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Conversion of property obtained through criminal activity to the state income as a way of restoring social justice: assessing the prospects of hybrid proceedings

A.A. Timoshenko

University of the Prosecutor`s Office of the Russian Federation, Moscow, Russia

ABSTRACT

The author analyzed the current criminal, criminal procedure and other related legislation on the issue of determining the current state of the procedure for the conversion of property obtained by criminal means into state ownership.

Particular attention is paid to the development of legislation on the confiscation of property, as well as special regulation of mechanisms for undermining the material basis of terrorism, extremism and corruption.

Taking into account the work done, a conclusion was made about the existence of hybrid mechanisms in relation to criminal procedure for the conversion of property obtained from tortious manifestations into the ownership of the Russian Federation.

The author comes to the conclusion about the need for the purposes of restoring social justice in a society suffering from crime, to continue the development of hybrid proceedings, including through the seizure of "unexplained" income of citizens.

Keywords: confiscation; punishment; conversion of property to the state ownership; hybrid proceedings.

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Обращение в доход государства имущества, полученного в связи с преступной деятельностью, как способ восстановления социальной справедливости: оценка перспективности гибридных производств

А.А. Тимошенко

Университет прокуратуры Российской Федерации, Москва, Россия

АННОТАЦИЯ

Проведен анализ действующего уголовного, уголовно-процессуального и иного смежного законодательства по вопросу определения современного состояния процедуры обращения в собственность государства имущества, полученного преступным путем.

Особое внимание уделено развитию законодательства о конфискации имущества, а также специального регулирования механизмов подрыва материальной основы терроризма, экстремизма и коррупции.

С учетом проделанной работы сделан вывод о наличии гибридных по отношению к уголовно-процессуальным механизмов обращения в собственность Российской Федерации полученного от деликтных проявлений имущества.

Автор приходит к выводу о необходимости для целей восстановления социальной справедливости в обществе, страдающем от преступности, продолжить развитие гибридных производств, в том числе за счет изъятия «необъяснимых» доходов граждан.

Ключевые слова: конфискация; наказание; обращение в собственность государства имущества; гибридные производства.

Как цитировать

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No doubt, it is important to achieve socially desirable results from any counter-crime efforts—but what are the prospects of such efforts? Can we defeat crime?

In defining the purposes of criminal proceedings, the Soviet criminal procedure law directly indicates that it is required to seek for prevention and eradication of crime (Article 2 of the RSFSR Criminal Procedure Code[1]).

On the contrary, Article 6 of the Russian Criminal Procedure Code (2001) does not define the ultimate goal of criminal procedure at all, noting only the determination to ensure that the guilty shall be punished in a just manner.

However, Article 43 of the Russian Criminal Code calls for recognition of social justice restoration as the key goal of criminal punishment.

In criminal studies, it is widely believed that it is impossible to eliminate criminal deviations in the society. It calls for social control over crime, which is achieved, *inter alia*, through involvement of civil society institutions and the maximum possible mitigation of retaliatory acts against an individual [1].

Largely due to the development of such approaches validated by studying social reality, laws have increasingly used more prudent wordings.

It should be noted that in concept documents of Russian criminal policy, the term *crime countering* is used to define the subject of law enforcement efforts as a response to criminal behavior.[2]

In addition, there are special laws aimed at developing a system for countering certain types of deviant behavior, including Federal Law No. 273-FZ *On Countering Corruption,* dated December 25, 2008[3] (the Anti-Corruption Law), and Federal Law No. 114-FZ *On Countering Extremist Activities*, dated July 25, 2002.[4]

It is worth noting that in some regulations, a more "rigorous" term is still used, i.e. the "fight against crime."[5]

However, from the philosophical point of view, any law enforcement efforts imply a certain element of offensiveness, which is impossible without a meaningful goal of such efforts. In his Article analyzing philosophical foundations of the fight against crime, Golik mainly asserts the primacy of thought in relation to action, including any legal action [2]. One can say that it is the thought, the vision of a goal that determines the specific existence of law in the form already interpreted for specific circumstances of law enforcement.

In this regard, it is specifically necessary to define a very clear goal of criminal procedure before we can expect its effective implementation. Flirting with the idea of adversarial proceedings and protection of human and civil rights and freedoms when defining the purpose of criminal proceedings involves abandonment of the offensiveness of investigating authorities and officials responsible for criminal prosecution.

Obviously, we do not call for ignoring a system of guarantees in criminal procedures, but we should not forget about the key function of procedural law, i.e. to ensure implementation of protective provisions of substantive law, especially as this matter has already been elaborated in legal monographs [3;4].

With any approach, it is important to point out to employees of competent authorities that criminal behavior shall not be ignored, it is required to continue to analyze its causes and consequences, prevent it in every possible manner, and assess the effects of behavior that is harmful to society.

It is in connection with this "high" goal that we can expect to shape an understanding of a general state policy path for law enforcement officers, which will certainly save the state's efforts to eliminate costly legal procedures.

The importance of this assertion is upheld by the recent history of laws on asset forfeiture as part of the criminal law implementation.

At all times, criminals were punished not only by personal oppression, but also by asset-related penalties.

For example, we can refer to *Russkaia Pravda*, a monument of ancient Russian law: its Brief Edition provided for a fine for murder of a free person at 40 grivnas (the cost of a herd of 50 cows) [5, p. 12]. One of the most severe penalties was deemed to be "wholesale pillage" consisting of expulsion of the guilty person and enslavement (subjection) of his wife and children after forfeiture of the family's assets. This penalty was imposed under the Extended Edition of *Russkaia Pravda* for robbery not caused by any personal enmity to the victim [5, p. 17].

In the Soviet Union, forfeiture of assets was used as a penalty and could be applied to all assets of the convicted person. Hence, it is classified as full and partial.

Under Article 50 of the RSFSR Criminal Code of 1922,[6] it could complement any punishment, even if it was not specified in the Special Part of the Code.

This regulation was repeated in the RSFSR Criminal Code of 1926;[7] however, in 1927, in accordance with the Consolidated Law on Seizure and Forfeiture of Assets

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1 Approved by the Supreme Council of the RSFSR on October 27, 1960 // ConsultantPlus Law Assistance System.

2 Concept of Countering Terrorism in the Russian Federation (approved by the President of the Russian Federation on October 05, 2009) // ConsultantPlus Law Assistance System; Concept of Development of the National System of Anti-Money Laundering and Financing of Terrorism (approved by the President of the Russian Federation on May 30, 2018) // ConsultantPlus Law Assistance System.

3 ConsultantPlus Law Assistance System.

4 ConsultantPlus Law Assistance System.

5 Article 10 of Federal Law No. 40-FZ ***On the Federal Security Service***, dated April 03, 1995 // ConsultantPlus Law Assistance System; Executive Order of the President of the Russian Federation No. 567 ***On Coordination of the Activities of Law Enforcement Agencies in the Fight Against Crime***, dated April 18, 1996 // ConsultantPlus Law Assistance System, etc.

6 Enacted by the Decree of the All-Russian Central Executive Committee dated June 01, 1922 // ConsultantPlus Law Assistance System.

7 Enacted by the Decree of the All-Russian Central Executive Committee dated November 22, 1926 // ConsultantPlus Law Assistance System.

approved by the Resolution of the All-Russian Central Executive Committee of the Council of People's Commissars of the RSFSR dated March 28, 1927, the court could impose forfeiture as a penalty for a crime, if that measure was specified in the relevant Article of the criminal code.

It is worth noting that the RSFSR Criminal Code of 1960[8] and the Russian Criminal Code of 1996 provided for forfeiture as an additional penalty that could be applied to all assets of the convicted person, with certain exceptions provided by civil procedural laws.

In addition, any items and valuables directly acquired through crime (special forfeiture) were also subject to forfeiture to the State.

The original version of Article 52 of the Russian Criminal Code with a similar regulation was applied prior to adoption of Federal Law No. 162-FZ *On Amendments to the Criminal Code of the Russian Federation*, dated December 08, 2003,[9] which excluded it from criminal laws.

The Memorandum to the relevant draft law notes low efficiency of forfeiture, which does not align with the general idea of humanizing criminal liability laws. In this regard, a fine was proposed instead as an additional penalty. However, Article 81 of the Russian Criminal Code maintained forfeiture of the assets acquired through crime (previously considered as special forfeiture).[10]

Chapter 15.1 of the Russian Criminal Code, introduced under Federal Law No. 153-FZ *On Amendments to Certain Laws of the Russian Federation Due To Adoption of the Federal Law On Ratification of the Council of Europe Convention on Prevention of Terrorism and the Federal Law On Countering Terrorism*, dated July 27, 2006,[11] provides for forfeiture of assets acquired through crime to the State under a guilty verdict based on specific provisions of that chapter.

It is worth noting that the law refers to a possible application of forfeiture to money, valuables or other assets gained by the use of assets acquired through crime (the list of relevant crimes is also provided by the law).

Thus, the applicable forfeiture procedure, when compared to the Soviet and early Russian regulations, has been curtailed following its limited application both due to the requirement to determine the criminal nature of the original source of assets and application of the rules on special qualification of criminal acts based on the list in Clause a, Part 1, Article 104.1 of the Russian Criminal Code, and the Note to it.

A special case is the provision on possible forfeiture of the assets used as part of terrorist acts or intended for financing of terrorism, extremist activities, an organized group, an illegal armed group, a criminal network (criminal organization), and activities against the national security of the Russian Federation in Clause c, Part 1, Article 104.1 of the Russian Criminal Code.[12]

An equivalent amount of money may also be forfeited in case of disposal of assets subject to forfeiture.

However, Article 104.3 of the Russian Criminal Code prioritizes the recovery of damages caused by a crime over a forfeiture judgment.

Analyzing the above provisions of the law, we reach the conclusion that the institution of forfeiture has been curtailed as compared to the institution existing in the Soviet Union. Forfeiture of all assets (with minor exceptions) to the Russian Federation is not permitted.

However, a special study on development of asset forfeiture laws emphasizes its particular importance in restoring social justice and eliminating an economic basis of crime [6, p. 80], which makes sense considering the influence of this legal institution on social relations.

The extent of this justice is difficult to determine. In any case, these relations are replete with opportunities for regulation based on mere discretion.

The practice of combating phenomena most dangerous for society still demonstrates the need in oftentimes harsh policies of proprietary sanctions in relation to involved persons.

Thus, Article 18 of Federal Law No. 35-FZ *On Countering Terrorism*, dated March 06, 2006,[13] provides for a possible forfeiture of assets owned by a person involved in terrorist activity and his or her immediate family members, relatives and affiliated persons, and acquired through terrorist activity, including the assets acquired for proceeds from such activity, to the Russian Federation and persons affected by a terrorist act as a recovery for damage caused by terrorist activity.

It is worth noting that if relatives and affiliated persons cannot prove the legal origin of the assets, such assets may also be forfeited to the State by the prosecutor's office under a judgment issued in civil proceedings based on the motion of the prosecutor who verified their origin.

In accordance with the provisions of Article 9 of Federal Law No. 114-FZ *On Countering Extremist Activities*, dated July 25, 2002,[14] the assets of a public or religious association are subject to forfeiture to the Russian Federation upon its liquidation after satisfying its creditors' claims.

However, these laws do not associate the above asset-related penalties to asset forfeiture in criminal proceedings.

A rather profound potential for the application of alternative seizure procedures aimed at forfeiture of assets acquired through activities prohibited by law (including crimes) to the Russian Federation is conveyed in the Anti-Corruption

[8] Approved by the Supreme Council of the RSFSR on October 27, 1960 // ConsultantPlus Law Assistance System.

[9] ConsultantPlus Law Assistance System.

[10] Memorandum to the Draft Federal Law On Amendments to the Criminal Code of the Russian Federation // ConsultantPlus Law Assistance System.

[11] ConsultantPlus Law Assistance System.

[12] In particular, such acts include offer and receipt of bribes.

[13] ConsultantPlus Law Assistance System

[14] Ibid.

Law and Federal Law No. 230-FZ *On Monitoring of Expenses of Public Officials and Other Persons and Their Income*, dated December 03, 2012.[15]

Public officials and persons employed by organizations listed in the law and by-laws shall disclose their financial standing. If they cannot prove legal origin of their income or do not declare their assets status, such assets are subject to forfeiture to the State.

The quintessence of application of these legal provisions was Resolution No. 49-P of the Constitutional Court of the Russian Federation *On the Case of Constitutionality Test of Articles 195 and 196; Clause 1, Article 197; Clause 1 and Paragraph 2, Clause 2, Article 200; Paragraph 2, Article 208 of the Civil Code of the Russian Federation as requested by the Krasnodar Regional Court,* dated October 31, 2024.[16]

This document states the position of the Constitutional Court of the Russian Federation, which has established the imperfection of the applicable anti-corruption laws and defined some principles for combating unlawful enrichment of corrupt officials.

The main points can be summarized as follows:

1. Public officials shall be prepared to be subject to some restrictions, including those affecting their legitimate interests.

2. The burden of proving the legal origin of the assets rests with the officials.

3. Application of general limitation periods for claims related to the forfeiture of assets under the anti-corruption laws does not comply with principles of countering illicit enrichment protected by the Constitution, which are characteristic of a state governed by the rule of law.

4. Augmentation of assets acquired for proceeds that have not been proved in accordance with anti-corruption laws does not prevent the court to uphold claims for its full forfeiture to the State.

5. Claims filed under anti-corruption laws as part of civil proceedings do not undermine their public law nature.

The analysis shows that state policy on combating unlawful enrichment as a result of various crimes has been significantly expanded recently.

Perception of the institution of forfeiture in criminal laws is special and, if necessary, may be supplemented by its full form.

In civil proceedings, forfeiture of assets that could have been acquired through crime to the State actually complements the criminal procedures of the restorative justice approach and, in this sense, is hybrid because it combines common elements of criminal prosecution and meets the criteria of general civil proceedings.

These phenomena should be viewed as nothing but positive.

Indeed, if we admit that the goal of eradicating criminal phenomena in society is unattainable, we must recognize the utmost importance of any public activity aimed at preserving integrity of a society stricken by the plague of crime, despite the limited means of combating crime.

When designing any schemes to evade the law, the authors of the designs shall remember that an outstanding Russian civil law scholar Pokrovsky noted: "In any society, whether governed by a monarchy or a republic, the power of the state over an individual is absolute and the latter's freedom may not interfere with this special status of a public authority" [7].

When assessing the prospects of the inter-sectoral institution of forfeiture of criminally acquired assets to the State, we can acknowledge the prospects of its hybrid application, including in relation to the assets allegedly acquired for criminal proceeds.

Now, there is a question whether it is possible to assess the prospects of any person's ownership of assets, if their legal origin is not proven.

In foreign countries, this practice is already in place, and the assets of "unexplained origin" shall be at least "frozen" and, following a special judicial procedure, forfeited to the State. This practice has become common in the UK, Australia, Colombia and some other countries [8, pp. 78–79].

In this context, we are suggested to make a judgment on involvement of such person in the money laundering. However, due to objective complexity associated with the lack of evidence of unlawful activity of the person, it is not possible to put forward a specific charge under Articles 174, 174.1. The way out may be through applying the above hybrid procedures provided by special regulations, which is a consensual decision to use approaches alternative to criminal procedures in the context of the quest for social justice.

Another thing is that such assets shall be forfeited to the State with the prioritized protection of the rights of crime victims.

In this regard, criminal procedure laws require a special provision on the priority of a civil law claim filed in criminal proceedings in relation to other penalties. Accordingly, the State could provide for the compensation of damages to crime victims from the federal budget, if the assets, which could be used to recover damages from the crime, had been previously forfeited to the State under hybrid procedures.

It seems that the institution of hybrid proceedings on forfeiture of unlawfully acquired assets to the State will develop, and the conflict of the private and the public will lead to extensive academic debates.

[15] Ibid.

[16] Ibid.

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AUTHOR INFO

Andrey A. Tymoshenko, Cand. Sci. (Jurisprudence), associate professor; ORCID: 0000-0003-2562-0022; e-mail: antim1@yandex.ru

ОБ АВТОРЕ

Андрей Анатольевич Тимошенко, канд. юрид. наук, доцент; ORCID: 0000-0003-2562-0022; e-mail: antim1@yandex.ru