



CONFISCATION: CRIMINAL LAW AND PROCEDURAL ASPECTS

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ABSTRACT

This article analyzes the relationship between the institute of confiscation in criminal law and criminal procedure law. The article reveals the role and importance of the institution of confiscation in substantive and procedural law, its similarities and differences.

At the same time, some problems that may arise in the process of applying this institution in criminal and criminal procedural law and opinions and comments on their solutions are given.

Keywords: confiscation, special confiscation, punishment, criminal law, criminal procedural law, substantive law, procedural law, personal education, crime prevention.

Introduction

The diversity of scientific views on the institute of confiscation also raises different debates as to which branch of law the institute belongs to.

While some scholars consider the institute of confiscation to be an institute of criminal law (in personam), another group of scholars argue that this institution belongs to the criminal process (in rem).

The main difference between the above views on the acceptance of the institution of confiscation is seen in the emergence of the grounds for the confiscation of property. In this case, these processes are not required for “in rem” if a criminal case is to be considered and a conviction is issued for “in personam”[1].

In our view, the debate over whether the institution of confiscation belongs to substantive or procedural law has both positive and negative consequences. On the positive side, the understanding of this institution in both criminal law and criminal procedure helps to study both sides of this concept, to develop a comprehensive approach.

On the other hand, the existence of a two-pronged approach to this issue raises problematic questions before the legislature regarding the choice of one of them.





According to N.A. Lopashenko, the biggest problem in the theoretical issues related to the institution of confiscation is the delineation of the types of confiscation in criminal law and criminal procedure law [2].

In addition to Lopashenko's above views, based on scientific debates and many years of research on the subject, we will analyze below the similarities and differences between criminal law and criminal procedure confiscation based on their specific characteristics.

First, these two types of confiscation differ in terms of the scope of property that can be confiscated. After all, only material evidence can be the subject of criminal proceedings.

Such material evidence includes criminal weapons belonging to the accused, subjects of criminal activity, money received as a result of the crime, valuables and other property and income from them, other items and documents that may serve as a tool to solve the crime and determine the status of the criminal case should be taken into account.

Confiscation of property law may be directed against:

- money, valuables and other property received as a result of the crime;
- property received as a result of the crime and money, valuables and other property received as a result of the proceeds from this property;
- Money, valuables and other property used or intended to be used to finance terrorism, organized crime, illegal armed structures;
- weapons, equipment or other means of committing a crime belonging to the accused [3].

Some scholars argue that confiscation in substantive and procedural law is almost identical in terms of its objects, and state that it is inappropriate to differentiate them according to this feature [4].

In our opinion, there is a certain difference between the objects that can be confiscated in criminal law and criminal procedure law, and we can see such a difference in the fact that the object of confiscation in substantive law may be criminal equipment and other means used to commit a crime.

Second, the above two types of confiscation differ from each other in terms of application. More precisely, the use of the institute of confiscation as a measure of criminal procedure, as a rule, is carried out through the following stages:

- Initiation of a criminal case;
- to determine the scope of the property to be confiscated and to search for them;
- recognition of property as material evidence;
- procedural decision making.





As a criminal sanction, confiscation goes through the following stages:

- to prove the guilt of the person who committed the crime;
- Proof of criminal origin of property;
- conviction by a court.

It follows from the above that while the emphasis in substantive law on the application of confiscation to prove the guilt of an individual is greater, this issue is not the main focus of procedural law.

Third, criminal law and criminal procedure confiscation also differ in terms of the document issued on its application.

In this case, confiscation as a criminal offence is allowed only on the basis of a court decision.

As a criminal procedural measure, confiscation may be applied, as well as by a ruling or decision to terminate the criminal case.

It is noteworthy that confiscation in criminal proceedings can be applied on the basis of the decision of the investigating authorities, which means that this procedural measure can be carried out both at the judicial and pre-trial stages.

Fourth, the types of confiscation also differ in terms of the competent authorities that enforce it.

In criminal proceedings, confiscation may be applied by a court or investigator (in a decision to dismiss a criminal case before it is sent to court).

In the case of a crime, only the court has the right to impose a confiscation measure. A group of scholars have argued that the application of confiscation by non-judicial bodies, including investigative bodies, is inappropriate from the point of view of reliably ensuring the rights and interests of an individual established by law.

In our opinion, such concerns about the use of the institute of confiscation are unfounded. Indeed, to us, many institutions in criminal and criminal procedural law have a dual influence.

For example, the liberalization of the law and the creation of more opportunities for the accused (suspects, defendants) may lead to an increase in crime in the future and, as a result, a threat to society.

It follows that the establishment of various restrictions and barriers in the application of the institute of confiscation may also hinder the achievement of the main purpose of future confiscation.

Fifth, substantive and procedural law also differs in terms of the purpose of confiscation. In substantive law, confiscation is used for the following purposes:

- personal re-education and crime prevention;
- restoration of social justice;





- Elimination of the grounds for financing terrorism and criminal group or criminal organization.

As a procedural measure, the purpose of confiscation is to provide the investigator and the court with access to evidence (objects and documents), as well as damage to the victim and property claims [5].

Some scholars have listed the objectives as well as the functions of confiscation. According to V.P. Revin, such features are manifested in the following:

- 1) deprivation of the accused of property received as a result of the crime;
- 2) implementation of normal economic activity in the country and regulation and restoration of the regulatory framework of property relations;
- 3) elimination of economic bases of organized crime and terrorism;
- 4) confiscation of weapons and other means used in the commission of a crime;
- 5) ensuring full compensation for damage caused by the crime [6].

Confiscation of substantive and procedural law also has mutual features. We can see such features in the following:

- they are carried out only on the basis of the decision of the relevant state body (court or investigative bodies)
- the attitude of the state to the offence;
- only material items can be confiscated;
- confiscated items can be turned into state revenue, returned to the owner or destroyed.

In addition to the above, confiscation in criminal and criminal procedural law is also considered to be similar in terms of problems in modern law.

One such problem is manifested in the debate over whether confiscation should be seen as a right or obligation for the authorities.

According to N.V. Viskov, the court must issue a decision to confiscate the property if there are appropriate grounds and conditions [7]. At the same time, Viskov considers the application of this measure as an obligation of the court.

Another group of scholars, including S.G. Kelina, argues that confiscation is the right of the court. The scientist bases his views on the fact that confiscation is a special "measure". Because, in his opinion, "measures" are always authoritative and have the characteristics of voluntariness [8].

In contrast to the above scholars, A. Ragulin believes that theoretical and practical rules leave the question open without giving a sufficiently substantiated answer to the question of whether confiscation is a right or an obligation [9].



In our opinion, it would be appropriate to view the confiscation of property as an obligation of the court. After all, it serves to facilitate its practical application and to ensure the achievement of its goals.

V.P. Revin argues that confiscation of property should be viewed not as a type of punishment but as a criminal measure that reinforces criminal punishment [10].

At the same time, the creation of mechanisms for the implementation of this institution in criminal procedure law will help to achieve the objectives of criminal law.

Based on the above, we can draw the following conclusions:

- the list of property to be confiscated in criminal law and proceedings is almost the same. At the same time, there are small differences, and criminal confiscation can be applied not only to criminal weapons but also to criminal-related equipment and other means used in the commission of a crime;
- criminal procedural confiscation can be applied by out-of-court investigative bodies, which, in turn, means that confiscation of substantive law can be applied only by a court decision, and confiscation of procedural law by a decision of investigative bodies;
- in criminal law, confiscation can be applied not only by a court conviction, but also by an acquittal;
- The main difference between criminal procedural confiscation and criminal-legal confiscation is its content and purpose.

In this case, the confiscation as a measure of criminal procedure is aimed at ensuring the preservation of evidence in the investigation of the criminal case, compensation for damages and the return of property to its rightful owner.

In material law, the purpose of confiscation is to influence the perpetrator in terms of depriving him of his property rights and preventing new crimes, restoring social justice, as well as eliminating the financial basis of organized crime.

In conclusion, it should be noted that although criminal and forensic confiscations differ in some respects, their provisions are closely related and mean that the institution of confiscation is cross-sectoral.

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