to property is limited, but is he provided the means to guarantee the defense of this right to property?

For example, the provisional measure of seizure is a secret procedural action in which the person is not present. Certainly, this provisional measure is imposed because these assets presumed illicit may disappear or lose. But this cannot deprive the individual, against the properties of whom this measure has been imposed, of the right to exercise control of the legality of the decision through the appeal. This right to effective appeal is provided for in Article 27 of the law, which provides that "appeal to a higher court can be made, in line with the deadlines set forth in the Code of Civil Procedure, against the court decision about the seizure of property, the extension of the seizure period, revocation, or termination of the measure of seizure".

When the person being imposed the property-related measures does not wish to appear at the court or is missing, the court provides a lawyer, when there is not one chosen by his family members.

We have already stated that the Anti-mafia law also acts against the assets of third parties because these persons are supposed to conceal the illicit assets. But the law guarantees these persons the right to participate in this proceedings, requiring the court to call these persons in the capacity of third parties, whose interests are likely to be affected by these proceedings. The court is obliged to notify them and give them the necessary time and appropriate procedural means to defend their property right, as provided for by Article 22 of the Anti-mafia law.

The Constitutional Court of Albania has come to the conclusion that: “Eventually, the imposition of seizure does not infringe the constitutional standard of effective access to the court, the principle of contradictoriness and the right to be heard”.

One of the elements that can be questioned during the implementation of the Anti-mafia law is the principle of legal certainty. But what does the law provide for in this case?

6. Legal certainty and the Anti-mafia law

The principle of legal certainty as a constitutional principle has been provided for in its Article 4 . Among others, this Article implies that the rights gained in a lawful way cannot be removed. This principle can be viewed from two different perspectives.

Firstly, when the third party has obtained an illegal property but was not aware of, and secondly, when the state has become the owner of an illegal property.

The international acts endeavor to find equilibrium between the individual freedoms and rights and the fight against crime.

Thus, the UN Convention and the Warsaw Convention provide for a defense for the person subject to measures against property, and at the same time for the third party, as a party affected in this process. This Convention specifies that the party countries are legally bound to respect all the rights provided for in the international acts.

Article 8 of the Warsaw Convention provides that: “each party shall adopt such legislative and other measures as may be necessary to ensure that interested parties affected by measures under Articles 3, 4 and 5, and such other provisions in this Section, shall have effective legal remedies in order to preserve their rights.”

Thus, the international law requires member signatory countries of these conventions that their legislations provide legal defense for persons bona fide.

Let us see the legal provisions of the Anti-mafia law with regard to third parties, who have obtained an illegal property bona fide.

It is true that the measures against property are also applied to third parties under the provisions of Article 3 of the Anti-mafia law. However, the Anti-mafia law guarantees and defends the third parties bona fide, who have obtained this illegal property bona fide. In principle, the law does not allow the imposition of any measures of property character, and when they have been imposed, the proceeding body must revoke them.

As a result, the property that is illegal but obtained bona fide, remains to the person who has obtained it bona fide. Through the principle of legal certainty, the Constitution of Albania guarantees the persons who have gained the property right bona fide.

The problem is the unlawfulness of this property, which is left to the third party bona fide, but which must be left outside civil circulation and its ownership must be transferred to the state. The legal action of enabling the transfer of the ownership right is an unlawful and invalid legal action. It is so because the object of this legal action is unlawful and, as a consequence, this legal action is absolutely invalid, as it is in contravention of a mandatory disposition of the law. In this bilateral contract, the party selling the property which is a product of a criminal activity is mala fide due to knowledge, whereas the party purchasing party in this case is bona fide. The regulation of the effects of this absolutely invalid legal action is provided for by the Civil Code, which defends third parties bona fide. In this case, my opinion is that the best legal solution would be that the crime proceeds transferred to third parties should be confiscated in favor of the state, while third parties should be financially compensated, including the legal late payment, by the person mala fide.

The Anti-mafia law also provides for legal protection of the state, which obtains the ownership right through the confiscation decision bona fide. When the confiscation decision becomes final, the property is transferred to the state. Article 29 provides that:

1. Assets confiscated following a court decision, under this law, are transferred to state ownership.
2. The final decision of the confiscation of assets is promptly delivered to AASCA.
3. When the confiscation decision becomes final, the ownership is irrevocably transferred to the state. In this case, the owner is entitled to request a fair compensation, if confiscation is later proved to be unlawful or ungrounded.

The law itself provides that property confiscated in accordance with the Anti-mafia law, following preventive procedure, is finally transferred to the state. In this way, the state gains ownership of this property under the Anti-mafia law.

Article 41 of the Constitution provides that ownership is acquired by sale, gift and the other means provided for by the Civil Code. Article 163 of the Civil Code specifies that the ways to acquire ownership also include special laws. In this specific case, ownership of these assets by the state has been acquired lawfully, namely by a special law such as the Anti-mafia Law.

Thus, the Anti-mafia law provides for not returning the property to the individual, but it remains under state ownership despite the fact that the decision is considered unlawful. As a result, the Anti-mafia law has not provided for the return of the parties to the previous state, but a fair compensation of the person whose assets have been confiscated. We find this solution fair because the person is deprived of his property for public interest by nationalizing it, in accordance with both Article 41 of the Constitution and Article 42, as, in essence, the person has not been deprived of his property, but he has received compensation for the property he is deprived of. This is somehow considered to be expropriation in the public interest.

One thing is completely obvious, the principle of legal certainty, as a constitutional principle, is guaranteed by the Anti-mafia law. The issue is the regulation of the legal effects in contravention of the Civil Code.

7. Conclusions, problems and recommendations

The Anti-mafia law, which sanctioned the preventive procedure, was a novelty for the Albanian law. It rejected widely accepted norms and principles of the international law and applied to the property right as a fundamental individual right. This sparked a great media debate and initiated its constitutional examination. The Constitutional Court considered the law compliant with the Constitution of Albania. This decision lacks coherence and is contradictory, but it is essentially fair because this law aims at fighting dangerous criminal activities, in which public interest is undoubtedly present, and, as such, should be implemented.

The Anti-mafia law tries to guarantee the constitutional elements which are likely to be affected during the preventive procedure.

The right to property appears to be the most vulnerable in this procedure because the property-related measures are applied to property itself. It has to be admitted that the right to property is limited, in compliance with the limitation provided by the Constitution, by law, in the public interest, as necessary in a democratic society. The same stance is shared by the European Court of Human Rights.

The problem is the implementation of the law for the criminal offences not set forth in this law. This would make confiscation extremely broad and would go beyond its scope, as it would allow the confiscation of assets which are not produced by criminal activities, but their licit origin is not proved. We believe that this would infringe the right to property. The legal solution would be that the law provides for the confiscation of only those assets set forth in the Warsaw Convention of May 2005.

As regards the right to a fair trial, the law brought more safeguards, as it provided a lawyer for the person who is not present and the participation of the third party when his legal interests are affected.

As far as the principle of legal certainty is concerned, the Anti-mafia law guarantees this constitutional principle because the person who has obtained a property bona fide does not lose it. This is also true when the state has obtained ownership by the final confiscation decision, because the property is not returned.

However, this legal remedy for the third party bona fide is in contravention of the Civil Code, which considers the legal action of the transfer of ownership of such an illicit property absolutely invalid. The regulation of the legal effects has been provided for in the Code, with the person bona fide being compensated and the state gaining property ownership. In this respect, I think that the Anti-mafia law should be amended in order to regulate the legal effects, as provided for by the Civil Code.

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