

Theoretical Aspects of the Legislation Dealing with Proceedings Regarding Criminal Property

By Sandra Kaija¹, Inga Kudeikina²

Abstract

The research deals with problems relating to proceedings regarding criminal property, as a result of which property may be recognised as criminally derived and be forfeited. It should be noted that matters at hand are interdisciplinary and require a systemic approach. The research focuses on procedural aspects of criminal property forfeiture in the context of an individual's right to property. The forfeiture of criminal property by way of special proceedings before a court judgement resulting in criminal conviction becomes final is an adequate means of criminal proceedings, whose main goal is to restore justice between parties to criminal proceedings by returning criminal property to the lawful owner as soon as possible. However, it should be considered that this type of property forfeiture has a dual nature, namely: the legislation should also secure the rights of persons having opposite interests, such as the alleged offender, the property owner affected by criminal proceedings and the victim.

Keywords: criminal property, proceedings regarding criminal property, basic right, sustainable development

1. Introduction

Crime is a factor jeopardising the evolution of society. This assertion is beyond question. That is why the detection of offences and the punishment of offenders are key measures promoting public safety. At the same time, sustainability of the state is also facilitated by bringing economic relationships affected by an offence to the original state. The share of property crime is extremely high in the crime structure. It is unacceptable that an offender gains benefits from criminal property, while the victim, who is the lawful owner of the property, loses its title illegally, thus not benefitting from the property owned. It should be emphasised that this legal basis comprises not only the criminal aspect but also constitutional and civil aspects. The right to property is a basic human right, which is why ensuring and protecting this right is a primary task of the state. In addition, it is property relationships that form the economic basis of the state. Returning criminal property to its lawful owner within the shortest possible time restores legal balance, stabilises civil circulation and, in general, ensures the rule of law in the state. A type of special property forfeiture – proceedings regarding criminal property according to Chapter 59 of the Criminal Procedure Law of Latvia – is intended for the above purpose. This chapter lays down the procedure for forfeiting criminal property before a court judgement becomes final.

Objective and methodology of the research. The objective of the research is to examine the legislation dealing with proceedings regarding criminal property, analysing the scope of criminal property in the context of the protection of ownership, in order to formulate

¹Professor of Riga Stradiņš University, Expert of the Latvian Council of Science, Latvia

²Assistant Professor of Riga Stradiņš University, Expert of the Latvian Council of Science, Latvia

suggestions for improving the legislation governing the forfeiture of criminal property. The research has employed descriptive and analytical, deductive and inductive methods. These methods have been used to analyse laws and the opinions of legal scholars and formulate conclusions and suggestions.

2. Research

In legislation, the term ‘property’ denotes tangible or intangible items that are the subject of financial interests of right-holders. It should be added that the term ‘property’ is not yet defined by laws. It is an interdisciplinary term used in different sectors of law, whose general scope can be established by applying the grammatical interpretation method: property is “a thing in respect of which there is the full right of possession, use and disposal; a thing (totality of property) owned by someone, to which someone has the right of possession, use and disposal; asset” (Tezaurs, 2021). Hence, property can be characterised by a right-holder’s power over a specific thing. Moreover, power may be either *de jure* or *de facto*. It is the right of property in the former case and the right of possession in the latter case. A right-holder may freely dispose of his property in both cases. It can therefore be concluded that property is always linked with a right-holder and his right thereto. It should be noted that the primary focus of legislation is ownership of property rather than property as a physical object. The origin of property can vary, and it can be classified according to several criteria, for example, depending on how property emerges: as a result of either an individual’s deliberate action or natural processes. In the former case – everything created, produced, grown, etc. by efforts of a human being; in the latter case – everything created by nature, such as wild animals, mineral resources, etc. The emergence of property as an object is of secondary importance. First of all, it must be established how a specific right-holder has obtained his rights to certain property and whether these rights are legitimate.

The interdisciplinary nature of property shines through in this context because property (rights thereto) can be obtained as a result of either lawful transactions or unlawful acts, including criminal offences.

General aspects concerning the lawful acquisition of property are governed by the Civil Law (Civil Law. Obligations Law, 1937), whereby property can be acquired by way of inheritance, division of matrimonial property, donation, purchase, exchange or acquisition through prescription. Moreover, the Civil Law also sets out principles of protection of both property and possession, namely in Article 1036 of the Civil Law and Article 912 of the Civil Law, according to which every possession is protected by law, respectively. There follows a principle established by Article 918 of the Civil Law, whereby the burden of proof lies with a person asserting that possession is illegal and possession is deemed legal and in good faith, so long as it is not proved otherwise. Consequently, disputes over rights of property and possession should *a priori* be settled following civil procedure. However, civil procedure is not always sufficient for solving matters concerning the ownership of property, the link between property and a specific right-holder and the right of possession of property.

When dealing with criminal offences involving the unlawful acquisition of property, the ownership and disposal of property are essential also in criminal relationships. Criminal

property that cannot be returned to the victim must be confiscated for the benefit of the state, as it is laid down in Chapter VIII² “Special Confiscation of Property” of the Criminal Law (Criminal Law, 1999). Consequently, it must be determined how property has been obtained as a pre-condition for the special confiscation of property, which means that, in order to be confiscated, property must be recognised as criminal.

Determining how property has been acquired is one of the most complicated and essential aspects in criminal proceedings. This is related to ownership and possession that are governed by civil law. Second, it must be assessed whether confiscation may be regarded as significant interference by the state with a right-holder’s fundamental right, namely the right of property, which is protected by both international and national laws, including the Constitution of the Republic of Latvia, in which Article 105 provides that everyone has the right to own property (Constitution, 1922).

It is quite easy to establish that property has been acquired unlawfully in the case of criminal offences, such as robbery, theft or fraud. Property already is the subject of such criminal offences, i.e., actions taken by an offender are aimed at acquiring the property. This is also confirmed by the second paragraph of Article 909 of the Civil Law, which sets forth that each possession acquired by force or in secret from persons from whom an objection could be expected is illegal (Civil Law, Property Law, 1937). As regards other criminal offences where property is not the subject of an offence but is rather acquired as a consequence of an offence (for example, bribery, drug trafficking, money laundering, etc.), it is not obvious how property has been acquired.

However, the unlawful acquisition of property does not always involve crime. There exist several types of civil disputes which concern ownership or possession of property. For example, ownership actions. According to Articles 1041 and 1044 of the Civil Law, an owner may bring an ownership action against any person who is illegally retaining his property; the objective is recognition of ownership rights and granting of possession in connection therewith (Civil Law, Property Law, 1937). In such situations, a person has acquired ownership illegally, but not through crime. It is within the competence of those applying legislation to establish whether the ownership of property should be determined by means of civil or criminal procedure.

The fact that a person cannot prove the origin of property does not immediately lead to a conclusion that the property concerned is of criminal origin. Indeed, ways of acquiring property are not defined in detail in the existing legislation. Likewise, the Convention for the Protection of Human Rights and Fundamental Freedoms (Convention for the Protection of Human Rights and Fundamental Freedoms, 1950) does not expressly refer to a standard of proof or sufficiency of proof lest property should be recognised as criminal. The case-law of the European Court of Human Rights chiefly deals with an assessment of the standard of proof inherent in criminal proceedings with respect to an individual’s guilt in the context of Article 6(1) and (2) of the Convention for the Protection of Human Rights and Fundamental Freedoms, which also refers to assessments in the context of the presumption of innocence.

It should be noted that proving guilt of an individual should be viewed separately from the criminal origin and confiscation of property. To this end, Article 1 of Protocol No 1 to the Convention for the Protection of Human Rights and Fundamental Freedoms should be analysed. As follows from the case-law of the European Court of Human Rights,

this article should be evaluated in three respects: 1) the right to the peaceful enjoyment of property, 2) a prohibition on arbitrary deprivation of possessions and conditions of such deprivation, and 3) the right of the state to control the use of property in accordance with the general interest (*AGOSI v. the United Kingdom*, 1986).

Meanwhile, the Constitutional Court has held that, according to Article 105 of the Constitution, an individual has a right only to lawful property and not to property acquired through crime if the criminal origin of the property is proven by a competent authority of a state with the rule of law, i.e. a court, and by way of proceedings meeting requirements of the rule of law (Judgment of the Constitutional Court, 2009). The unlawful acquirer has no title to property that has been recognised as criminal following the procedure prescribed by the Criminal Procedure Law; therefore, such property is out-of-scope for the purposes of Article 105 of the Constitution (Judgment of the Constitutional Court, 2011). Consequently, the confiscation of criminal property cannot affect an individual's right to property because the individual does not have such a right. It should be observed, however, that, in the case of confiscation, the criminal origin of property must be established by a competent authority of a state with the rule of law and by way of proceedings meeting requirements of the rule of law.

In contrast, civil law refers to the principle of freedom of parties as one of fundamental principles, whereby right-holders are conferred a very wide margin of discretion for the selection of their counterparties and types of transactions. We should agree with an opinion expressed in scientific literature that freedom to choose types of contracts is one of elements of this principle (Dagan, Heller, 2013). The case-law contains a slightly different opinion, namely: freedom of contract can be restricted if it is necessary for arranging legal relationships (Department of Civil Cases of the Senate of the Supreme Court of the Republic of Latvia, 2011), but, viewing this opinion in conjunction with Article 1473 of the Civil Law, which lays down that the form of a transaction depends on the discretion of the parties, except in cases specifically indicated by law (Civil Law. Obligations Law, 1937), it can be concluded that restrictions should be assessed in each specific case individually, while in general the principle of freedom of contract implies that contracts may be made and property acquired based on either an oral or written agreement, or implicitly. Such situations are solved similarly in legislation of other countries, for example, the UK: "English law contains few restrictions on freedom of contract. With the relaxation in recent years of the rule against penalties, aside from illegality and contracts contrary to public policy, the common law will generally uphold parties' agreements".

As regards civil transactions, written form is required by law (Civil Law, Article 1483, 1937) only in the following situations:

- 1) as an essential element of certain transactions;
- 2) when certifying transactions publicly;
- 3) when transactions must be registered in the Land Register;
- 4) as a condition for the right to make claims on the basis of transactions.

It is evident that the form of transactions is not related to their value. Most of transactions, including those of a high value, are made orally. As a result, proving the origin of property could be objectively hard in such situations. It should be added that there is a prohibition which is related to the payment procedure with regard to real estate transactions, but not the form of transactions. According to Article 30(1^o) of the Law on Taxes and Duties, no

payments may be made in cash for real estate (Law on Taxes and Duties, 1995). Hence, the legislator has already defined the category of transactions for which freedom of contract is restricted, and there are no grounds for extending and attributing the restrictions to other types of transactions. Neither the transaction nor the lawful origin of property should be questioned merely because the transaction is made orally, for example. However, another standard of proof has been introduced concerning the criminal origin of property, and it is provided by Article 124(6) of the Criminal Procedure Law, which lays down that conditions included in an object of evidence in relation to the criminal origin of property should be considered to have been proven if there are grounds to admit in the course of proving that, most likely, the property is of criminal rather than lawful origin (Baumanis, 2018). In this case, the burden of proof is incumbent on a person asserting that property is not criminal.

As mentioned above, it can be hard or even impossible for an owner to prove the origin of his property in certain cases. For example, documents concerning a transaction have been lost, or a transaction has been made orally, without witnesses and the other party has died. Under these circumstances, property can be viewed as criminal according to the existing legislation because its lawful origin cannot be proven. The term ‘property of unidentified origin’ is being increasingly used in legal practice in such situations, thereby admitting that there can be property whose origin and ownership cannot be established. Although it may seem at first sight that the institution of ‘property of unidentified origin’ introduced legally would protect the rights of a presumed property owner more effectively, the question still remains open as to who is the owner. Although laws do not expressly state that any property must have an owner, it is evident because property is an object of rights which must be linked with a right-holder, namely an owner. Right-holders are natural and legal persons, including the state (Civil Law. Obligations Law, Articles 1406 and 1407, 1937). There can be no property of unidentified ownership as property would be handed over to the state in any case. That is why it is not reasonable to introduce the institution of ‘property of unidentified origin’ in legislation.

Traditionally, ownership actions belong in the realm of civil proceedings. Parties to civil proceedings have equal procedural rights, including the right to obtain evidence, and the parties must also have equal possibilities during the process of special confiscation of property, which is performed according to the principles of criminal procedure.

“The equivalence of procedural powers does not imply that all parties involved in criminal proceedings must have absolutely equal rights and duties. It should be emphasised that this principle is governed in rather general terms and, certainly, ‘equal exercise’ is an evaluative notion that should be specified in each particular case. Moreover, this principle is not identical to the principle of equality” (Kaija, 2017).

According to the principle of legal presumption, it is *a priori* determined in criminal proceedings that property involved in laundering activities should be viewed as criminal if a party to criminal proceedings is unable to plausibly explain the lawful origin of the property concerned and the person conducting the proceedings has all grounds to assume based on the body of evidence that property has criminal origin.

We should take into account also Directive 2014/42/EU of the European Parliament and of the Council on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union, which lays down that the affected person must have an effective

possibility to challenge the circumstances of the case, including specific facts and available evidence on the basis of which the property concerned is considered to be property that is derived from criminal conduct (Directive, 2014).

Consequently, the equal exercise of rights of the property owner and the state should be evaluated in proceedings regarding recognition of property as criminal. In this situation, it is a responsibility of the person conducting the proceedings in assessing the origin of property because evidence may be regarded as sufficient if a court establishes with confidence that the unlawful origin of property is highly probable and the owner is unable to prove the opposite.

Criminal procedure does not provide any special procedural means for establishing the lawful origin of property. Property, ownership and possession are institutions of civil law; therefore, it should be discussed whether a multidisciplinary approach should be pursued in deciding about the origin of criminal property in criminal proceedings, considering also civil aspects of the acquisition of property. The way how property has been acquired, namely the type and form of transactions, should also be taken into consideration as a criterion in deciding about the origin of property, and it should be analysed pursuant to the principles of civil law.

It should be noted that this matter could be given more attention because currently there are several cases in progress at the CJEU, including Case C-319/19 (Official Journal of the European Union, 2020), where one of the questions is as follows: A) the objective of the confiscation of assets as declared by national law is general prevention, that is to say the prevention of the possibility of obtaining and disposing of assets illegally, whereby confiscation is not conditional on the commission of a crime or other offence or on a direct or indirect connection between the offence and the assets obtained; B) the confiscation threatens not an individual asset, but (i) the total assets of the person under inquiry, (ii) property rights of third persons (natural and legal) acquired by the person under inquiry, whether for consideration or not, and (iii) property rights of the contracting partners of the person under inquiry and of the third parties; (C) the only condition for confiscation is the introduction of an irrebuttable presumption of the unlawfulness of all the assets for which no legal origin has been identified (without a previously established definition of 'legal/illegal origin'); (D) in the absence of proof of the origin of the acquisition of assets by the person under inquiry, the law governing the lawfulness of the acquired assets is revised with retroactive effect for a period of ten years for all the persons concerned (person under inquiry, third parties and their contracting partners in the past), whereby at the time of acquisition of the specific property right there was no statutory obligation to provide such proof?

It should be admitted that the standard of proof with regard to criminal property is not regulated by law with sufficient clarity, and the relevant legislation should be improved. It is very likely to be affected also by the formation of the CJEU case-law in terms of ensuring a fair trial in the context of proceedings concerning recognition of property as criminal and confiscation.

3. Conclusion and Implications

As a result of the research, the authors have arrived at the following:

1. the forfeiture of criminal property by means of special proceedings reflects a state's duty to ensure the transparent and lawful transfer of ownership and is an effective means of protecting property rights;
2. the legislation dealing with the forfeiture of criminal property before a court judgement becomes final has to secure the rights of both the acquirer and the lawful owner of criminal property;
3. in assessing how property has been acquired, criminal proceedings should take into account also civil legislation concerning the acquisition of property;
4. if property is recognised as criminal and confiscated, rights to this property cannot be affected because the relevant individual has no rights to the property concerned;
5. the criminal origin of property must be proven by a competent authority of a state with the rule of law and by way of proceedings meeting requirements of the rule of law.

The forfeiture of criminal property by way of special proceedings before a court judgement resulting in criminal conviction becomes final is an adequate means of criminal proceedings, whose main goal is to restore justice between parties to criminal proceedings by returning criminal property to the lawful owner as soon as possible. However, it should be considered that this type of property forfeiture has a dual nature, namely: the legislation should also secure the rights of persons having opposite interests, such as the alleged offender, the property owner affected by criminal proceedings and the victim. It should be stressed that the protection of the right to property as a basic right refers also to the alleged offender whose property is recognised as criminally derived. Hence, the effective work of those applying laws is the cornerstone of justice in specific circumstances. The forfeiture of criminal property cannot become an aim in itself in proceedings regarding criminal property. Assessing how property has been acquired leads to a collision quite often. The civil understanding of the acquisition of ownership of property is broader than the criminal understanding. Therefore, without assessing the acquisition of property based on an interdisciplinary approach, the process may be fundamentally flawed and property may be forfeited illegally, thereby causing material damage to an individual's right to property. It should however be borne in mind that laws do not protect acquirers of criminal property; instead, they deal with an individual's right to property, which can be restricted for legitimate reasons.

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