

Civil Confiscation Procedure in Kosovo: What did the Venice Commission say?

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Author: Rreze HOXHA ZHUJA*

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Group for Legal and Political Studies
“Rexhep Luci” str. 16/1
Prishtina 10 000, Kosovo
Website: www.legalpoliticalstudies.org
E-mail: office@legalpoliticalstudies.org
Tel/fax.: +381 38 234 456

*Senior Research Fellow at Group for Legal and Political Studies

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INTRODUCTION

On July 14th, 2022, the Assembly of Kosovo passed the draft Law on the State Bureau for verification and confiscation of unjustified assets on the first reading.¹ Right after, on March 4th, 2022, the Speaker of the Assembly requested an opinion from the Venice Commission (the Commission) with regard to its compliance with European and international standards.² The Commission published its opinion on June 20, 2022, wherein it raised concerns on the draft's compatibility with minimum human rights standards.³ Despite the good intentions of the law, the Commission highlighted the necessity to address certain shortcomings which infringe the fundamental rights guaranteed by the Constitution of Kosovo and the European Convention on Human Rights (ECHR), directly applicable in Kosovo.

The Commission emphasized the necessity to focus and re-shape the issues provided below:

- The purpose of the law should be precise;
- The idea of creating a new mechanism, such as the Bureau, should be reconsidered and, if after reconsideration the Ministry still decides to establish it, it must guarantee independence and professionalism of the institution;
- It must be precisely provided under what criteria and conditions should the Bureau collect information *ex officio*, what will trigger the verification procedure, and what should be a priority for the Bureau, notably ensuring that the latter will pertain high profile cases;
- Clarify that the burden of proof will switch only after the Bureau presents a reasoned proposal and evidence showing at least a probability of illegal acquisition of assets, on the basis of the civil standard proof of the balance of probabilities,
 - o furthermore, defining more precisely the civil standard proof of the “balance of probabilities”;
- Ensuring and introducing stronger guarantees of the party's human rights, such as:
 - o defining the right to legal remedy on the decision on initiating the verification procedure, which in itself guarantees that once such procedure is initiated it must be communicated to the party at hand,
 - o defining that everything stated or documented from the party in this procedure cannot and will not be used against them in a criminal procedure,
 - o defining that family members are targeted as ‘third persons’,
 - o giving it a second look to the provision specifying that natural and legal persons may be obliged by the Court to cooperate with the Bureau,
 - o regulating third parties' legal interest in this procedure,
 - o guaranteeing that the persons concerned by confiscation are not deprived of all assets,

¹ The Assembly of Kosovo. Decision No. 08-V-326, dt. 14.07.2022. Available at:

https://www.kuvendikosoves.org/Uploads/Data/Documents/121Vendimpermiratimneparim_p8fXYwpHRh.pdf

² European Commission for Democracy through Law (Venice Commission). “*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)*”. June 2022. Available at:

[https://venice.coe.int/webforms/documents/?pdf=CDL-AD\(2022\)014-e](https://venice.coe.int/webforms/documents/?pdf=CDL-AD(2022)014-e)

³ *Ibid.*

- guaranteeing the right to compensation for all parties in case of an ultimately unsuccessful confiscation procedure;
- Introducing an adequate threshold for interim security measures, which can only be taken under the civil procedure even if criminal investigations have been initiated.⁴

To summarize it, the Commission recognized that the initiative of civil confiscation is a useable way to combat organized crime and corruption in the country. This is in addition to preventing the exploitation of illegally-acquired funds to prevent the use of such funds for further activity. Moreover, the Commission supported the argument that civil confiscation as a measure will be important to help the economic development in the country. However, despite the recommendations provided above, the Commission emphasized that existing mechanisms with the mandate to fight corruption and organized crime should be utilized before deciding to establish new ones, yet another on the chain of institutions with quasi-identical mandates. Another important fact further discussed by the Commission was the lack of proper implementation of legislation on confiscation already existent in Kosovo.

Once the opinion of the Venice Commission became public on June 20, 2022, the Minister of Justice publicly vowed that all recommendations provided therein would be addressed at the Parliamentary Committee on Legislation.⁵ This declaration was followed by different opinions from opposition parties' Members of Parliament and other stakeholders due to the recommendation to reconsider establishing the Bureau. This is because such a reconsideration would actually entail that, should it be decided to not go through with its establishment, the entire draft need to be changed.⁶

So far, the law has not been subject for discussion on the Parliamentary Committee on Legislation yet. Hence, below we put forth some observations with regards to the comments and recommendations provided on the opinion of the Commission.

I. HOW DID THE VENICE COMMISSION ASSESS THE IDEA OF A CIVIL CONFISCATION PROCEDURE IN KOSOVO AND WHAT ARE ITS INSIGHTS?

As a continuation of efforts for fighting corruption and organized crime in the country, the Venice Commission provided support to the idea of civil confiscation. The purpose behind this initiative is to prevent criminality in cases where current confiscation legislation is insufficient. The positive law in Kosovo provides two possibilities of when confiscation can occur. The first is foreseen in in Article 92 of the Criminal Code in Kosovo, which provides the confiscation of means and material benefits of criminal offences. This can occur once the defendant has been found guilty and a connection proven on illicit wealth acquired by a criminal offence in accordance with the provisions of the Criminal Procedure of Kosovo.⁷ The second possibility is foreseen in the Law of Extended Powers on Confiscation of Assets, which provides for the possibility of confiscation of

⁴ *Ibid.* Para 69.

⁵ Gazeta Express. "Haxhiu zotohet publikisht: Të gjitha rekomandimet e Komisionit të Venecias për Byronë Shtetërore do të adresohen/ Haxhiu publicly pledges: All recommendations of the Venice Commission for the State Bureau will be addressed". July 2022. Available at: <https://www.gazetaexpress.com/haxhiu-zotohet-publikisht-te-gjitha-rekomandimet-e-komisionit-te-venecias-per-byrone-shteterore-do-te-adresohen/>

⁶ Nacionale, "Pushtet e opozitë përplasen për Byronë e Konfiskimit të Pasurisë/The opposition powers clash over the Asset Forfeiture Bureau". July 2022. Available at: <https://nacionale.com/politike/pozite-e-opozites-perplasen-per-byrone-e-konfiksimit-te-pasurise>

⁷ Assembly of Kosovo. "Criminal Code NR. 06/L-074 of Kosovo", Article 92. Available at: <https://gzk.rks-gov.net/ActDetail.aspx?ActID=18413>

property when the procedures detailed in the Criminal Procedure Code of the Republic of Kosovo are not sufficient.⁸ This law applies to the assets of persons who have been convicted of a criminal offense once. It is important to understand the provisions within the positive legislation in order to understand the Commission's concerns. Given that the current legislation is not the focus of this note, the author will not enter into further details analyzing them.

Going back to the substance of the draft Law on the State Bureau for verification and confiscation of unjustified assets, there are three critical issues to be discussed as pointed out in the Venice Commission's published opinion:

- On the proposal to establish a new body, the Bureau, considerations on if such an initiative would make the fight against corruption more effective;
- On the conditions and criteria under which the Bureau should collect information ex officio, considering under what conditions should the verification procedure be initiated;
- On the guarantees that the party's and other persons' human rights will not be violated.

Mainly, the Commission raised questions on the design of the reform and the potential aspects of the law which fail to guarantee the fundamental rights of parties.

Concerning the first issue, on the Bureau's establishment, the Commission expressed its doubts on whether the establishment of a new body would potentially complicate the whole system rather than help it., in light of already existent independent mechanisms mandated to fight corruption and organized crime. It would surely introduce new legal challenges. Having said this, it must be noted that those other institutions are: the Kosovo Police, the Prosecution service, the Tax and Customs authorities and the Anti-Corruption Agency. Given that civil confiscation is clearly a new procedure, the verification of assets as foreseen in the draft law requires special expertise, continuous commitment and specialized capacities, which none of the already existent institutions have in their wider scope of tasks. Nevertheless, the Commission's concern was in regards to the regulation that officials are already obliged to declare their assets annually to the Anti-Corruption Agency and, although the purpose and scope of the Agency is different, officials would now be obliged to declare their assets to two different bodies. As such, the Commission recommended reconsidering the creating the Bureau, a new mechanism to undertake the verification procedure. Instead, it offered the option to entrust these closely-related tools to one single body⁹ and, of course, foresee the necessary expertise be provided to the institution in order to fulfill the law's aim.

Moreover, the Venice Commission went further and flagged that, should the idea of establishing a new body be sustained, then, the issue of independence will arise.¹⁰ Insofar the draft law does not offer sufficient guarantees of independence for the Bureau to resist political pressure. The Commission was fierce in saying that it is not convinced the Bureau will be able to deal with serious cases of corruption, namely where political figures might be involved and treating them

⁸ Assembly of Kosova. "Law No. 06/L-087 on Extended Powers on Confiscation of Assets" Article 1. Available at: <https://gzk.rks-gov.net/ActDetail.aspx?ActID=8651>

⁹ European Commission for Democracy through Law (Venice Commission). "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 21. June 2022. Available at: [https://venice.coe.int/webforms/documents/?pdf=CDL-AD\(2022\)014-e](https://venice.coe.int/webforms/documents/?pdf=CDL-AD(2022)014-e)

¹⁰ *Ibid.* Para 41.

notwithstanding their political affiliation.¹¹ The issue of election and dismissal of the Director of the Bureau, its mandate and the disciplinary procedures. must be carefully decided to ensure the purpose of fighting high level crime is achieved and, as such, it should be considered to entrust it to an independent expert commission, not to the Assembly.¹²

Regarding the second issue, on the Bureau's conditions and criteria, the Commission emphasized the fact that this procedure should be designed in compliance with human rights guarantees, especially the right to property and to fair trial.¹³ The non-conviction based civil confiscation is a procedure allowed under the Financial Action Task Force Recommendations and EU Regulations, and has also been introduced in common law countries such as Australia, UK, Ireland and Italy.¹⁴ It has also been subject to revision by the European Court of Human Rights (ECtHR), which in turn has considered it to not be in violation of the right of property. This was acknowledged by satisfying a specific three-elements test composed of three questions: 1) is it foreseen by law? 2) does it serve the general interest? 3) is it proportionate to the aim pursued?¹⁵

The draft law foresees that, without having to prove attainment of particular asset is conducted based on criminal activity, it will be possible to confiscate those assets in case the owner is unable to prove its legal origins. Hence, the concern with regards to violations of fundamental rights, such as the right to property, is eminent. Scrutinizing property rights of a person should definitely be done under certain procedures guaranteeing that the parties' rights are not being violated. These guarantees are not included in the draft law, according to the Commission.

The Commission moreover raises its concerns with the preconditions for opening the verification and confiscation procedure. The draft law has provided two options: initiation based on collection of information collected ex officio, and on information received from outside. The Commission concluded that it is not clear under what conditions information should be collected ex officio and, frankly, this is a pivotal point of the law.¹⁶ It should be decided clearly under which conditions - be it checks carried out on a random basis, systematically, or on the basis reason to start the procedure - the Bureau should act. This is important for the parties as well, not only once the law starts being implemented. On the other hand, this discussion takes us to the third issue raised by the Commission, wherein the draft law does not specify that the decision to start the verification procedure should be communicated to the person concerned and subject to possible legal remedy. Let us recall that the option to use legal remedy is a constitutional right which cannot be ignored. It is a standard which should be guaranteed in the draft law as well. These are only some of the concerns raised in the opinion.

Nevertheless, considering that the starting point of discussions should be on the necessity of establishing a new mechanism for fighting organized crime and corruption, one should carefully review all possible options. As the Minister of Justice declared, the draft law is currently awaiting discussion in the Parliamentary Committee on Legislation, and has not been returned to its sponsor, the Ministry of Justice, yet. If the members of the Committee decide to offer an

¹¹ *Ibid.* Para 42.

¹² *Ibid.* Para 42.

¹³ *Ibid.* Para 19.

¹⁴ *Ibid.* Para. 15.

¹⁵ *Ibid.* Para 17.

¹⁶ *Ibid.* Para 45.

amendment or a set of amendments proposing the Bureau not be established and the competence for verification and investigation procedure on civil confiscation be passed to an existing institution, that this would change the draft law substantially. Having that in mind, one should consider if it was a right decision to not withdraw the draft law from the Ministry instead of leaving it with the Parliamentary Committee. With regards to expanding the debate by involving opposition parties, it was undoubtedly the best decision. However, if it is decided the Bureau be established, more than 50% of the law will be changed. Moreover, let us recall that such legislation must be drafted carefully considering that there is a fine line between creating something legitimate and violating fundamental human rights.

WHAT NEXT?

The Venice Commission's findings did not come as a surprise. It has long been discussed that, if the Draft Law is not carefully drafted, the main legal conflicts created will interfere with property rights.¹⁷ Additionally, it would fail in its aim on fighting organized crime and, in turn, lead to even more corruption. The current draft law has been prepared on the basis of the Concept paper drafted on April 2021, of the Ministry of Justice explaining the necessity of such an initiative given the low number of confiscated assets in the country.¹⁸ As the Commission rightly pointed out in its opinion, the low number of confiscations can be mainly explained by defective implementation of the law, rather than deficiencies of the law itself. Better financial investigations, better cooperation and coordination between institutions involved, continuous training, and prioritization of confiscation cases can all be measures to increase the number of confiscated assets. If not, the new regulation allowing for civil confiscation cannot possibly be successful if operating alone. The abovementioned challenges exist and, as an initiative, it should be used broadly to encompass all measures mentioned above aimed at enhancing the law enforcement system.

In addition, all comments and recommendations of the Commission should be rightly included once it is decided who will be the responsible body on starting the verification and investigation procedure in Kosovo. The institution's independence and professionalism should be guaranteed. Concrete procedural guarantees must be foreseen for all persons subject to such proceedings. The preconditions to start the verification procedure should be concrete and elaborated. The same applies for investigation procedures - stronger guarantees of the party's and other persons' human rights should be foreseen, such as the right to be informed and the right to use legal remedies.

Despite the recommendations offered in the opinion, a preliminary review from the Court to start the investigation procedure must be foreseen in the law. Only in this way will the rights of the parties be ensured. Meanwhile, the law should not only target the public sector, but anyone suspected of having obtained and possessing unjustifiable assets.

¹⁷ Group for Legal and Political Studies. "A Review of the Current State of the Justice Sector in Kosovo: Are we up for progress or will the old saga continue?" May 2022. Available at:

http://www.legalpoliticalstudies.org/wp-content/uploads/2022/05/GLPSPolicyAnalysis_A-review-of-the-current-state-of-the-justice-sector-in-Kosovo.pdf

¹⁸ Ministry of Justice. "Concept Paper on the issue of Unjustifiably Acquired Assets". April 2021. Available at: <https://kryeministri.rks-gov.net/wp-content/uploads/2022/07/Concept-Paper-on-the-Issue-of-Unjustifiably-Acquired-Assets-converted.pdf>

Nonetheless, first things first. The Council of Europe's Venice Commission rightly pointed out the necessity to reconsider the idea of establishing the Bureau. One more institution does not guarantee better results. Hence, the discussion should be focused also on which of the existing institutions could possibly take over the verification or investigation process. It should not be thought that all competences with regards to civil confiscation be concentrated in one institution only - the Customs, Kosovo Police, prosecution service and Anti-Corruption Agency can all play a part. Linked to this, such institutions should not be excluded from the debate on designing and incorporating the recommendations of the Commission into an improved draft law of civil confiscation in Kosovo.

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