Revue des Sciences Humaines Vol –35 N°4, December 2024– pp. 493-498

The role of the criminal judiciary in recovering criminal proceeds from corruption crimes

Received: 30/04 /2024; **Accepted:** 09/10/2024

Imene BOUGUESSA[1], Yahia BEDAIRIA[2]

1 مخبر التحولات القانونية والسياسية، كلية الحقوق، جامعة جيجل، الجزائر. imene.bouguessa@univ-jijel.dz
2 كلية الحقوق، جامعة تبسة، الجزائر. yahia.bedairia@univ-tebessa.dz

Abstract

The Algerian legislator has approved a number of legal mechanisms that the criminal judge resorts to with the aim of recovering assets obtained from corruption crimes. These mechanisms have varied, some of which are related to confiscation and others related to freezing and seizure, as the assets looted by corruption constitute a serious problem for the leakage of state funds, as these lead to Financial losses affect the national economy and deplete development resources. Most of the legislation has sought to make efforts at the international level in order to create mechanisms to implement asset recovery operations once they are transferred abroad, and to focus on tracking financing and eliminating obstacles that prevent the recovery of these funds.

Keywords

corruption;
corruption crimes;
seizure freezing;
recovering criminal;
asset recovery.

دور القضاء الجزائي في استرداد العائدات الإجرامية من جرائم الفساد

ملخص

أقر المشرع الجزائري جملة من الآليات القانونية التي يلجأ إليها القاضي الجزائي بهدف استرداد الموجودات المتحصل عليها من جرائم الفساد، وقد تنوعت هذه الآليات فمنها ما يتعلق بالمصادرة ومنها ما يتعلق بالتجميد والحجز، حيث تشكل الموجودات المنهوبة بفعل الفساد مشكلة خطيرة لتسرب أموال الدولة، إذ تؤدي هذه الخسائر المالية إلى المساس بالاقتصاد الوطني واستنزاف موارد التنمية، وقد سعت غالبية التشريعات إلى بذل الجهود على الصعيد الدولي من أجل خلق آليات لتنفيذ عمليات استرداد الموجودات متى تم تحويلها إلى الخارج، والتركيز على تتبع التمويل والقضاء على العقبات التي تحول دون استرداد هذه الأموال.

الكلمات المفتاحية

الفساد؛
جرائم الفساد؛
الحجز والتجميد؛
العائدات الإجرامية؛
استرداد الموجودات.

* Corresponding author. E-mail: dr.bouguessa@gmail.com

Doi: https://doi.org/10.34174/0079-035-004-041

E-ISSN: 2588-2007 ---Journal homepage: http://revue.umc.edu.dz/index.php/h

I- Introduction :

Asset recovery in corruption crimes is considered a fundamental aspect and a necessary requirement in the fight against corruption and its reduction. Its goal is to deprive the perpetrators of their ill-gotten gains and ensure that they do not benefit from this crime.
Given the significance of the topic of mechanisms for recovering assets obtained from corruption crimes, we find ourselves facing the following questions:
How effective are the appropriate legal mechanisms for the process of asset recovery in corruption crimes?
What is meant by asset recovery?
What is the role of international cooperation in the control and confiscation of assets obtained from corruption?
How are confiscation orders issued by foreign judicial authorities executed?
We will attempt to answer these questions through this study using an analytical approach in presenting and studying relevant legal texts. This will be done based on two main axes:
The first axis: The concept of asset recovery.
The second axis: Mechanisms for recovering assets obtained from corruption crimes.

I.1. First Subtitle: The concept of asset recovery:

The term "asset recovery" is mentioned in all international agreements related to crimes involving financial aspects such as organized crime, money laundering, terrorist crimes, and corruption crimes. Committing these crimes enables criminals to obtain significant illegal proceeds, and it is necessary to intervene to deprive them of these proceeds because the punishment includes confiscation. This is achieved through asset recovery obtained from the committed crimes.
Recovering embezzled funds due to corruption crimes is a serious issue as it leads to the leakage of state funds, resulting in financial losses that weaken the concept of good governance. It also undermines the state's ability to provide basic services and encourages sustainable economic, social, and political development. Furthermore, it depletes developmental resources.
Therefore, most comparative legislations aim to recover these assets by focusing on tracking financial transactions on one hand and facilitating all legal obstacles hindering this process on the other hand.
Studying asset recovery is a modern and complex procedure within the field of criminal legal procedures, whether at the national or international level. Let's delve into the study of the concept of asset recovery by examining its definition, importance, and types.

1. Definition of Asset Recovery: This procedure is referred to by various names such as "asset recovery," "asset restitution “and” recovery of embezzled funds," all of which carry the same meaning. The term "asset recovery" was mentioned in Article 51 of the United Nations Convention against Corruption as a fundamental principle. The convention obliges its member states to provide each other with the greatest possible assistance in this area. However, many cases of corruption worldwide have shown that successful legal prosecutions, sufficient penalties, and the return of embezzled assets to their rightful owners still fall short of the desired level.
International agreements and domestic laws have sometimes used the term "funds," and at other times, they have used the term "revenues." Some agreements have also employed the term "proceeds of crime." However, they all agree that these terms refer to the profits gained by criminals through the commission of unlawful acts.
In Algerian legislation, in paragraph "Z" of Article 2 of Law No. 06-01 concerning the prevention and combating of corruption, the term "criminal proceeds" is defined. Asset recovery is defined as all properties acquired directly or indirectly as a result of committing a crime. This definition aligns with the one mentioned in paragraph "H" of Article 2 of the United Nations Convention against Corruption.
Indeed, asset recovery is defined by a set of judicial and non-judicial measures, as well as the efforts made by countries to recover funds that have been siphoned away from their wealth and resources due to corruption. These funds may have been transferred to foreign countries or remained within the same country.
Therefore, it can be said that the term "asset recovery" was first introduced in the United Nations Convention against Corruption. The aim of including it was to establish legal rules for regulating the mechanisms and provisions of recovery to reclaim assets that have been transferred to foreign countries. This issue is not only an international matter but also a domestic one, related to the domestic laws of each country.
Criminal proceeds are all properties acquired directly or indirectly from the commission of a crime. The process of recovering these funds can be defined as a set of procedures resulting from a judicial decision to seize illicitly acquired assets resulting from corruption crimes by the requesting state through international cooperation and mutual legal assistance with the aim of repatriating these funds from abroad.

2-The Importance of Asset Recovery:

Asset recovery is of significant importance for several reasons:
The benefit of the asset recovery report in corruption cases lies in the following:

- Asset recovery is considered a deterrent measure because it eliminates the incentive that drives individuals to commit money laundering and financial crimes in general. It reinstates justice in both local and international arenas by imposing penalties on any corrupt behavior.
- It represents a collectively agreed-upon acknowledgment of the criminal and corrupt nature.
- Asset recovery obtained from corruption-related crimes and international cooperation in legal assistance are essential tools in combating the illicit money laundering phenomenon, given its serious criminal nature. This is particularly significant as many forms of corruption are now carried out by organized criminal groups, making them transnational crimes.

Asset recovery serves as a practical foundation for international judicial cooperation and contributes to achieving economic development.

II– Second Subtitle: Mechanisms for recovering assets obtained from corruption crimes.:

focuses on the established mechanisms for recovering assets obtained from corruption-related crimes. Asset recovery is considered a fundamental principle among the efforts to enhance international anti-corruption measures under Article 51 of the United Nations Convention against Corruption. Let's delve into the established mechanisms for asset recovery from corruption crimes, discussing the role of banks and financial institutions in detecting corruption crimes, direct asset recovery measures, international cooperation in tracking and confiscating funds obtained through corruption, and the execution of confiscation orders issued by foreign judicial authorities in four consecutive points.

1-The Role of Banks and Financial Institutions in Detecting Corruption Crimes: Banks are central hubs for the circulation of illicit funds. Given the complexity, speed, and interconnection of their financial operations, banks play a crucial role in concealing illicit funds and conferring legitimacy upon them. This role becomes more apparent with the advancement of modern banking operations utilizing technology. Modern electronic services can be misused in violation of the law because most of these transactions occur automatically. The ability to monitor them requires effort, time, dedication, and costs. Additionally, laws that grant confidentiality to bank accounts and make them accessible only under specific conditions add an extra layer of complexity for banks in this regard.

Many banks have prioritized the process of returning embezzled funds to their original countries, often finding innovative ways to enhance their capabilities in effectively tracking and recovering these funds. They have established specialized task forces and sometimes working groups among multiple agencies to respond to requests for mutual legal assistance regarding asset recovery. These efforts include providing relevant information and taking urgent measures to freeze funds.

Article 58 of the Anti-Corruption and Anti-Bribery Law stipulates that the overall mission of banks and financial institutions revolves around the task of thorough examination they must conduct when opening accounts for natural or legal persons, or when handling these accounts or recording transactions related to them. Banks and financial institutions maintain comprehensive records covering all accounts and customer-related transactions, with a minimum retention period of five years from the date of the last recorded transaction.

Within the framework of institutional adoption and in the interest of preventing the transfer of corrupt proceeds and exposing them, Algerian law does not allow the establishment of banks in Algerian territory that have no physical presence and are not part of a financially regulated group. Furthermore, Algerian banks are not permitted to establish relationships with foreign financial institutions that would allow the use of their accounts by banks that have no physical presence and are not part of a financially regulated group.

The role of the banking system in combating corruption appears to be significant, especially in the area of depositing the proceeds obtained from these crimes.

- Strengthening and developing the bank's relationship with its customers involves utilizing the 'Know Your Customer' (KYC) principle. This includes enhancing the awareness of bank employees, increasing their sense of customer activity, proximity, and closely monitoring them to protect them from falling into the temptations of criminal gangs. It also entails staying updated on the various developments the customer goes through.
- Receiving notifications regarding suspicious transactions, followed by investigation and examination of these transactions, and then reporting to the public prosecutor's office or the relevant units.

Establishing and creating a function for monitoring money laundering operations within the administrative structure of each branch of the bank and within departments related to various cash transactions that could be used for money laundering.

2-Implementing direct asset recovery measures: Initiating direct asset recovery procedures is required of all parties to the United Nations Convention against Corruption to amend their legal texts in a way that enables countries affected by corruption crimes to recover their funds and for affected countries to receive appropriate compensation. Each party to the convention must take necessary measures to allow another party to file a civil lawsuit in its courts to establish a right in properties acquired through criminal acts according to the convention, provided that the measures are taken within the framework of domestic law.

Direct asset recovery measures are simple and straightforward, aiming to facilitate the control of revenues obtained from corruption crimes or to estimate their value, thereby enabling the affected country to exercise its right to civil compensation for the damage caused. In this case, the competent judicial authority should accept civil claims from the

affected state, which must be a party to the anti-corruption convention, in order to recognize its ownership rights over assets obtained through corrupt acts.
If a decision to seize assets is issued, the competent judicial authority handling the case must take necessary measures to preserve legitimate property rights, which another party to the convention may claim.

3- International Cooperation in the Control and Confiscation of Assets Obtained from Corruption Crimes:
The presence of international cooperation in recovering assets obtained from corruption crimes necessitates the establishment of a legal system for freezing, controlling, and confiscating financial assets. This is a prerequisite and essential condition for international cooperation and asset recovery, as the infrastructure paves the way for cooperation in matters related to confiscation.

-Confiscation:

Confiscation is one of the most effective penalties in combating corruption because seizing funds resulting from corruption crimes means eliminating the criminals' primary goal, which is profit. Therefore, international cooperation in this penalty is of great importance.
Confiscation is a financial penalty that involves the forced transfer of ownership of assets to the state without compensation. It applies to funds obtained from the crime itself, as well as to assets or items that are considered criminal in their own right, such as drugs and counterfeit money. Confiscation is considered the cornerstone of the punitive system for corruption crimes, no less deterrent than custodial penalties because it simply means depriving criminals of all proceeds from their criminal activities.

What is meant by confiscation, according to paragraph (z) of Article 2 of the United Nations Convention against Corruption, is everything that entails deprivation, where permanent deprivation of property is imposed by order of a court or other competent authority. Article 31 of the same convention also specifies sanctions related to freezing, seizure, and confiscation, thereby regulating the procedure and necessary measures to execute confiscation in the jurisdiction where it is applied.
From paragraph 1 of Article 31 mentioned earlier, it can be inferred that confiscation is a penalty applied to corruption crimes covered by the convention.
- The criminal proceeds obtained from criminal acts according to this convention, or property equivalent in value to those proceeds. Assets, equipment, or tools that were used or intended for use in committing criminal acts according to this convention, which are the typical items subject to confiscation. Confiscating funds obtained from corruption crimes or any other proceeds or assets requires some preliminary measures, such as freezing and seizure, or subsequent actions such as managing the frozen or seized assets. This is outlined in paragraphs 2 and 3 of Article 31 of the same convention.

Confiscation Procedures: Each State party takes all necessary measures to identify any of the items referred to in paragraph 1 of Article 31 mentioned above, trace them, freeze them, or seize them for eventual confiscation. Each State party also takes, in accordance with its domestic law, the legislative and other measures necessary to regulate the management of frozen, seized, or confiscated assets by competent authorities. Regarding the preliminary measures for confiscation aimed at identifying funds or proceeds obtained from corruption crimes for the purpose of confiscation, these measures may need to be taken against individuals by the state concerning the funds and assets they possess. The goal is to uncover assets obtained from corruption crimes. Alternatively, these measures may be taken against entities and institutions that possess information and records that can help in identifying and tracking these funds or assets for the purpose of confiscation. Financial institutions or other entities that possess information and records that can be used to identify these illicit sources may be responsible for this task. Confiscation is considered a penalty, and penalties are determined only by a judicial judgment. However, the United Nations Convention against Corruption also allows for the determination of confiscation through an administrative decision issued by a non-judicial authority. This non-judicial authority may subsequently have its decision ratified by a judicial order or decision, or it may be based on a decision issued by another competent authority. It is clear that the non-judicial authority can encompass administrative decisions related to confiscation.
While the previous paragraphs primarily focus on confiscation procedures within the same country, Article 55 of the United Nations Convention includes provisions for international cooperation for confiscation purposes. Some key points from Article 55 include:
Each State party must empower its courts or other competent authorities to order the production of banking, financial, or commercial records, and objections based on the secrecy of bank accounts cannot be used to refuse compliance with this provision.
If criminal proceeds, assets, tools, or other items related to a crime are located in the territory of one State and a request for confiscation is made by another State with jurisdiction over a crime covered by the convention, the receiving State must take the necessary measures under its domestic legal system to transfer the request to its competent authorities. This can be for the purpose of issuing a confiscation order, executing an existing order, or for the purpose of implementing the confiscation order issued by the competent court in the requesting State, including identifying, freezing, or seizing the proceeds and assets derived from the crime.

-Each state party is required to submit to the Secretary-General of the United Nations copies of its domestic legislation relevant to the provisions of Article 55 of the same Convention and to declare any amendments made to these domestic laws in subsequent stages.

Recognition of foreign sanctions: The Mutual Legal Assistance Treaty or any other multilateral agreement includes an obligation to freeze proceeds derived from unlawful activities for subsequent confiscation. This requires a specific state, at a certain time, to recognize the sanctions imposed by another state. This resembles the execution of confiscation orders based on agreements recognizing the enforceability of foreign judgments. According to the European Money Laundering Agreement and other documents aimed at implementing confiscation orders, mutual legal assistance intertwines with the recognition of the execution of foreign confiscation judgments. The treaty recognizing foreign confiscation judgments is based on several principles.
Under the aforementioned agreement, a state can be requested to enforce various types of sanctions and measures, including confiscation provisions, provided that certain conditions are met, such as adherence to the principles of double jeopardy, no trial for the same offense twice, and ensuring that the person subject to the sanctions has had a fair opportunity to defend within a trial that upholds the fundamental principles of justice and human rights. Every decision must be final and enforceable. The crime that led to the confiscation should not be of a political, military, or financial nature. When a state submits a request it must provide the following:
- A certified copy of the confiscation order or decree.
-A description of the crime for which the penalty was imposed, along with a description of the penalty and its specification.
-A copy of the text that defines the act as a crime.
-Statement of the identity and whereabouts of the person sought.
In the case of confiscation, disclosure of information related to the sought property.
As for Algerian legislation, the execution of confiscation orders issued by foreign judicial authorities is directly forwarded to the Ministry of Justice, which then transfers it to the Prosecutor General of the relevant judicial authority. It is a requirement that the request be made by a state party to the Anti-Corruption Convention, and the request must specify that the confiscation order pertains to the proceeds of the crime, property, equipment, or any means used in the commission of one of the corruption crimes specified in the law. Subsequently, this foreign judgment is sent by the Prosecutor General to the competent court, along with its requests. The court's judgment is subject to appeal and cassation according to the law. The judgments issued based on the requests made by the Prosecutor General are enforced through all legal means.
What can be inferred is that Algerian legislation, in order to recognize foreign judgments related to the confiscation of proceeds from corruption crimes, requires the fulfillment of the aforementioned conditions specified in Articles 67 and 68 of the Law on Prevention and Combating Corruption. This serves as an authentication of this type of judgments.

III-Results and discussion:

Asset recovery is a legal procedure, whether at the national or international level, known by various names such as "asset recovery," "recovery of assets," and "recovery of embezzled funds." It encompasses a range of judicial and non-judicial measures and efforts made by countries to retrieve funds lost to corruption that have been transferred abroad or remain within the country itself.
Banks and financial institutions play a crucial role in conducting thorough examinations when opening accounts for individuals or entities, or when handling these accounts or recording transactions related to them. These institutions maintain comprehensive records of all accounts and customer-related transactions for a minimum of five years from the date of the last recorded transaction.
Direct asset recovery measures are simple and uncomplicated procedures aimed at facilitating the identification of revenues obtained from corruption crimes or assessing their value, thereby enabling the affected country to seek civil compensation for the resulting damages.
Confiscation is a financial penalty involving the compulsory transfer of ownership of funds to the state, without compensation, and their addition to state assets. Confiscation targets not only funds obtained from the crime but also assets or items that are considered criminal possessions, such as drugs and counterfeit money. Confiscation is a cornerstone of the punitive aspect of the anti-corruption legal framework, no less deterrent than custodial penalties, as it essentially deprives criminals of all proceeds from their illegal activities.

IV-Conclusion:

Based on the information presented in this study, it can be concluded that asset recovery is a form of mutual legal assistance aimed at tracing and confiscating funds acquired from corruption and smuggling crimes outside the country and returning them. The study emphasizes that asset recovery from corruption crimes has become one of the most significant and detrimental social phenomena in societies.
Recommendations:
Establish clear guidelines to facilitate financial monitoring of individuals involved in corruption crimes, ensuring that bank secrecy does not hinder the freezing of their funds or the confiscation of criminal proceeds.

Activate and enforce the measures and provisions taken by Algerian legislators to combat administrative and financial corruption, in line with international developments.
Ensure the implementation of foreign judgments related to the confiscation of criminal proceeds resulting from corruption crimes.
Continuously monitor financial institutions and banks, and implement the "know your customer" principle.
Organize more international, regional, and bilateral conferences related to the fight against corruption in general and the recovery of assets embezzled due to corruption in particular.

Referrals and References:

Sources:

Presidential Decree No. 04-128 dated April 19, 2004, which ratified the United Nations Convention in New York on October 31, 2003. Official Gazette, Issue No. 26, dated 2004.
Law No. 06-01 dated February 20, 2006, on the prevention and combating of corruption. Official Gazette, Issue No. 14, dated 2006. Amended and supplemented by Order No. 10-05 dated August 26, 2010. Official Gazette, Issue No. 50, dated 2010. Further amended and supplemented by Law No. 11-15 dated August 2, 2011. Official Gazette, Issue No. 44, dated 2011.
Books:
Al-Sharif, Saeed Kamal. "Organized Crime in Comparative Law." Dar Al-Nahda Al-Arabiya, 1st edition, Egypt, 2001.
Mahmoud Sharif Bassiouni. "Money Laundering: International Responses and Regional and National Efforts." Dar Al-Shorouk, Arab Republic of Egypt, 1st edition, 2004.

Articles:

Samia Belgharaf. "Asset Recovery from Corruption Crimes." Journal of Rights and Freedoms, Issue 2, 2016.
Hussein Hayat. "Mechanisms of International Cooperation for Asset Recovery from Corruption Crimes in Light of the United Nations Convention against Corruption." Journal of Legal and Political Studies, Issue 11.
Lakhdar Rabhi. "International Cooperation for the Recovery of Assets Obtained from Corruption Crimes." Legal Studies Journal, Volume 6, Issue 2, 2019.
Nabil Malikia. "International Cooperation in the Recovery of Assets Obtained from Administrative Corruption Crimes." The Professor Researcher Journal of Legal and Political Studies, University of M'sila, Issue 3, 2016.
Emad Ali Rabat. "Methods of Recovering Smuggled Assets Obtained from Corruption Crimes and the Position of Iraqi Legislation." Al-Qadisiyah Journal, College of Law, Iraq, Volume 10, Issue 1, 2019.

Electronic references:

Nermin Marmish, "The Regulative Framework for Asset Recovery at the Local and International Levels," Birzeit University Journal, Birzeit, Palestine, 2015.