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**The Confiscation System of Unjustified Wealth in the Republic of
Kosovo and its compatibility with the European Law**

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Abstract

This thesis's topic sheds light on the confiscation of unjustified wealth and legal alternatives in relation to confiscation. It considers the arguments for and against different confiscation regimes to accelerate the fight against corruption and strengthen the Rule of Law in the Republic of Kosovo. This study's overarching objective is the need for further research in confiscation laws and possible reforms of Kosovo's legal and institutional framework in compliance with the European Laws.

The Republic of Kosovo faces many hurdles to detect and prosecute illicit wealth gaining of its officials mainly engaged in corrupt activities. The overnight unjust enrichment of people with charming houses, luxury holidays, extravagant cars suspiciously gained, without being able to explain and not reasonably equivalent to their incomes, has been a big concern for the Kosovar society over decades. To dispense these disturbances, proper confiscation regimes and not necessarily equitable are needed to be set in place. We will see that fair regimes of confiscation are not always effective and that new approaches and methods, even if seen as unfair, shall be considered.

Organised crime and corruption have halted Kosovo's progress toward EU integration and the livelihood of the Kosovars. To stump down organised crime and fight corruption for a better quality of life, it is more than necessary an effective regime of confiscation, which would hamper the continuity of criminal activities and reinforce the Rule of Law. Although a lot of work has been done on this issue, more is to be done on the strategic and institutional framework in compliance with European Law.

Keywords: Republic of Kosovo, corruption, confiscation, unjustified wealth.

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1. Introduction

Corruption, organised crime, and the confiscation of the illicit wealth which springs from them pose fundamental challenges to any country worldwide, but even more so to developing countries that have only recently undergone transition and are only slowly progressing towards establishing Rule of Law. The Republic of Kosovo is an example of such transitioning countries that face such challenges.

It has been thirteen (13) years since Kosovo declared its independence, but the country is still to see any substantial progress in the fight against corruption. A slow and inefficient judicial system and a lack of know-how and professionalism on the part of the prosecutorial system have seen Kosovo struggle for these past thirteen (13) years. However, just recently, with the new political elite that came to power, the country has been meaning to bring a gun to this knife fight. In addition to combating organised crime and corruption per se, the plan is to hit them where it hurts, i.e., dealing with the proceeds gained from these criminal activities. This is to be done by taking confiscation from criminal proceedings to civil proceedings. To ensure the efficiency of this system of confiscation in the civil proceedings, two elements are to be enforced: first, the confiscation will be carried out regardless of a final criminal conviction order and second, the shifting of the burden of proof to the accused party to justify the source of their wealth, will be put in place.

Even though this new and somehow innovative system of confiscation seems to be well-thought and potentially effective in dealing with the above-mentioned problems, i.e., making confiscation of illicitly gained wealth more efficient and consequently more effective, there are still some issues that are raised as this 'new system' is being designed. The most challenging and important among such issues are those pertaining to questions raised regarding Human Rights.

Kosovo is set on a path towards European Union integration and that as per Article 22 and 53 of its Constitution, it is obliged to respect the European Convention of Human Rights and the Case - Law of the European Court of Human Rights. Therefore, a question to be answered is whether this new confiscation regime/system complies with the European legal order as well as its Human Rights framework. In this thesis, we strive to provide an answer to these questions.

Before we tackle the substance of the problem, we shall first provide a short elaboration of "confiscation" and its meaning in the world of Law; then, we will give an overview of Kosovo's existing legal framework on confiscation, its problems, and the civil confiscation system. By doing so, we then may judge the compatibility of civil confiscation with European Law, we will take a closer look at the EU confiscation framework as well as the ECtHR's approach to this system. In light of the above, we shall conduct an analysis of the matter in order to be able to reach a conclusion on the compatibility of this civil confiscation system with European Law. The thesis will finally be recapped in conclusion, where our final thoughts on the matter will be articulated.

2. General overview on the confiscation of unjustified wealth

Confiscation of unjustified wealth has caused a lot of debate and controversy on an international scale. Even the terminology used seems to be a topic of discussion. Different countries use terms such as unjustified wealth, unexplained wealth, criminal wealth, illicit enrichment, unjust enrichment, and unreasonable enrichment in their jurisdiction, but with the same connotation on unjustified wealth. As a result, in this paper, unjustified wealth is also referred to as illicit enrichment, which appears to be more convenient for readers of this thesis. Both terms directly call attention to the confiscation of unjustified wealth.

For the first time, the idea of unjustified wealth took shape in Argentina and India in the mid-20th century. These two countries enacted their first confiscation laws on unjustified wealth, with the primary goal of imprisoning public officials that engage in criminal activities. Since that time, it was understood that all the financial assets received from obscure sources, mainly through illegal activities, unveil the need for proper confiscation laws. Confiscation law – delineating the seizure of assets and/or property unlawfully gained – is part of each country's legislation. Confiscation systems/laws differentiate from country to country – based on cultural and legal particularities – thus showing that there is no standardised system of confiscation on the international level.

Countries by their act of confiscation seek to take under total control of the possible '*instrumenta et producta, fructa sceleris*', which encompasses all the illicit resources used to commit the crime or the alleged action toward the wealth growth. The Roman Maxim *nemo locupletari potest aliena iactura* or *nemo locupletari debet cum aliena iactura*, meaning that "*no one should be benefited at another's expense*"¹, describes best the concept of illicit enrichment. Furthermore, the United Nations Convention against Corruption determines illicit enrichment as "*a large rise in a public official's assets that he or she can't justify in relation to his or her legal income*".² The United Nations Convention Against Corruption (UNCAC) in its article 20 emphasises the need to criminalise this offence by each State Party according to their legal systems,³ proving us with a general understanding that the confiscation laws aim to halt criminal activities with the act of confiscation of all illicit assets obtained by illegal activities.

¹ Aaron X. Fellmeth and Maurice Horwitz, *Guide to Latin in International Law* (Oxford: Oxford University Press, 2009), <https://bit.ly/3x1COMC> [accessed 05 January 2021] p. 194.

² UN, *United Nations Convention against Corruption*: Article 20 (New York: The United Nations General Assembly, 2004), <https://bit.ly/3sXSqrb> [accessed 05 January 2021].

³ Ibid.

The same outline on the act is given by the Inter American Convention against Corruption⁴, which considers illicit enrichment an offence to be criminalised by all the American States. Correspondingly, by today, we can notice that illicit enrichment is outlawed in most countries worldwide. Countries adopt their own methods to tackle the phenomenon of unjustified wealth, and the forms differentiate from each other. Still, the main aim of the approaches used by countries is to halt the illegal money flows, which materialise from criminal activities and are used chiefly to maintain the continuity of those unlawful schemes.

The Organization for Economic Cooperation and Development (OECD) actively supports the principle of changing the standard of evidence for confiscating the profits of corruption. As a result, in 2018, OECD proposed that "there should be a presumption of criminal origin of the property with the burden of evidence being shifted to the accused individual and/or told third parties".⁵ Regardless of the confiscation scheme in place in each nation, the Member States of the Anti-Corruption Network for Eastern Europe and Central Asia are pushing hard for the presumption of proof to be shifted to the defence in confiscation procedures involving unjustified wealth found in the proceeds and instrumentalities of corruption actions.

To wind up, we can say that unjustified wealth is considered a collection of financial and other tangible physical assets acquired unlawfully by a person who cannot justify these assets' legitimacy. In other words, there exists a colossal dissimilarity between the lawful incomes and the worth of the assets owned by the individuals.

2.1. Meaning and definitions of the confiscation of unjustified wealth

United Nations Convention against Corruption constitutes the international foundation of unjustified wealth confiscation by promoting comprehensive financial investigations and reliable systems of wealth declarations to combat organised crime and corruption.⁶

Additionally, the Convention urges the countries to design proper frameworks to succeed on the matter and implement adequate confiscation regimes for them.⁷ That being said, this illustrates

⁴ OAS, *Inter American Convention against Corruption*: Article 9 (Caracas: Senate 106th Congress, 1996), <https://bit.ly/3sX6G3x> [accessed 05 January 2021].

⁵ Vitaly Kasko and Dmytro Kotlyar, *Confiscation of instrumentalities and proceeds of corruption crimes in Eastern Europe and Central Asia* (Paris: OECD, 2018), <https://bit.ly/3dTawGo> [accessed 28 January 2021], p. 51.

⁶ UN Convention against Corruption (n2), Article 52.

⁷ *Ibid.*, Art. 54.

that confiscation laws have always been a means of fighting corruption and organised crime by confiscating the proceeds of crime. The term "*proceeds of crime confiscation*" refer to the permanent deprivation, by order of a court or some other competent authority, of any property (i.e. assets of every kind, whether corporeal or incorporeal, movable or immovable, tangible or intangible and legal documents or instruments evidencing title to, or interest in, such assets) derived or obtained, directly or indirectly, through the commission of an offence".⁸ Another definition on proceeds of crime confiscation is given by Kosovo's Law on the Management of Sequestered and confiscated assets, which in Article 2 defines confiscation as "*the asset's permanent seizure, as ordered by a court's final decision*".⁹ The UN Convention also gives the exact definition against Illicit Traffic in Narcotic Drugs and Psychotropic Substances.¹⁰

As identified, by confiscation, we understand the act of taking or seizing the financial assets and property goods under the control of the State's public purse, from the person who is found guilty of a crime or in some cases without conviction if regulated so and if there is reasonable doubt of unlawful activities. An additional plausible definition of confiscation is provided by Article 1 of Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime, describing confiscation "*as a penalty or a measure, ordered by a court following proceedings concerning a criminal offence or criminal offences resulting in the final deprivation of property*".¹¹ Here we can notice that the Convention gives a range of practicability for the Council of Europe Members to decide whether they want to activate the institute of confiscation as a penalty in a conviction based procedure or as a measure in a non-conviction based approach.

Having fleshed out the term confiscation, we are now going to analyse the existing confiscation regime in Kosovo and the changes that this country is about to undergo in this area in the coming future.

⁸ Barbara Vettori, *Tough on Criminal Wealth: Exploring the Practice of Proceeds from Crime Confiscation in the EU* (Netherlands: Springer, 2006), p. 23.

⁹ Assembly of the Republic of Kosovo, *Law on the Management of Sequestered and Confiscated Assets: Article 2* (Prishtina: Official Gazette, 2016), <https://bit.ly/3aJSrbT> [accessed 06 January 2021].

¹⁰ UN, *United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances: Article 1* (New York: The United Nations General Assembly, 1988), <https://bit.ly/2R6GgPG> [accessed 06 January 2021].

¹¹ COE, *Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime: Article 1* (Strasbourg: European Treaty Series - No. 141, 1990), <https://bit.ly/3eP146v> [accessed 22 January 2021].

3. Confiscation in Kosovo. Crime pays... a lot!

The phenomenon of unjustified wealth seems to be a major concern for Kosovar society. The civil society reports and sustained focus on the confiscation of unjustified wealth became visual in 2010 when the Government of Kosovo enacted the Law on Declaration and Origin of the Property and Gifts of Senior Public Officials¹², obliging public officials to declare their incomes, the origin of their property and possible gifts received by them.

Under this Law, the Anti-Corruption Agency publishes annual reports on wealth declaration of high public officials. Immediately from 2008 to 2012, suspicious growths and shrinks of senior public officials' wealth led to the endorsement of unjustified wealth leaks. In 2010 and 2011, the Anti-Corruption Agency reported a growth of almost 500% on the wealth of a senior public official, whose wealth rose by 1.2 Million €, from approximately 200,000.00 to around 1,400,000.00 €. ¹³

Public and media pressure in Kosovo on the issue got the European Union's attention, with the Commission identifying the unjustified wealth as an issue, consequently setting a benchmark to be met by Kosovo so that its citizens be granted visa liberalisation.¹⁴ The continuity of illicit enrichment, with a sublime level of corruption of high profile officials and with almost no investigation done in this regard, will diminish chances of Kosovo toward EU accession, therefore, urging the Government of Kosovo to act in the blink of an eye and develop new strategies and more effective tools in this regard.

The Corruption Perceptions Index (CPI), which measures public perceptions of corruption, notes that corruption remains widespread in Kosovo. The CPI barometer in 2020 for Kosovo published by Transparency International reveals that 8% of civil service users gave a bribe in 2019 and ranks Kosovo as the 104th among 180 countries subject to the index for the same year statistics.¹⁵ These perturbing statistics are strongly supported by the 2020s Commission Report for

¹² Assembly of the Republic of Kosovo, *Law No. 03/L-151 on Declaration and Origin of the Property and Gifts of Senior Public Officials*: Article 5 (Prishtina: Official Gazette, 2010), <https://bit.ly/3xsFsW> [accessed 06 January 2021].

¹³ Anti-Corruption Agency, *Annual Reports 2010-2011* (Prishtina: ACA publications, 2011), <https://bit.ly/3tYkMCO> [accessed 06 January 2021].

¹⁴ EEAS, *Visa Liberalization Roadmap with Kosovo* (Brussels: European Union External Action, 2012), <https://bit.ly/3aI7O4x> [accessed 06 January 2021].

¹⁵ Transparency International, *Corruption Perceptions Index 2020* (Berlin: International Secretariat, 2021), <https://bit.ly/3aFyqDy> [accessed 06 January 2021].

Kosovo, which states that "*Kosovo has made limited progress in this field, including in the investigation and prosecution of high-level cases, asset confiscation, and the establishment of Special Departments in the courts to handle cases of high-level corruption (and organised crime).*"¹⁶ Considering that the issue of unjustified wealth directly affects the Rule of Law and economic governance, Kosovo should make further reforms in this field, with the main focus on proper implementation of legislation, as there has been a significant drop in final confiscations. Kosovo implements the traditional model of confiscation, where a criminal conviction is required to be able to confiscate the proceeds of crime. Having a final verdict *conditio sine qua non* to be convicted guilty from the Court brings in a lot of hurdles considering the stealthy nature of the offence. The conviction-based system regime in place has not been successful. The burden of proof for the wealth origin has been under the prosecutor's shoulders, and there have been tendencies of political snags on initial investigations. The blind eyes behaviour and the cover-up of perpetrators, most high-profile officials, have been preventing the prosecutors from investigating the cases related to unjustified wealth, adversely creating a culture of impunity.

Nonetheless, to get a clearer understanding of this issue in Kosovo, we will take a closer look into the county's legal framework concerning the matter of confiscation.

3.1. National legal framework on confiscation and its limitations

Kosovo has undergone many legal and structural changes in the last two decades, focusing on the battle against corruption as one of the most critical layers of the Rule of Law. The legal framework in Kosovo is *prima facie* considered sufficient to secure the grounds for confiscation of criminal proceeds, yet, with the institutional framework failing to implement in practice the regulation in place. Whilst most of the provisions on confiscation and unjustified wealth date latterly after 2008, with rare practice utilisation,¹⁷ it is of great importance not to judge their efficacy while also proceeding in the hunt for different coherent schemes.

¹⁶ EC, *Kosovo 2020 Report* (Brussels: Commission Staff Working Document, 2020), <https://bit.ly/3sZQhLA> [accessed 06 January 2021, p. 5.

¹⁷ *Ibid.*, p. 24.

We immediately understand that by having in place a conviction-based system, the provisions of the Criminal Code¹⁸ and the Criminal Procedure Code¹⁹, altogether with the late Law on Extended Powers for Confiscation of Assets Acquired by Criminal Offence, form the basis for the confiscation of criminal proceeds. As the leading Law on the issue, the Criminal Code of the Republic of Kosovo, as the leading Law on the issue, in Article 92 stresses that all the properties and the means obtained by illicit actions shall be confiscated. When not possible to do so, the perpetrator shall pay an equal sum, or the Court shall confiscate the same value from the perpetrator's property.²⁰ The Criminal Procedure Code with its articles 90, 112, 268 strengthens the confiscation of illicit assets by providing provisions on freezing, sequestration and confiscation of assets obtained by criminal offences.

The Law mentioned above on Extended Powers for Confiscation came into force in 2019 aligned with the EU Directive 2014/42,²¹ and in conjunction with the Law on the Management of Sequestered and Confiscated Assets²² present the policy on asset confiscation with extended power given to the prosecutors, respectively, the asset administration policy. Conductive to the Law on Extended Powers for Confiscation is a time span of 5 years from a final judgement for any criminal offence related to corruption and specified one by one on the Law. The extended power is given in a way that the prosecutor must find the legitimate owner of the so considered unlawful assets, not necessarily related to the criminal offences committed. Afterwards, the burden of proof is automatically transferred to the defendant to prove that the assets he owns have been obtained by lawful sources and have legitimate evidence for that. Although seen as promising, the Law has fallen short of its expectations, as its efficacy has been subdued by the requirement of a final conviction to proceed with the confiscation of unjustified wealth.

On the other hand, the immense number of cases coupled with an institutional framework considered as unstable has created a "tradition" of prolonged proceedings, which is unacceptable in the area of confiscation. The lengthy proceedings and the lack of political will have been

¹⁸ Assembly of the Republic of Kosovo, *Criminal No. 06/l-074 Code of the Republic of Kosovo* (Prishtina: Official Gazette, 2019), <https://bit.ly/3a1vpSC> [accessed 06 December 2021].

¹⁹ Assembly of the Republic of Kosovo, *Criminal No. 04/L-123 Procedure Code of the Republic of Kosovo* (Prishtina: Official Gazette, 2012), <https://bit.ly/3xu6Ti8> [accessed 06 December 2021].

²⁰ Criminal Code of the Republic of Kosovo (n18), Article 92.

²¹ EUR-Lex, *Directive 2014/42/EU of the European Parliament and of the Council of 3 April 2014 on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union* (Strasbourg: Official Journal of the European Union, 2014), <https://bit.ly/3nqKIVx> [accessed 06 December 2021].

²² Law on the Management of Sequestered and Confiscated Assets (n9), Article 19.

affecting over time the Kosovo Police, the Prosecutors Office, the Courts, the Agency for the Administration of Sequestered or Confiscated Assets, the National Coordinator for Combating Economic Crimes as the central institutions on the fight against corruption and organised crime. Impressive to that, Kosovo benefits from the international cooperation and institutional frameworks of the EU on corruption, money laundering and organised crime, which brings forth ample support on confiscation of unjustified wealth, with a considerable number of anti-corruption strategies set in place. In addition to that, Article 16, par. 3 of the Republic of Kosovo's Constitution stipulates that "*The Republic of Kosovo shall respect international law*",²³ and throughout its Article 19 grants Kosovo's legal system the possibility of directly applying the ratified international agreements in the internal legal system with superiority over the national laws.²⁴

As we can see, Kosovo's legal framework cannot be considered exactly "lacking" as it is quite like most traditional legal frameworks which foresee confiscation in criminal procedure. However, inefficiency to the lengthy procedures as foreseen by the traditional system is added by the myriad issues the country has regarding the implementation of the existing legal framework. These issues have been common knowledge to the public for some time now, but they continue to evade the Government. In the next chapter, we are going to elaborate on these issues and take a closer look at them.

3.2. Struggling to implement the Law

The implementation of the current legal framework in the Republic of Kosovo faces few procedural flaws that hamper the efficiency of the system of confiscation to fight corruption and organised crime, starting with money laundering, duration of judicial proceedings, and other legal and procedural shortcomings to be considered.

The phenomenon of money laundering and illicit enrichment is considered the main components to be tackled to put an end to corruption and organised crime. With that aim, the

²³ Assembly of the Republic of Kosovo, *Constitution of the Republic of Kosovo*: Article 16 (3) (Prishtina: Official Gazette, 2008), <https://bit.ly/3euXdeu> [accessed 08 December 2021].

²⁴ *Ibid.*, Article 19.

Financial Action Task Force on Money Laundering,²⁵ a task force created in 1989 on the G7 Summit in Paris, operates internationally as the foremost multi-disciplinary institution in the fight against money laundering. Its forty recommendations represent the basis of every indefinite effort in the fight against money laundering. The same forty recommendations are embraced in more than 130 countries worldwide, including Kosovo, whose Financial Intelligence Unit was created based on these recommendations. This unit was created within the Ministry of Finance to be considered the central institution in Kosovo against money laundering, with the prominent role of tracing illicit money operating in and out of Kosovo.

Kosovo has many regulations to fight money laundering, yet it lacks the political will to administer and proper implementation mechanisms. The Criminal Code of the Republic of Kosovo²⁶ in Article 308 criminalises the money laundering offence, followed by Law on the prevention of money laundering and combating terrorist financing²⁷, as a *lex specialis* on the offence, which in a detailed manner stresses the steps to fight and prosecute the violation. Despite the fact that there is a legislative system in place, the 2020 European Commission report for Kosovo shows that only nine people were indicted for money laundering, and none of them with a final court decision,²⁸ a situation that illustrates enough about the difficulty of proving the offence.

What seems problematic is that in most of these cases, the Special Prosecution Office of the Republic of Kosovo, as the leading investigating authority, did not give any order of confiscation for the so considered dirty money, and what is even more concerning, nor did the Courts. That situation shows a lack of commitment and professionalism of the institutions, directly impacting its citizens' life quality and making their country even more vulnerable to corruption and organised crime. "These institutions should not be satisfied only with the filing of indictments and the holdings of formal court proceedings but should substantially combat this phenomenon with concrete actions in the confiscation of illegally obtained properties/wealth".²⁹ These

²⁵ OECD, *The Forty Recommendations* (Paris: Financial Action Task Force on Money Laundering, 1996) <https://bit.ly/3sPLIgw> [accessed 08 January 2021].

²⁶ *Criminal Code of the Republic of Kosovo* (n18), Article 92.

²⁷ Assembly of the Republic of Kosovo, *Law No. 05/L-096 on the Prevention of Money Laundering and combating terrorist financing* (Prishtina: Official Gazette, 2016), <https://bit.ly/2QZ5K1a> [accessed 08 January 2021].

²⁸ Kosovo 2020 Report (n15), p. 42.

²⁹ Justice Today Snapshot Analysis, *Fight against money laundering and the confiscation of illegally obtained assets: A reflection on the current situation* (Prishtina: British Embassy Prishtina, 2020), <https://bit.ly/32Snf6c> [accessed 10 January 2021], p. 12.

circumstances show that Kosovo institutions still lack the power and willingness to be successful in illegal asset confiscations and in addressing the institutional and legal framework's malfunctioning in this regard.

Neck and neck, European Union countries are doing a lot to address the issue, as they see Kosovo as a place where money laundering can be done on a great scale. Its impact can effortlessly destroy the economy by erecting sufficient room for the development of corruption and organised crime at high levels. It is considered that the construction and hotel industry is the main target for money laundering in Kosovo. This happens as a result that most of the construction is done by exchanging means for a part of construction to be done and that there are barely a few times that an agreement for construction is done with cash or other forms of payments.

On the other side, procedural shortcomings of the current regime of confiscation in the Republic of Kosovo halt the progress of Kosovo toward an efficient fight against corruption and organised crime. With the traditional system of confiscation installed in Kosovo, and with several laws addressing the confiscation concurrently, beginning with the Criminal Code of the Republic of Kosovo, the Criminal Procedure Code, and the Law on Extended Powers for Confiscation of Assets Acquired by Criminal Offence as the backbone legislative poles, there exists a lot of uncertainty about when and where each of the laws shall be considered as predominant on different confiscation cases. The Criminal Procedure Code is not fully aligned with the Law on Extended Powers for Confiscation of Assets Acquired by Criminal Offence. Different expressions exist for the same thing, such as `temporary seizure` and `temporary confiscation, which brings forth the laws' deficiency, resulting in the low number of final confiscations, thus, hampering a possible efficient fight against corruption and organised crime.³⁰

The length of judicial hearings is one of the most important factors influencing the inadequate number of final confiscations. Case overload with a low number of judges and prosecutors,³¹ who are not even specialised in unjustified wealth, make the issue even more complicated. The judicial procrastination and delays on the unjustified wealth proceedings might significantly increase the possibilities of new crimes and recidivism cases by offering the perpetrators the means of doing so.

³⁰ GLPS, *Confiscation of Illicit Wealth in Kosovo: Time to think for a new policy?* (Prishtina: Group for Legal and Political Studies, 2015), <https://bit.ly/3eGHsRB> [accessed 14 January 2021], p. 8.

³¹ UNODC, *Judicial Integrity in Kosovo: Assessment Report* (Prishtina: United Nations Development Programme, 2014) <https://bit.ly/3xu7ujS> [accessed 14 January 2021], p. 23.

The difficulties that bring forth the very long duration of criminal proceedings call attention to the loss of value of the sequestered goods, and most of the times, they become a burden for the country. These issues prolong the initiated criminal procedures, therefore, prolonging the act of confiscation. Until the final decision in the case where the defendant is found guilty, the amortisation of the property loses its value, therefore, directly affecting the state budget when the confiscation is executed. On the other side, while thinking of the tendency of Human Rights protection, we can come up with the question of what will happen to the goods or property that loses the value because of such prolongation, and at the very end, the courts determine that conditions to confiscate such good are not met, or the defendant is found not guilty?!

Even though the Law on the Management of Sequestered and Confiscated assets grant the Agency and State Prosecutor the authority to preserve the value of goods by selling them,³² especially when the expense of storing such goods exceeds their value, these actions do not occur in practice, mainly because courts are hesitant to sell such goods. The efficacy of these proceedings is also halted when the prosecutors decide that a particular good subject to sequestration is considered evidence on a judicial proceeding, precluding them from being sold.

Kosovo's legal infrastructure in place does not allow non-conviction-based confiscation, therefore, lacking the ability to address the needs in the field of confiscation of unjustified wealth. The Criminal Code of the Republic of Kosovo, the Criminal Procedure Code, and the Law on Extended Powers for Confiscation of Assets Acquired by Criminal Offence as the backbone laws on confiscation do not allow the confiscation through the civil procedure and without a final judgment issued by the courts. Dirty money is floating free in the country's economy is indisputable but also, as of recent, no longer acceptable. A prosecution that is not up to the task and a legal framework providing for lengthy procedures and slow distribution of justice have long ceased being factors contributing to corruption within the country and have become problems on their own right - especially regarding the confiscation of illicit wealth. In the hope of tackling all these problems at once, the Government of the Republic of Kosovo is looking to find a new approach to confiscation of criminal proceedings.

³² Law on the Management of Sequestered and Confiscated Assets (n9), Art. 18.

3.3. How to make crime not worth it? Make the criminals justify their own wealth!

The confiscation of unjustified wealth seems to be challenging in both domestic and European domains. The wealth obtained by criminal activities serves as an assisting engine toward continual criminality. Bearing that in mind, in the European realm, there have been steady efforts to fight corruption and organised crime as the primary sources of illegal wealth gaining's.

By understanding the dynamism and complexity of organised crime and corruption, we can notice that the investigation, detection, and verification of illicit gaining is challenging and complex to be proven when it comes to unjustified wealth. Based on this, the legislator shall consider the possibility of rule changes regarding the burden of proof. Especially when considering the confiscation of wealth gained by criminal activities, everyone shall consider that one of the most practical ways of doing so, nowadays, is the option of transferring the burden of proof totally to the owner or the defendant in an ongoing procedure. The situation would imply that the owner of a property or goods considered illicit must justify and prove that the contested wealth originates from lawful sources. As a result, the growth of new methods of crimes and their complexity demands more practical ways of fighting those crimes.

The jump from the traditional criminal confiscation known as '*in personam forfeiture-against a person*' confiscation, which originates from the continental legal systems, basically consists of confiscating criminal proceeds after being charged from the State and with a final conviction from a criminal proceeding. On the other side, "the *in-rem forfeiture* is a property-related consequence of illegal activity whereby a judicial authority orders the surrender of ownership of the property referred to herein to the State without consideration or compensation of any kind".³³ This type of confiscation follows up a civil procedure directed against material goods or property and not against a person as in the criminal confiscation. The second institute of confiscation does not necessarily respect the fundamental principles and legal rights, as in the first one, that of illegal confiscation has to be respected with preconditions. The *in-rem* confiscation comes into action whenever the prosecutor or other authorised institutions doubt that someone's wealth is attained following illicit sources, therefore, executing the confiscation even without a final conviction.

³³ UNODC, *Model Law on in Rem Forfeiture* (Vienna: Legal Assistance Programme for Latin America and the Caribbean, 2011) <https://bit.ly/3gJ2O3p> [accessed 15 January 2021], p. 5.

These confiscation models have been serving countries over the decades to seize and confiscate the materials goods subject to criminal or even suspicious activity without a lawful origin of the goods. To do so, countries, besides criminal confiscation as the one side of the coin, considered applying civil confiscation as the other side, which offers the opportunity of confiscation without a final conviction from the courts. The non-conviction-based confiscation, "*Despite its name (which expressly refers to a protective measure), allows for the confiscation of property allegedly obtained by illegal activity that the individual in question is accused of having previously committed*".³⁴

The current trend in the field of confiscations requires at least some indicators to initiate the procedure of confiscation without being convicted of a crime. When some people's lifestyle does not correspond to their legal incomes, it is considered a dial to start an investigation and act upon a possible confiscation.

For the Republic of Kosovo as a country in transition, non-conviction confiscation and its application might be problematic, bearing in mind the domestic legal and institutional framework. The issue of unjustified wealth seems challenging when defining ownership and the origin of the wealth. Apart from the few legal flaws in Kosovo's approach to unjustified wealth and the lack of cooperation among relevant institutions, other social and economic seeds threaten the institutions' ability to succeed in the domain of unjustified wealth. Inherited property, non-formal contracts, the diaspora remittances, and all other circumstances add up a garment of sensitivity on the issue of unjustified wealth and the successful implementation of non-convicted based confiscation. Most of the European countries have adopted criminal offences to punish perpetrators and to be able to recover assets that public officials have acquired, assets known as unjustified wealth. "The need to prove that such wealth is unexplained stands, but in such frameworks, there is no need to prove the source of the illegally acquired wealth by identifying and proving the underlying offences, such as bribery, embezzlement, trading in influence, and abuse of functions".³⁵ This creates the ground to confiscate the proceeds of crime, yet in question is the burden of proof and other Human Rights that can be violated, especially for the countries like Kosovo with a conviction-based regime.

³⁴ Miriam Allena, *Anti-mafia confiscation against corruption: The new frontier of Human Rights* (Italy: Bocconi Legal Studies Research Paper, 2019), <https://bit.ly/3xvEPe3> [accessed 19 January 2021], p. 6.

³⁵ Lindy Muzilla et al., *On the Take: Criminalizing Illicit Enrichment to Fight Corruption* (Washington: The World Bank, 2012), <https://bit.ly/2QZVo11> [accessed 07 January 2021], p. 55.

The Council of Europe expresses the demand for reforms in the field of confiscation, encouraging countries to act with their judgment to stamp organised crime and corruption.³⁶ Enacting a new law in the confiscation or authorising institutions specialising in unjustified wealth, adjusting instruments to fight crime, seizing and confiscating criminal proceeds would vastly discourage organised crime and corruption. The confiscation of the profits of corruption is unquestionably necessary for the Republic of Kosovo to successfully combat corruption. The prosecution bears the burden of proof based on the presumption of innocence. Even if it would be more effective if the burden of proof is placed on the accused, forcing them to justify their property or risk having it confiscated might put at risk fundamental rights. From this perspective, the key question is whether the consequences of the presumption of innocence in Kosovo are impeding the effectiveness of anti-corruption efforts. The presumption of innocence, of course, aids in the protection of Human Rights. On the other hand, there is also a need for the criminal justice system to be effective. At the end of the day, Human Rights protection should be just as critical as efficiency in fighting corruption-related crimes. Otherwise, we risk depriving victims of crimes like corruption justice while attempting to defend the interests of unethical offenders.

As a result, the need to respect fundamental rights and the tendency for efficacy in the criminal justice system must be balanced. This research would demonstrate that to achieve some balance in every case dealing with unjustified enrichment, the presumption of innocence should be applied in a more effective manner, but only when it comes to confiscation of the proceeds of corruption as unjustified assets. Shifting the presumption of proof from the prosecution to the accused/defence through a civil forfeiture scheme or an expanded criminal confiscation system may be the most effective strategy for successfully confiscating the proceeds of corruption as unjustified wealth in the Republic of Kosovo.

³⁶ CoE, *Impact Study on Civil Forfeiture* (Belgrade: Council of Europe, 2013), <https://bit.ly/3vsONLG> [accessed 07 January 2021], p. 47.

3.4. The problem of informal economy – when the line between dirty and clean money blurs

Deviating from the traditional confiscation regime does not come without risks. The matter of confiscation in civil procedure touches upon, directly or indirectly, several Human Rights such as the right to a fair trial and right to property, among others, and this is true for any country which is set on undertaking this endeavour. The next chapter will focus on the issue of civil confiscation and Human Rights and how they are protected in Europe; however, there are other issues that are not strictly legal in nature which countries must face when undertaking the civil confiscation reform, which is directly related to the circumstances they find themselves in.

In the case of Kosovo, such an issue proves to be the level of the informal economy, which is apparent in the country. It is one thing to shift the burden of proof to the accused, and it is a whole other matter to shift the burden of proof to the accused while he does not stand a chance to prove the legality of his wealth by no fault of his. In this sense, it is particularly difficult to safeguard Human Rights during the civil confiscation procedures in Kosovo as it would require tackling the informal economy before undertaking the civil confiscation reform. However, tackling this issue is easier said than done. To get a better understanding of this problem, we are going to take a closer look at the scope and causes of this problem.

Kosovo seems to rely on financial assistance from its Diaspora bearing the fact that nearly 2 million Kosovars have been forced out from their homes. Migration has had a strong impact on the large number of remittances collected each year, propelling Kosovo's economy to new heights. Therefore, legislators, before a possible introduction of a new confiscation regime, shall consider the huge number of financial flows to Kosovo each year formally and informally.

It is estimated that most of the households, accounting for about 25% of the homes, depend on remittances as a result of the displacements that peaked in 1999 and with the young leaving Kosovo for a better standard of life.³⁷ Financial flows from the Diaspora are considered to be the second-largest source of income for remittance-receiving households, emphasising the critical position they have played in assisting most of the households in meeting their basic needs while also

³⁷ UNDP, *2012 Kosovo Remittance Study* (Prishtina: United Nations Development Program, 2012), <https://bit.ly/2S9CR2X> [accessed 10 January 2021].

contributing about 128 million € to Kosovo's budget through taxation.³⁸ Microeconomic and macroeconomic imbalances are exacerbated by the Diaspora. Kosovo is in the top 10% of countries with a high proportion of migrant remittances as a percentage of GDP, with remittances accounting for 18% of GDP in 2011 and about 17% of GDP in 2019.³⁹ Remittances are mainly used for basic use by claimants, with more than 90% of remittances going to food, clothes, shelter, education and durable goods.⁴⁰

The statistics for yearly financial flows from Diaspora to Kosovo, only by bank transfers figure from 500 Million € to almost 1 Milliard € each year, with an estimation that the Diaspora has sent more than 40 milliard euros to Kosovo since 1999, bringing economic prosperity to the country.⁴¹ This implies that the informal financial flows are enormous, adding even more problems to the informal economy.

Further on, inheritance related problems and non-formal contracts are of big concern, as they affect the informal economy directly, therefore, making the confiscation of a so considered unjustified wealth hard to be confirmed as unlawful. *When the French peasant paints the devil, he paints him in the guise of a tax collector*⁴² is one of the aphorisms that best describe the informal economy in Kosovo and that hundreds of years after this saying, even if sorrowful, it survives the times. By that saying being appropriate in this situation, we immediately understand that most of the trade and the employment in Kosovo is made without any formal contracts, hence contributing directly to the informal economy, which lacks the will and the state infrastructure to be addressed.

The Strategy for Combating the Informal Economy, Money Laundering, Terrorist Funding, and Financial Crimes 2019-2023⁴³ is one of the documents used by the Government of Kosovo to tackle the informal economy in all its forms and structures. Still, most of the international measure

³⁸ KAS, *Results of the Household Budget Survey* (Prishtina: Kosovo Agency of Statistics, 2011), <https://bit.ly/3u0h77Q> [accessed 10 January 2021].

³⁹ CBK, *Annual Report - 2018* (Prishtina: Central Bank of Kosovo, 2018), <https://bit.ly/3vo854F> [accessed 10 January 2021].

⁴⁰ UNDP, *2012 Kosovo Remittance Study* (Prishtina: United Nations Development Program, 2012), <https://bit.ly/2PrvZgp> [accessed 10 January 2021], p. 11.

⁴¹ Central Bank of Kosovo Annual Report – 2018 (n39), p. 11.

⁴² Hal Draper, *The Death of the State in Marx and Engels* (New York: Revolution, 1977) <https://bit.ly/2Prw1F3> [accessed 10 January 2021], p. 14.

⁴³ The Government of Kosovo, *The strategy of combating informal economy, prevention of money laundering, terrorist financing and financial crimes 2019-2023* (Prishtina: Minsitry of Finance, 2019), <https://bit.ly/3nxu8Dq> [accessed 11 January 2021], p. 10.

reports show that Kosovo's informal economy accounts for around 31.7% of GDP,⁴⁴ estimating approximately 2 billion euros a year, a perturbing statistic that immediately halts investments and economic development ceases in a great mass.

With a high number of informal economy, it is crystal clear that the amount of undeclared property and unjustified wealth is at high numbers as well. On the other side, most of the properties in Kosovo are inherited, without any formal documents in the hands of the inheritors, which adds up difficulties on the systems of confiscation. These problems present further issues to be addressed at the same time with the issue of unjustified wealth by introducing new methods and means of formalising the economy and everything that seems to be helpful for a successful fight against corruption and organised crime.

Nevertheless, the relevance of the above-stated problem would largely depend on the scope of the new civil confiscation regime. The scope of civil confiscation usually follows two models. The first applies to all subjects who are suspected of having been enriched through criminal activities. The second applies only to high public officials and politically exposed individuals who are required to declare their wealth upon accepting these positions.

The problematic role of the level of the informal economy will greatly diminish if the second model is chosen. This is because it is much more reasonable to compare the current wealth of the accused to their declared wealth upon having taken their respective position. In addition, having individuals justify the wealth they have themselves declared is a much more reasonable expectation, and ergo, much more likely to be considered proportionate to the goal of the civil confiscation regime, thus not risking encroaching on these individuals' Human Rights.

Having a better of the circumstances and threats to the encroachment of Human Rights in Kosovo by the civil confiscation regime, the next question which requires answering is the compatibility of this regime with the European legal framework as Kosovo is a potential candidate country to join the European Union and it is also obliged through its Constitution to apply European Convention of Human Rights as well as apply the case-law of the Strasburg Court.

⁴⁴ IEC, *Economic Reform Programme of Kosovo 2020-2022* (Brussels: Commission Staff Working Document, 2020), <https://bit.ly/2QZ6IKQ> [accessed 14 January 2021], p. 15.

4. European Law on Confiscation

Civil confiscation is not novel to Europe. In an effort to combat corruption and organised crime in the Union, the European Union has a legal framework in place which seeks to harmonise the confiscation regimes of its Member States through setting minimal standards for them to adhere to. Nevertheless, some of the Member States of the Union, as well as countries which are party to the Convention of Human Rights, have had civil confiscation already adopted, which inevitably, due to its novelty and dubious nature from a Human Rights perspective, has produced enough case law in the Strasbourg Court to be considered as guidelines on how civil confiscation can be regulated in a human right's friendly way.

4.1. EU legal framework on confiscation

A minimum harmonisation on confiscation of unjustified wealth is unavoidable in various European cultures, with various national laws in place for corruption and organised crime. Consequently, Article 83 of the Treaty on the Functioning of the European Union stresses the need of establishing minimum rules for harmonisation concerning the definition of criminal offences and sanctions and of creating networks of cooperation to address the main interest of the Union in the area of organised crime and corruption.⁴⁵ In the fields of organised crime, terrorism, human trafficking, and sexual harassment of women, this cooperation is also concerned with promoting and accelerating cooperation in relation to prosecutions and the implementation of rulings, facilitating extradition between the Member States, and defining minimum rules relating to the constituent elements of criminal acts and penalties.⁴⁶ Therefore, to be successful in confiscation laws and deter the discrepancies between them, the EU shall continue to harmonise its legal framework and establish a standard regime on confiscation, even though seen as really complex and stiff to accomplish. This is because efforts to expand the confiscation system beyond offences or beyond evidence that proceeds originate from a specific offence tend to question domestic

⁴⁵ EUR-Lex, *Consolidated version of the Treaty on the Functioning of the European Union*: Article 83 (Lisbon: Official Journal C 326, 2012), <https://bit.ly/2R6l2jO> [accessed 12 January 2021].

⁴⁶ Klaus-Dieter Borchardt, *The ABC of EU Law* (Luxembourg: Publications Office of the European Union, 2017), p. 53.

criminal and constitutional Law in the several EU Member States.⁴⁷ Hence, a common European Legal Framework toward a more systematic and effective response against corrupt behaviours is essential.

The 1990 Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime⁴⁸ has been accepted as the main instrument for incrimination of all offences in this realm of crimes. The Council of Europe, with the provisions of the above-mentioned Convention, sets sight toward a more unified legal framework for all the Member States, granting help and cooperation in seizure and confiscation of criminal proceeds, along with the investigation of perpetrators. The same Convention in 2001 was nourished by the Council Framework Decision of 26th June.⁴⁹ Moreover, progression in this respect has been made with the 1998 Joint Action on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds of crime, which offers sufficient guidelines for all the Member States in strengthening the fight against corruption and organised crime, enormously assisted by the European Judicial Network.⁵⁰

By the same token, toward having a stronger EU Criminal Law *acquis*, in 2006 entered into force the Council Framework Decision on Confiscation.⁵¹ Article 3 of the Framework Decision on Confiscation attempts to harmonise confiscation regimes and stipulates three different confiscation models seeking to ease the mutual recognition of confiscation orders and implement one of the models to their domestic legal framework.

Later on, in 2008, the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism entered into force,⁵² which, altogether with the EU rules and other Framework Decisions form a stable and well-presented legal framework on the issue of unjustified wealth.

⁴⁷ Valsamis Mitsilegas, *EU Criminal Law* (Oregon: Hart Publishing, 2009), p. 102.

⁴⁸ *Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime* (n11), Article 7.

⁴⁹ EUR-Lex, *Council Framework Decision on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds of crime*: Article 2 (Brussels: Official Journal, 2001), <https://bit.ly/3tWZl5i> [accessed 22 January 2021].

⁵⁰ EUR-Lex, *Joint Action 98/699/JHA on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds of crime*: Article 3 (Brussels: Official Journal, 1998), <https://bit.ly/2R5RG5S> [accessed 22 January 2021].

⁵¹ EUR-Lex, *Council Framework Decision on the application of the principle of mutual recognition to confiscation orders*: Article 3 (Brussels: Official Journal, 2006), <https://bit.ly/2Prudf7> [accessed 23 January 2021].

⁵² CoE, *Warsaw Convention* (Warsaw: Council of Europe Treaty Series – No. 198, 2005), <https://bit.ly/3ntk52e> [accessed 22 January 2021].

4.2. Is civil confiscation in conformity with Human Rights? ECtHR case law on the matter.

European Human Rights law has been concerned with possible infringement of the most fundamental rights and legal principles in modern confiscation regimes. The non-conviction-based system of confiscation enlightens several specific problems that have been emerging during the procedural guarantees.

Countries face the burden of assessing whether they shall protect the public's interest by acting against an individual whose wealth is suspected of being achieved illegally or not acting upon their suspicions to safeguard one's Human Rights. Concerning this, the European Court of Human Rights, in the case of *Arcuri and others v. Italy*, noted that: *"The huge profits these groups make from their illegal activities give them a degree of control that puts the State's Rule of Law in jeopardy. The methods used to combat this economic power, especially the confiscation measure in question, may appear to be critical to the success of the fight against the organisations in question"*.⁵³

Indeed, it is up to the country to decide on its preventive measures. Yet, there is no firm answer to all the problems that may arise during the modern forms of confiscation, which go beyond the defendant's conviction for a crime and transfer the burden of proof to them or the third parties. In fact, on an international scale, there exists a legal basis to do so. In general, the burden of proof in criminal proceedings is carried by the prosecution. Still, the burden of proof regarding the legitimate origin of suspected confiscated property can be reversed to the degree that it is consistent with the countries' legal framework and confiscation cases. Still, the shift of the burden of proof from the prosecution to the defendant means that the defendant will be found guilty if one cannot put forth enough evidence to prove the opposite, consequently resulting in his or her conviction. According to this, in an unjustified wealth case, the accused person in a criminal proceeding must prove that his wealth or property in question originates from lawful sources, therefore shifting back the prosecutor's burden to determine whether the evidence presented is liable and trustworthy.

With the traditional confiscation model, an unjustified wealth case is automatically classified under Criminal Law, with the presumption of innocence playing a pivotal role for a fair trial, as one of the fundamental principles that shall not be infringed during the whole procedure.

⁵³ *Case of Arcuri & Three Others v. Italy*, no. 52024/99 (Strasbourg: ECtHR, 2001 - VII), p. 6.

Under this constitutional principle, everyone is innocent unless proven guilty for an offence. But what happens when the presumption of innocence meets a civil confiscation process, invoking one's right to silence and self-incrimination?

Considered as the backbone of a just trial and as "*an absolute minimum requirement of the common law systems*", the presumption of innocence presents a vital right for each person accused of a criminal offence.⁵⁴ It is an absolute minimum requirement of the common law systems. According to the Universal Declaration of Human Rights, everyone charged with a crime has the right to be presumed innocent unless proven guilty according to the Law in a jury trial in which he has had all the guarantees required for his defence.⁵⁵ It is the responsibility of each State to prove that a person is guilty or not, and to do so until the very end of the procedure, the presumption of innocence principle shall be respected. The International Covenant on Civil and Political Rights (ICCPR), Article 14 stipulates that "*everyone accused of a crime has the right to be presumed innocent unless proven guilty in a court of law*".⁵⁶ The same description is given under the European Convention on Human Rights under the right to a fair trial.⁵⁷ According to these conventions, the right to be presumed innocent and prove the defendant's guilt by the State constitutes one of the most fundamental principles to guarantee a fair trial.

The Strasbourg Court Jurisprudence shows that the presumption of innocence shall always be respected, and that is best demonstrated by the Case of Saunders v. United Kingdom.⁵⁸ Saunders was convicted of trading frauds. By the time that he was interviewed for the first time, the Company Act obliged everyone to answer the questions made by the Inspectors of the Department of Trade and Industry, compelling Mr Saunders to answer all the questions. The Company Act foresaw that anyone who would not answer the inspectors' questions would be considered to commit an offence. Later on, these answers were used in the Court as evidence, incriminating him in the proceeding for the crimes. During his trial, he challenged such statements without being successful at all. He also made legal challenges in the Court of Appeals, albeit unsuccessful. Therefore, he appealed to the European Court of Human Rights to abuse process and

⁵⁴ Noeline Blackwell et al., *Human Rights Law* (Oxford, Law Society of Ireland, 2008), p. 276.

⁵⁵ UN, *Universal Declaration of Human Rights*: Article 11 (1) (New York: The United Nations General Assembly, 1948), <https://bit.ly/3ntkyl0> [accessed 11 January 2021].

⁵⁶ UNHR, *International Covenant on Civil and Political Rights*: Article 14 (2) (Geneva: United Nations Human Rights, 1976), <https://bit.ly/3vIOaTP> [accessed 24 January 2021].

⁵⁷ CoE, *European Convention on Human Rights*: Article 6, (Strasbourg: Council of Europe Publishing, 1953), <https://bit.ly/3gII9O8> [accessed 25 March 2021].

⁵⁸ *Case of Saunders v. United Kingdom*, no. 19187/91 (Strasbourg: ECtHR, 1996 - VII).

the right to a fair trial. The ECtHR found that the prosecution made extensive use of the answers given by Mr Saunders, directly infringing the right of Mr Saunders not to incriminate himself. By sixteen votes to four, the Court ruled that the trial was unjust and that the right not to be forced to self-incriminate was violated.

It is considered that civil confiscation can run counter to the right to a fair trial and the presumption of innocence in the pursuit of an efficient and just legal procedure. The presumption of innocence and the right to a fair trial shall never operate as dividing lines between Human Rights and anti-corruption efforts, but rather as balancing acts between ensuring Human Rights and active anti-corruption efforts by the confiscation of unjustified wealth. Nevertheless, the Case Law reveals the possibilities that countries can go beyond the legal principles in question and limit them if needed. *Philips v. United Kingdom*⁵⁹ raises Article 6 of the European Convention on Human Rights, the right to a fair trial.⁶⁰ A confiscation order was issued against Mr Philips, a British national. He was found guilty of importing a large amount of cannabis resin in 1996 and was imprisoned for nine years. During the hearing, the Court, in accordance with the Law on Drugs, had the possibility by Law to assume and link all his unjustified wealth of the last six years with the offence that he was convicted for, that of drug trafficking. A confiscation warrant for about 95.000 pounds sterling was issued against him, despite the fact that he has never been accused of any drug-related offence. Based on the principle that the Member States are for infringements of Union Law⁶¹, Mr Philipps filed an application ECtHR, insisting that the Crown Court's finding that his gains were obtained from illegal sources violated his right to a fair trial and the presumption of innocence. The appeal made by Mr Philipps was rejected by the European Court of Human Rights, standing firm that his claim was exempt from the right to a fair trial, hence, providing countries with sufficient discretion to limit the right concerned here. At the same time, the European Court of Human Rights rejected the claim that the presumption of innocence was invoked, arguing that the British Court issued the order of confiscation on the assumption that his wealth was acquired by criminal activities and, more precisely, that of drugs, and it was not issued to prove his guilt on the offence.

⁵⁹ *Case of Philips v. United Kingdom*, no. 41087/ 98 (Strasbourg: ECtHR, 2001 - VII).

⁶⁰ European Convention on Human Rights (n57), Article 6.

⁶¹ Borchartd (n46), p. 97.

The presumption of innocence was also raised on a similar case like the one above in the European Court of Human Rights, known as *Butler v United Kingdom*.⁶² Even though no criminal charges were filed against Mr Butler, an order of civil confiscation was issued against him for around 239.000-pound sterling without any proof, relying only on the doubt that the money had been earned because of drug-related criminal activities. Mr Butler appealed in the European Court of Human Rights, claiming that the procedural guarantees were breached and that the order of confiscation constitutes a criminal sanction imposed against him without a final conviction, directly breaching Article 6⁶³ of the European Convention of Human Rights. On the other side, the European Court on Human Rights argued that his claim does not stand. They claimed that the order of confiscation issued on a civil procedure is considered a preventive measure taken by the United Kingdom and does not represent a criminal sanction. Accordingly, the breach of the presumption of innocence proclaimed by Mr Butler is void and not even applicable in a civil procedure like this one.

The implementation of the presumption of innocence in the confiscation process does not pose a problem under Article 6 of the EU Convention on Human Rights if sufficient protections for a fair trial accompany it. The use of the presumption of innocence or changing the burden of evidence against the accused '*must be kept within fair bounds*'.⁶⁴ That said, although the presumption of innocence might not be absolute, the Court may have an option when it comes to confiscating the proceeds of crime in cases of corruption, as long as the complete reversal of the standard of proof on a defendant or accused is not permitted.⁶⁵

The right to own property is one of the fundamental rights guaranteed by the Constitution to every citizen of the Republic of Kosovo.⁶⁶ The right to own property is seen as an absolute right, still being limited by the State in different circumstances for the common good. Limitations in each democratic country come in the form of confiscation or sequestration of unjustified property or money, which can only be done in strict compliance with the Republic of Kosovo's Constitution and relevant applicable laws. At the same time, Article 1 of the European Convention on Human Rights⁶⁷, applied in Kosovo directly in accordance with Article 22 of the Constitution of the

⁶² *Case of Francis Butler against the United Kingdom*, no. 41661/98 (Strasbourg: ECtHR, 2002 - V).

⁶³ European Convention on Human Rights (n57), Article 6.

⁶⁴ *Case of Salabaku v France*, no. 10519/83 (Strasbourg: ECtHR, 1988).

⁶⁵ *Ibid.*, p. 21.

⁶⁶ Constitution of the Republic of Kosovo (n23), Article 46, par.1.

⁶⁷ European Convention on Human Rights (n57), Article 1, par.1.

Republic of Kosovo⁶⁸, guarantees the absolute right of peaceful enjoyment of one's lawful possessions.

It is believed that the confiscation of wealth without a final conviction by the courts directly violates the right to own a property as an absolute right. Most countries guaranteed that they would protect their fundamental rights throughout their system of laws in each case.

The Strasbourg Court Case Law illustrates that countries can limit the right to own property and justifies it to the country's general interest. The European Court of Human Rights has clarified that no one can be deprived of their 'peaceful enjoyment' unless it harms the public interest and contradicts international law principles.⁶⁹ The Court held the same in *Raimondo v. Italy*, stating that the confiscation order issued against the Mafia by Italy constitutes a proportionate tool to combat the organised crime and corruption, especially in this case, the Italian Mafia.⁷⁰ The Court emphasised that the confiscation order's main aim as a preventive measure was to control the property and prevent any other form of organised crime from the instrumentalities confiscated, thus preserving Italy's public interest. In several other events, the European Court of Human Rights took the same stance, including here the Case of *Arcuri and others against Italy*⁷¹ and the Case of *Agosi against the United Kingdom*.⁷² In both cases, the Court held that countries could deprive someone of enjoying their property and enact legislation that is proportionate to their general interests according to the European Convention of Human Rights.⁷³

⁶⁸ Constitution of the Republic of Kosovo (n23), Article 22.

⁶⁹ *Case of Gogitidze and Others v. Georgia*, no. 36862/05 (Strasbourg: ECtHR, 2015).

⁷⁰ *Case of Raimondo v. Italy*, Series A no. 12954/87 (Strasbourg: ECtHR, 1994), para. 39.

⁷¹ *Case of Arcuri & Three Others v. Italy* (n53).

⁷² *Case of Agosi v. the United Kingdom*, Series A no. 9118/80 (Strasbourg: ECtHR, 1986).

⁷³ European Convention on Human Rights (n57), Article 1 (2).

4.3. EU Member States approaches on civil confiscation as subjects of both EU Law and ECtHR case law

The urge to fight organised crime and corruption in the European Union creates the need to enact new laws on unjustified wealth. Albeit dangerous, and thought of infringing fundamental Human Rights, many countries are criminalising illicit enrichment, pointing that public interest is first.

The European Directive on the freezing and confiscation of instrumentalities and proceeds of crime⁷⁴ partly permits non-conviction-based confiscation, since it notes that it authorises the confiscation in a criminal proceeding if convicted guilty, and where that is not practicable, it authorises confiscation without a final conviction only in the event of the convicted person's sickness or escape. Indicating that the Directive in the word did not welcome the civil confiscation and the need for reforms in the realm of unjustified wealth to combat organised crime and corruption compelled the European Parliament and Council to adopt the Mutual Recognition of Freezing and Confiscation Orders Regulation. This regulation pushed the European Member States to strengthen their judicial cooperation to ease the mutual recognition of confiscation orders. The mutual recognition demands the Member States to cooperate in confiscation, even if the other country does not follow a particular confiscation regime as the other one does.

The European Court of Justice, in a press release, made it clear that the legal framework of the European Union does not prohibit the European Union Member States from enacting laws by which they install civil confiscation of unjustified wealth in the absence of a final conviction.⁷⁵ The communication in question resulted after the Bulgarian authorities had asked the European Court of Justice whether the Member States of the European Union may enact laws permitting the confiscation of property without a final conviction issued by the courts. The same conclusion was drawn in the case of *Agro* in 2001, where a Bulgarian Court asked the European Court of Justice whether, under EU law, they can issue an order of confiscation without a final conviction.⁷⁶

⁷⁴ Directive on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union (n21), Article 4 (2).

⁷⁵ CJEU, *EU law does not preclude Member States from providing for civil proceedings for confiscation which are unrelated to a finding of a criminal offence* (Luxembourg, CJEU Press Release no. 32/20, 2020), <https://bit.ly/2Pw9U06> [accessed 29 February 2021].

⁷⁶ Request for a preliminary ruling from the Sofiyski gradski sad — Bulgaria C- 234/18, *Agro in 2001*, no. 221/20 (Luxembourg: ECJ, 2020).

The in-rem confiscation has been adopted over time by a lot of European countries, with the main aim of fighting organised crime and corruption. One of the most well-known models of confiscations in Europe is that of Italy. In 1996, as a result of more than 20 years of discussions and struggle in politics and Italian society, Italy adopted the Law n.109/1996⁷⁷ on the destination and management of confiscated assets, concerning the public and reuse of assets confiscated from the Mafia. It is believed in Italy that the Law that soon celebrates 25 years is the best tool on disposal of the State to limit the power of the Mafia, as once judge Giovanni Falcone⁷⁸ in one of the movies made in his honour, stated: "Mafia fears much more to lose its assets and wealth than 20 years in prison – Touch their pockets, and you will destroy their basements.". The entry in force of this Law faced many problems and resistances at various State administration levels, with many high officials expressing scepticism about its possible real impact on the Mafia's power.

The situation slowly changed, only starting with the murders of judge Borsellino and judge Falcone in 1992; it became clear that the mafia biggest concern was keeping its financial power rather than worry about arrests or penal consequences of their deeds. The Law in the word came into force only after a lot of debate and the involvement of hundreds of thousands of citizens promoted by the Libera Association's commitment, which collected more than 1M signatures.⁷⁹ The Law offered the possibility of restoration of the wealth and assets to the community that was previously stolen from criminal organisations. The instrumentalities accumulated unlawfully have been transformed into common goods, employment opportunities, places of welcome and culture: a path unimaginable years ago, before the popular petition that led to the collection of more than 1 million signatures in 1995 in support of the entry in force of the new Law.

On the scent, in 2011, Italy ratified the Anti-Mafia Bill, and in 2017 it amended it by transforming it into the Anti-Mafia Law with some extended powers of confiscation. Civil confiscation in Italy, besides being a sanction when part of an offence, was used as a preventive measure for the non-conviction-based procedure. By that time, when mafias were terrorising Italy, this confiscation regime's aim was not only a person's detention but also their public prestige,

⁷⁷ ANBSC, *Law n.109/1996 on the destination and management of confiscated assets* (Italy: ANBSC Transparent Administration, 1996), <https://cutt.ly/kbwGaRd> [accessed 29 January 2021].

⁷⁸ Note: *Giovanni Falcone was a famous Italian judge, known for his successful Anti-Mafia investigations and his methods of investigations are now used throughout the world. He was murdered by the Italian Mafia in 1992 alongside with another judge and the officers accompanying him.*

⁷⁹ CAC, *The Italian experience in the management, use and disposal of frozen, seized and confiscated assets* (Vienna: Open-ended Intergovernmental Working Group on Asset Recovery, 2014), <https://bit.ly/3aKongj> [accessed 30 January 2021], p. 13.

which was considered much more invasive for them.⁸⁰ This regime of confiscation gave the responsibility and competence to the judicial police to act on the seizure. Most of the seized property in Italy is given for the public interest, and most of the times to the institutions of Italy or the army, and if it happens that the seized property is not compatible for confiscation, it is restored.

When an individual or organisation is considered to have unlawfully attained the property, the prosecutor must prove that an individual's wealth is disproportionate to their lawful earnings. After doing so, the prosecutor is presumed that that wealth is unlawful, and the burden of proof is automatically transferred to the owner of that property. If the individual cannot prove that their wealth has a legal origin, it will be confiscated immediately even if there is not found any relevant committed offence for the confiscation order altogether with the civil confiscations. In addition to the positive results achieved, nowadays, Italy's Anti-Mafia law has become a reference in Europe and internationally, besides having many problems and knots to overcome.

Most European countries, namely France, Luxembourg, Belgium, Portugal, Malta, Sweden, prefer to stick to the traditional confiscation regime, where a final conviction is compulsory to order the confiscation of unjustified wealth. Still, on the other side, a lot of the other countries such as Italy, Ireland, Slovenia, Croatia, Latvia, Poland, et cetera are considering the modern regimes of confiscation, yet, limiting the course of offences under which they order the confiscations without a final judgment from the courts. Beneficial to the effective fight against organised crime and corruption, the European Directive on the freezing and confiscation of instrumentalities and proceeds of crime urges the Member States to take adequate measures to act upon the confiscation of all the proceeds of crime.⁸¹ The successful confiscation of crime instrumentalities leaves the criminals without the means to commit another offence, making it more challenging.

One example of a successful regime of *in rem* confiscation is that of Ireland, which adopted civil confiscation in 1996,⁸² clearing the path toward a non-conviction-based confiscation. The whole civil confiscation procedure is aimed at the persons considered to have criminal behaviours and not necessarily commit a criminal offence or found guilty of one. Civil confiscation is

⁸⁰ Anna Sergi, *The Italian Anti-Mafia System between Practice and Symbolism: Evaluating Contemporary Views on the Italian Structure Model against Organized Crime* (London: University of West London, 2015), <https://bit.ly/2QCOcbp> [accessed 30 January 2021], p. 7.

⁸¹ Directive on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union (n21), Art. 2 (3).

⁸² Colin King, *Civil Forfeiture in Ireland: Two Decades of the Proceeds of Crime Act and the Criminal Assets Bureau* (London: University of Sussex Press, 2016), <https://bit.ly/3gE6mUR> [accessed 31 January 2021], p. 3.

governed by the Proceeds of Crime Act,⁸³ which functions fully out of the criminal domain of confiscation, understandingly, without the need of a criminal conviction, therefore operating fully in civil proceedings.

According to the Proceeds of Crime Act of Ireland, the Criminal Assets Bureau, which brings together the police, taxation and other authorised officials from the Bureau, with the power to report a case to the Court whenever they doubt that someone has gained illicit assets through a criminal offence, have a doubt that somehow the assets are related to a criminal offence and that the amount of the assets is higher than 5.000,00 pounds sterling.⁸⁴ After the Bureau official files the application to the Court, the Court decides whether they will seize the assets in question. If so, the burden of proof as is known in the civil procedure is transferred to the suspect, who is obliged to prove that the assets gained are of lawful origin, and if failing to do so, the Court issues the order of confiscation. The United Kingdom adopted a similar confiscation regime, which in the same way as Ireland focuses on the 'balance of probabilities and not in the standard of the 'beyond a reasonable doubt. By this, we understand that in civil confiscation, the Court decides to issue the order of confiscation whenever there are more probabilities that a particular asset has been obtained by illegal sources than the legal ones.

Further on, to identify and demonstrate the demands of the international instruments in the realm of confiscation on how they have been manifested over the times in reality, firstly, we will also set an eye on Slovenia's system of confiscation, whose system corresponds to the one of Kosovo. Slovenian Criminal Code, more precisely Article 73, stipulates that all *"the objects used or intended to be used or gained through the committing of a criminal offence may be confiscated if they belong to the perpetrator"*.⁸⁵ The indicated provision shows that the Slovenian Criminal Code permits confiscation only according to a final conviction passed on the committed criminal offence.⁸⁶ Bearing in mind all the challenges that Slovenia went through to combat organised crime and corruption as a country from the Balkan peninsula and its accession to the European Union in 2004, we may state that the Slovenian confiscation regime can be applicable to Kosovo.

⁸³ ISB, *Proceeds of Crime Act* (Ireland: Irish Statute Book, 1996), <https://bit.ly/3xqtQTI> [accessed 31 January 2021].

⁸⁴ *Ibid.*, Article 3.

⁸⁵ Assembly of the Republic of Slovenia, *Slovenian Criminal Code: Article 73 (1)*, (Ljubljana: Official Gazette, 2008), <https://bit.ly/3gGDKu0> [accessed 31 January 2021].

⁸⁶ *Ibid.*, Article 74.

As we reckon, initially, the Slovenian Criminal Code did not allow any confiscation without the Court's final conviction for an offence. Therefore, in 2011 they enacted the Forfeiture of Assets of Illegal Origin Act⁸⁷ bringing in a new regime of confiscation. With this act, Slovenia aimed to hamper the unjustified enrichment and the use of the illegal obtained property and means by their owners by confiscating these instrumentalities based on the fact that it did not correspond to their legit incomes and wealth. The confiscation procedure starts with a financial investigation done to the suspected person by the prosecution whenever they presume that objects have not been acquired from legal income sources.⁸⁸ This assumes that the prosecutor bears the burden of proof until it is determined that someone's wealth is disproportionate to his legitimate incomes, at which point the burden is transferred to the property owner who is subject to confiscation. In case that one fails to justify their wealth, the prosecutor issues the order of confiscation. Similarly, Germany permits all the charges of confiscation for white-collar crimes and terrorism without a final conviction, therefore, establishing a limited regime of confiscation.

Furthermore, as a candidate country to join the European Union, Albania permits both the criminal and civil seizure and confiscation of assets with the primary purpose of preventing and fighting organised crime and corruption. The Albanian Criminal Procedure Code emphasises that the prosecutor or the State decides on the order of seizure⁸⁹ whenever they consider it eligible throughout the criminal proceeding with a *reasonable decision*⁹⁰ issued. Meanwhile, the Criminal Code sets out the instrumentalities which are the object of confiscation during a criminal proceeding.⁹¹

On the other hand, as a preventive measure against organised crime and corruption, Albania adopted the civil confiscation regime, allowing confiscation *in absentia* of a criminal conviction

⁸⁷ Katja Rejec Longar, *Analysis of the Legal Aspects of Illegal Asset Recovery in Slovenia* (Varstvoslovlje: Journal of Criminal Justice and Security, 2020), <https://bit.ly/3vpKctI> [accessed 07 January 2021], p. 434.

⁸⁸ Note: Article 5, Assets of Illegal origin: (5.2) *'If there is a gross disproportion between the amount of assets and income minus taxes and contributions paid by the persons referred to in the preceding paragraph during the span of time in which the assets were obtained, the assets are considered not to have been acquired from legitimate sources of income, that is, in a lawful manner'*.

⁸⁹ Assembly of the Republic of Albania, *Criminal Procedure Code of Albania*: Article 270 (Tirana: Official Gazette, 1995), <https://bit.ly/3npPzpH> [accessed 30 January 2021].

⁹⁰ Note: Article 274 of the Criminal Procedure Code considers that a decision of sequestration is reasonable: *'When the court with the application of the prosecutor see that there is a danger that free possession of an item connected to the criminal offence may aggravate or prolong its consequences or facilitate the commission of other criminal offences, therefore, ordering the sequestration'*.

⁹¹ Assembly of the Republic of Albania, *Criminal Code of Albania*: Article 36 (Tirana: Official Gazette, 1995), <https://bit.ly/3sWLdYg> [accessed 30 January 2021].

through its Anti-Mafia Law. Inspired by the Italian Anti-Mafia Law, the Law on Prevention and Fighting of Organized Crime, Trafficking, Corruption and Other Crimes Preventing Measurement of Property⁹² highlights that to prove that property or other instrumentalities are attained by legal sources, the person against whom it is requested the confiscation has to show and prove that his/her wealth is legal, imposing upon them the burden of proof.⁹³ Albania's Anti-Mafia Law considers the seizure of instrumentalities as preventive measures to be taken, and if a person finds it as illegal, through the right of appeal⁹⁴ and the right of a fair trial (providing them with sufficient time to prove the legality of their seized instrumentalities).

The seized instrumentalities lie under the state budget, controlled by the Agency for the Management of Confiscation Assets until a final decision is taken. This Agency is responsible for the seizure and confiscation of instrumentalities, which go to the state budget, a special fund for preventing other crimes, or the Agency's budget.⁹⁵ If the property owner proves that the confiscated instrumentalities were obtained in a lawful manner and sources, the Agency compensates the instrumentalities taken. If not possible (in the event of being sold or of the loss of value), it does it with the other instrumentalities that were previously confiscated in other cases. Albania's approach seems to be successful and appropriate with a view to the efficient fight against organised crime, corruption, and particularly the phenomenon of unjust enrichment.

⁹² Assembly of the Republic of Albania, *Law 10/192 on the Prevention and Striking of Organized Crime, Trafficking, Corruption and other Crimes Preventing Measurement of Property* (Tirana: Official Gazette, 2009), <https://bit.ly/3xtcuoL> [accessed 30 January 2021].

⁹³ *Ibid.*, Article 21.

⁹⁴ Note: Article 27 (2) of the Anti-Mafia Law stipulates that: '*An appeal may be taken to a court of a higher level against a decision of the court for the confiscation of assets according to the time periods and conditions provided in the Code of Criminal Procedure*'.

⁹⁵ GRETA, *Reply from Albania to the Questionnaire for the evaluation of the implementation of the Council of Europe Convention on Action against Trafficking in Human Beings by the Parties* (Strasbourg: Council of Europe, 2018), <https://bit.ly/3dULneF> [accessed 30 January 2021], p. 10.

5. Analysis of compatibility

What remains for us to do is to delve into the analysis of the compatibility of Kosovo's civil confiscation regime with European Law.

The improvement of implementation for the current regime of confiscation in Kosovo seems unrealistic and inefficient. The low number of confiscations will undoubtedly continue to be the same without a new regime of confiscation, which would clear the path toward civil confiscation. The current system will continue to point out all its legal and procedural shortcomings due to the non-harmonisation of the three main pillars of confiscation. None of the laws, including the Criminal Code of the Republic of Kosovo, the Criminal Procedure Code, as well as the Law on Extensive Powers for Confiscation of Assets Acquired by Criminal Offenses, do not permit the confiscation of unjustified wealth in a civil procedure and without a final conviction from the Court.

For these reasons, Kosovo should consider adopting a non-conviction-based regime of confiscation, always considering the Human Rights and other procedural guarantees to raise the number of final confiscations to fight corruption and organised crime. This would open a new opportunity, that besides the traditional regime of confiscation already installed in Kosovo, there will be another civil confiscation system that allows a confiscation without a final conviction and which would come into play only after the total exhaustion of the traditional one. The Criminal Code of the Republic of Kosovo, the Criminal Procedure Code, and the Law on Extended Powers for Confiscation of Assets Acquired by Criminal Offence would operate in the same way as before for the traditional confiscation, with an increased harmonisation on their implementation. In contrast, the new Law on civil confiscation would operate apart and clearly in different confiscation domains.

The suggestion of following in the footsteps of other European countries and those in the Balkans which have already adopted the *in-rem* confiscation systems would bring hope among the citizens of Kosovo, and most importantly, would assist the increase of the final confiscations with the main aim of fighting corruption and organised crime.

Based on the examples above and those in previous chapters with the conclusions we made upon problems raised on the current regime of confiscation in Kosovo, to deter the criminal organisations from keeping the profits gained by illegal activities and finance their future

operations, we can come up with the idea of adopting a new law on confiscation of unjustified wealth, with the civil regime confiscation in place, based on the steps of asset confiscation addressed by the European Commission Working Paper, as follows:

1. Identification - Illegal assets can only be confiscated after they have been found, regardless of the terms of the confiscation order.
2. Wealth preservation - Since obtaining a confiscation order takes time, there must be safeguards in place to protect assets in the meantime, with freezing and seizing as the most used methods.
3. Confiscation - A confiscation order allows stolen proceeds to be lawfully recovered.
4. Execution - A confiscation order is carried out against specific properties.
5. Redistribution - Funds recovered may be returned to victims or underserved communities, or they may revert to the Government.⁹⁶

The new Law would significantly improve confiscation's general functioning, prompting a successful fight against corruption and organised crime. At the same time, we shall consider the constitutional constraints already in place, as the Constitution of the Republic of Kosovo states that the State Prosecutor is an autonomous agency with jurisdiction and responsibility for prosecuting people accused of criminal offences and other legal violations,⁹⁷ which article does not grant the power to the prosecutor to initiate an in-rem confiscation and would contradict the constitutional privileges already in place.

To clear out possible confusions and keeping in mind the difficulties of making constitutional amendments, a sustainable solution would be that of adding scattering civil confiscation competency to the Tax Administration of Kosovo. Using the Tax Administration as a tool against those who get rich overnight, with some extra scrutiny from the other institutions and especially the Ministry of Finance, might bring some light in the realm of unjustified wealth. A possible change on the Law of Tax Administration authorising this institution with full power on confiscation orders would prompt new techniques of fighting organised crime and corruption. Whenever the institution would consider that a person's wealth is in disproportion with his or her

⁹⁶ EC, *Proposal for a directive of the European Parliament and the Council on the freezing and confiscation of proceeds of crime in the European Union* (Brussels: European Commission, 2012), <https://bit.ly/2S7c4UZ> [accessed 31 January 2021], p. 9.

⁹⁷ Constitution of the Republic of Kosovo (n23), Article 109 (1).

legal incomes, it would request from them to justify in detail the wealth in question and at the same time file an application to the State Prosecution. If the State Prosecution concludes that the filed application does not have to do with any criminal offence, the Tax Administration would be authorised based on the balance of probabilities to file an order of confiscation to the Court, as the last mean against a suspected person. The Court, throughout a judicial proceeding, with the burden of proof given upon the Tax Administration of Kosovo and according to the balance of probabilities, decides whether the assets in question shall be seized or not. If so, after the courts choose to seize the assets, the burden of proof is automatically transferred to the suspect, which is obliged to prove that the assets that have already been seized by the Tax Administration are obtained by legitimate sources.

This method of confiscation would result in a higher number of final confiscations, always keeping in mind the risk that disputed assets that have already been seized or confiscated may be shown to be from legitimate sources during the judicial proceedings, in which case the Tax Administration would ensure that the assets were returned, and if that was not possible, it would be required to make a total compensation. Given the large volume of final confiscations based on the likelihood of being illegal and the critical importance of the confiscation in stamping out corruption and organised crime, the threats are negligible.

6. Concluding remarks

Confiscation of unjustified wealth is equal to striking the roots of criminality. It is the most critical issue when it comes to fighting organised crime and corruption. Having a strong confiscation regime may be the strongest weapon against such criminal activities which undermine the well-being of society. In Kosovo, it has been stressed and widely accepted that corruption is widespread and concentrated among senior high officials – making them rich at the expense of the majority. As the saying goes, "the richer get rich, and the poor get poorer". Under such circumstances, with this alerting level of corruption, as sometimes is referred to as "endemic corruption", it is crucial that an efficient system of confiscation of unjustified wealth is established in the Republic of Kosovo. It goes without saying or debating that there is an urgent need for the Republic of Kosovo to re-evaluate its existing system of confiscation of unjustified wealth and focus its energy on building an effective confiscation regime to combat organised crime and corruption. However, what is even more important is that a system of confiscation is designed where not only fighting of organised crime is being made possible but also preventive measures are put in place.

This research has enlightened that confiscation of unjustified wealth is a hot topic of discussion in every country, including the Republic of Kosovo. A type of criminal confiscation regime is currently applicable in the Republic of Kosovo. As this paper tried to argue, the criminal confiscation regime – within the Republic of Kosovo – is accompanied by a plethora of challenges and obstacles. The current legal framework foresees the existence of a final conviction order as a precondition to clear the way so the confiscation of unjustified wealth can be carried out. Such a practice is deemed ineffective, and this is shown by the very fact that seizures and/or confiscations remain low in numbers – with only one case of where the Law on Extended Powers for Confiscation of Assets has been applied! Such a situation leads to the conclusion that reviewing this regime is inevitable to tackle criminality and unjust enrichment.

Judging from the experience of European countries so far and according to the European Union Law, the civil confiscation regime seems to have become quite efficient and somehow trendy. So far, European countries such as Italy, Bulgaria, Slovenia, Germany, Ireland, and the United Kingdom have established the said confiscation regime, thus providing us with sufficient experience to be followed to maximise the success of establishing such a confiscation regime. At

the same time, European Institutions are persistently recommending the switch from a conviction-based system to a non-conviction-based-system. In this manner, the burden of proof would be shifted from the prosecution to the defendant – through a civil law procedure rather than criminal proceedings. It is imperative that Human Rights and freedoms are carefully and thoroughly attended to when considering confiscation regimes. Protecting human rights and freedoms, in this context, implies protecting the victims of criminality through the – lawful – confiscation of the proceeds of crime. It is indisputable that the non-conviction-based-system, where the burden of proof is put on the defendant, is more efficient than the conviction-based system where the defendant does not need to prove anything. The conviction-based system makes things much harder in terms of proving that said wealth has been illicitly gained, whereas, under a non-conviction system, all you need to do is wait for the allegedly illicit wealth to be justified by the one who possesses it – if that is not done then it can be confiscated. The non-conviction confiscation system became the current European and International standard on the confiscation of unjustified wealth. Therefore, the Republic of Kosovo shall embrace these standards. Illegally obtained wealth shall never be considered private – and thus enjoy legal protection – because it was never obtained lawfully. Switching from the traditional (criminal) confiscation regime to the modern (civil) confiscation regime as a non-conviction-based-system where the burden of proof is on the defendant through civil law procedure shall be the right approach toward successfully combating crime.

However, we must remain very much aware – if not alerted – by the fact that, even though corruption is more effectively being combated by a non-conviction-based system, the placing of the burden of proof on the suspect does pose a major risk on the issue of violating the said person's rights and infringe his/her fundamental rights. As a result of this, although countries worldwide have shown deep interests and solid will in fighting corruption and organised crime, a considerable number of them are refraining from enacting new laws that apply the non-conviction-based-system. Having in mind such complexities, alternative initiatives – such as a possible amendment of Tax Administration Law to prompt the administration with civil confiscation powers – can effectively address the unjustified wealth problems without posing that much of a risk for possible infringements of human rights. The Government of Kosovo shall examine these alternative ways as part of their ongoing anti-corruption efforts and shall make sure to safeguard fundamental rights.

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