

LEGAL BARRIERS IN THE COUNTER-EXECUTION PROCEDURE AND CONTRADICTIONS BETWEEN THE LAW ON EXECUTION PROCEDURE AND THE LAW ON OBLIGATIONS OF KOSOVO

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Abstract: *This article critically evaluates the contradictory provisions contained in the Law No. 04/L-077 on Obligations of the Republic of Kosovo on certain cases of counter-execution. The context of this evaluation is the issue of counter-execution as a special procedure, within the framework of civil procedure, as regulated by the Law No. 04/L-139 on Execution Procedure of the Republic of Kosovo. This duality of legal regulation undermines the legal certainty of citizens, especially those from countries with fragile democracies that are going through transition phase, as in the case of the Republic of Kosovo.*

Keywords: *civil procedure, execution procedure, counter-execution procedure, creditor, debtor*

1. GENERAL OVERVIEW

In the legal life it may occur that the debtor according to the execution title is obliged to give a certain amount of money or to make any performance towards the creditor.

But later on, in the next stages of procedure, the execution title may have undergo certain legal changes.

This coercive fulfillment of obligation cannot be valid because the legal basis of fulfillment has ceased e.g. has been annulled, abrogated or the execution title has been changed.

Therefore, legislation and legal theory have foreseen two ways of regulating this situation, to reduce or remove the consequences that have occurred to the debtor in the case of execution of the creditor's claim against him/her.

One is the procedure of counter-execution (Chapter VI, Articles 54-59 of the LEP of the RK¹), whereas the other one is the procedure of unjust enrichment (Chapter III, Articles 195-202 of the LO of the RK²).

The first procedure is the shortest and the least difficult way, while the second is the longest and most difficult.

Regarding the question of when these legal institutes can be presented, legal theory and legislation did not have the same opinion within different periods of time. Various authors, but also Croatian lawmaker claim that the lawsuit for unjust enrichment may be

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¹ Law No. 04/L-139, 20 December 2012, Promulgated by Decree No. DL-001-2013, dated 03 January 2013, President of the Republic of Kosovo Atifete Jahjaga. In: *Gazeta Zyrtare e Republikës së Kosovës* [online]. 31. 1. 2013 [2019-04-04]. Available at: <<https://gzk.rks-gov.net/ActDetail.aspx?ActID=2870>>.

² Law No. 04/L-077, 10 May 2012, Promulgated by Decree No. DL-024-2012, dated 30 May 2012, President of the Republic of Kosovo Atifete Jahjaga. In: *Gazeta Zyrtare e Republikës së Kosovës* [online]. 19. 6. 2012 [2019-04-04]. Available at: <<https://gzk.rks-gov.net/ActDetail.aspx?ActID=2828>>.

filed after the expiration of the legal deadline for filing the proposal for execution, exceptionally if in the object where the execution was performed have been appeared real and legal changes which make its return impossible, the debtor is authorized to file the claim, though the deadline for submitting the proposal is still pending.³

While North Macedonian legislation foresees that *“the counter-proposal can be filed within 30 days of the day when the debtor has learned of the reason of counter-execution, and at the latest within one year from the date of completion of the execution. Until the expiration of the term referred to in paragraph (2) of Article 88, the debtor can not file the lawsuit against the debtor in civil procedure.”*⁴

Actually, this attitude of the legislation of North Macedonia has been proposed by theorists of civil procedural law since 2011.⁵

Further, the Montenegrin legislator states that *“Debtor cannot satisfy his claim in a civil procedure prior to expiration of the deadlines referred to in paragraph 3 of Article 78.”*⁶

It is also the attitude of the Serbian legislator that *“the debtor cannot exercise the claim in civil procedure until the deadline to propose counter-execution does not expire.”*⁷

*“Counter-execution is special and specific way of law protection which was created as an alternative of the civil procedure of unjust enrichment, with the aim of achieving in a relatively simplified, shorter and faster procedure the debtor’s right to recover what was executed without basis.”*⁸

Counter-execution means request for returning the means and objects which were previously executed. Everything that can be object of execution procedure, can be object of counter-execution too. The counter-execution procedure is special, and important for legal protection of the subjects of law. The counter-execution procedure and counter-execution actions are in the court’s competence, as a counter-execution body set by legal provisions. But despite this, the execution procedure may also be enforced by another body authorized by the law. Such bodies are known as private enforcement agents. Based on this procedure, the court also confirms the subjective right of the creditor party in the

³ Article 82, paragraph 6 in relation with paragraph 2 of the Law NN 112/12, 25/13, 93/14, 55/16, 73/17 on Execution Procedure of the Republic of Croatia (In original: Ovršni zakon), effective from 03 August 2017. See Ovršni zakon. In: *Zakon HR* [online]. 3. 8. 2017 [2019-04-04]. Available at: <<https://www.zakon.hr/z/74/Ovr%C5%A1ni-zakon%20POZNIĆ, B., RAKIĆ-VODINELIĆ, V. Civil Procedural Law. Belgrade: Savremena Administracija d.d, 1999, p. 459.>>

⁴ Article 88, paragraph 2 and 3 of the Law No. 72/16 on Execution of the Republic of North Macedonia (In original: Закон за извршување), Published in the Official Gazette of the Republic of North Macedonia, No. 72 of 12 April 2016. See Закон за извршување. In: *Pravdiko* [online]. [2019-04-04]. Available at: <<https://www.pravdiko.mk/wp-content/uploads/2013/11/Zakon-za-izvrshuvane-12-04-2016.pdf>>.

⁵ JANEVSKI, A., ZOROSKA-KAMILOVSKA, T. Counter-execution in the Republic of Macedonia – problems and dilemmas. *Nova pravna revija – Časopis za domaće, njemačko i evropsko pravo*. 2011, Vol. 2, No. 1, p. 35, [2019-04-04]. Available at: <https://pravosudje.ba/vstv/faces/pdfservlet?p_id_doc=18203>.

⁶ Article 78, paragraph 3 and 4 of the Law No. 01- 909/2 on Execution and Security of the Republic of Montenegro (In original: Закон о извршењу и обезбедењу), Published in the “Official Gazette of the Republic of Montenegro”, No. 36/2011 from 27 July 2011. See Закон о извршењу и обезбедењу. In: *WIPO* [online]. [2019-04-04]. Available at: <<https://www.wipo.int/edocs/lexdocs/laws/sr/me/me031sr.pdf>>.

⁷ Law No. 106/2015, 106/2016 and 113/2017 on Execution and Security and of the Republic of Serbia (In original: Закон о извршењу и обезбедењу). See Закон о извршењу и обезбедењу. In: *Paragraf* [online]. [2019-04-04]. Available at: <https://www.paragraf.rs/propisi/zakon_o_izvrshenju_i_obezbedjenju.html>.

⁸ JANEVSKI, A., ZOROSKA-KAMILOVSKA, T. *Counter-execution in the Republic of Macedonia – problems and dilemmas*. p. 34.

counter-execution procedure, since “*this procedure is based on the proposal of debtor - now the creditor (counter-executioner), against the creditor - now the debtor, to repay what he earned through the forced execution procedure.*”⁹

The first condition for initiating the counter-execution procedure is that the case has a connection, with the execution procedure that has been executed previously.

The possibility of filing the proposal for counter-execution is determined by the legal provisions, stipulated by Article 54 of the LEP of the RK, which foresees that “*Debtor is entitled during same execution procedure, and after the end of execution procedure, to request the court the issuance of a decision ordering the creditor to return the items taken based on execution procedure.*”

This provision exists in order to provide legal protection to the debtor by the Court. By such decision, the court provides legal protection between the parties, in cases where at a stage of the procedure we had a final enforceable decision and the same was executed according to the legal provisions of the LEP of the RK.

The reasons that justify the counter-execution procedure are described in detail by Article 54, paragraph 1, sub-paragraph 1.1, sub-paragraph 1.2, sub-paragraph 1.3 and sub-paragraph 1.4 of the LEP of the RK.

These are the following reasons: execution title by a final decision is overruled, amended, annulled, dismissed or was concluded in another way that did not produce legal effects; ruling or enforcement writ by a final decision is annulled or amended; during the conduct of execution proceedings, the creditor has got under possession more items than the value of the credit, including costs of execution and interest charges or the execution carried out on a specific object of execution shall be impermissible.¹⁰

In the counter-execution procedure, a procedural legal relationship is established between the parties. The parties are the creditor-former debtor who may request against the debtor-former creditor to perform an obligation. This obligation requires the new debtor to take action to restore the material benefit, gained by a decision which at one stage of the procedure had a legitimate basis, which resulted in an execution, and at a later stage is found by a higher judicial authority to have no legal basis, because of the annulment of that judgment, ruling or, an amended or rejected claim.

In the counter-execution procedure, the provisions of this law pursuant for performing execution shall be applied *mutatis mutandis*.

Can the issue of the counter-execution procedure be considered a new special process, or is it merely a continuation of the execution procedure?

The answer to this question can be found at Ruling No. Gr-266/1999-2 of the Supreme Court of the Republic of Croatia, where it is said that “*Counter-execution can be requested in the same procedure in which the execution was performed, for this reason execution and counter-execution are one single procedure, and during this procedure the court is obliged to take care of its territorial competence.*”¹¹

⁹ BRESTOVCI, F. *Civil Procedural Law II*. Pristina: University of Pristina “Hasan Prishtina”, Faculty of Law, 2006, p. 195; ŠARKIĆ, N. *Commentary of the Law on Execution and Security*. Belgrade: Paragraflex d.o.o, 2016, p. 121.

¹⁰ See Ruling CPNo.429/2018, dated 09 January 2019, of the Basic of Gjilan/Kosovo.

¹¹ See Ruling No. Gr-266/1999-2, dated 27 October 1999, of the Supreme Court of the Republic of Croatia.

Counter-execution procedure it is an accessory procedure, dependent, in relation to the execution procedure. We cannot have counter-execution procedure without first having execution procedure. Counter-execution procedure takes place after the end of execution procedure.

Legal provisions that have been in force at the time of initiation of the execution procedure apply even in case of commencement of the procedure of counter-execution, because as abovementioned, execution procedure and counter-execution procedure are one single procedure. This approach is confirmed by the case law of the Supreme Court of the Republic of Croatia.¹²

In the execution process the formal fulfillment of legal protection is established by the court. This occurs when the debtor does not fulfill his obligation voluntarily. The counter-execution procedure is carried out in the same procedure, with some common features between the two, but with distinctive features in changing the role of the parties to the proceedings, in other words a change of position.

If creditor through execution has realized an amount of money, the debtor in the proposal for counter-execution may demand payment of interest-delay, starting from the day of the payment of such amount, in accordance with Article 54, paragraph 2 of the LEP of the RK.

We did not notice any obstacles in the law that the procedure of counter-execution under the provisions of the LEP of the RK cannot be applicable even with regard to the execution procedure which is based in authentic documents.¹³

In Article 54, paragraph 3 of the LEP of the RK, it is stated that *“Proposal for counter-execution from Article 54, paragraph 1 may be submitted in fifteen (15) days from the day when the debtor became aware for the reason of counter-execution, but not later than one (1) year from the completion of execution procedure.”* Deadlines for submitting the proposal for counter-execution are described in two ways, one as subjective deadline and the other one as objective deadline.

The beginning of the subjective deadline is dependent from the knowledge of debtor for the situation which is relevant for calculation of deadline (reasons for counter-execution). Whereas, the beginning of the objective deadline is dependent from the occurrence of relevant facts (completion of execution procedure), independently from knowledge of the debtor concerning that fact. After expiration of the objective deadline, debtor loses the right to submit the proposal for counter-execution, even if the subjective deadline still didn't expire, or has not even started to run yet.

In meanwhile, Article 54, paragraph 4 of the LEP of the RK foresees that *“After the expiration of the deadline from paragraph 3 of this Article, the debtor may not initiate counter-execution, but must instead initiate a civil procedure over its claim.”*

¹² Ruling No. Rev-x 1083/11-2, dated 25 January 2012 of the Supreme Court of the Republic of Croatia.

¹³ Authentic documents are regulated by Article 29, points 1, 2, 3, 4 of the LEP of the RK; Regarding ex-Yugoslav law see: CRNIĆ, I. Execution upon the basis of authentic documents. *Zakonitost. Journal of Legal Theory and Practice*. 1991, No. 9-10, pp. 1018–1020.

2. LOSS OF THE CREDITOR'S/COUNTER-EXECUTOR'S RIGHT TO REFUND THE COMPENSATION FOR BODILY INJURIES AND DAMAGE TO HEALTH FOR LIFE AND BODY

In the practice of courts there are numerous circumstances of violent execution of decisions where the creditor's right is known, according to a judgment or ruling of binding nature, between certain subjects, with particular content, of a certain value. Such judgment requires to the debtor to give or do something on behalf of the creditor. After completion of the procedural conditions in their final form, the execution occurs and the parity period passes. In spite of this and after using the legal ordinary or extraordinary remedies that are settled by the higher instances such as the Supreme Court of the Republic of Kosovo who reviewed the submitted extraordinary legal remedies, their results, the rejection of the claim and the annulment of the judgment. This is also a rejection of the final judgment and based on these decisions also the violent execution.

From the decision-making process of the higher instances of the justice system emerges a judgment whose difference from the previous decision is in its meaning-obligatory character. This character varies in the volume that implies the monetary amount of the items, or their quantity. After the violent execution, a new circumstance arises which requires a procedure by creating a relationship between the parties to the execution procedure, but now with the opposite roles. In this situation arises the basis and the right of the old debtor and new creditor to initiate the counter-execution procedure.

The amended judgment entitles the subjects to initiate the proposal for counter-execution, in those cases where the Supreme Court of the Republic of Kosovo has made a decision by amending the judgment of the first or second instance court, and having dismissed the judgment and the case returned for resettlement, or even refused the claim. This can occur despite the fact that even with the decisions of the first and second instance courts, such a right was known in a determined time, changing the circumstances according to the decision, but also creating new circumstances.

This was also regulated by the Law No. 29/1978 on Obligations of the former Socialist Federal Republic of Yugoslavia¹⁴ (LO of the SFRY), Article 211, where it was stipulated that *"Whoever effects payment while knowing that he is not obliged to pay, shall have no right to claim reimbursement unless he reserves such right or unless he is paying off to avoid duress."*

Additional regulation can be found in Article 216 of the LO of the SFRY, where it was determined when it is possible to hold that which was taken in advance on a legitimate basis. This provision stipulates that *"There shall be no claim of the amounts paid without ground as recovery for loss caused by bodily injury, damage to health or death, after the payment has been made to an honest acquirer."*

Whilst, the new Law No. 04/L-077 on Obligations of the Republic of Kosovo (LO of the RK), Article 199, stipulates that *"It shall not be possible to demand the return of compensa-*

¹⁴ Law No. 29/1978 on Obligations of the former SFRY, was approved by the SFRY Assembly at the session of the Federal Chamber on 30 March 1978 and entered into force on 01 October 1978.

*tion sums baselessly paid out for physical injury, damage to health or death if they were paid to a recipient that acted in good faith.*¹⁵

The ex-Yugoslavian legal norm is almost entirely described in the Kosovo's Law, with a difference, because a new paragraph has been added to the Kosovo's Law on Obligations. It is Article 199, paragraph 2 of the Law on Obligations. In this Article it is expressly stipulated that *“As a baselessly paid sum shall be counted also the payment on the basis of a judicial decision that was later changed or abolished.”*

In the practice of the courts, numerous cases arise when litigation claims are filed on the basis of compensating material damage and moral damage, as a consequence of bodily injuries or death. The appealed decision can be amended, annulled or can be returned for retrial in the first or second instance court by the decision of the Supreme Court.

Depending on the decision of the Supreme Court, if this decision amends, annuls or otherwise abolishes the legal power of the first or second instance decision, then to the debtor is given the opportunity to initiate the counter-execution procedure.¹⁶

However, the legal provisions prevent the execution bodies, which are the courts, from obtaining the means in the execution procedure from the creditor, because there are legal obstacles preventing such action, including those sanctioned by Article 195, 199 of the LO of the RK of 2012. Reasons are also given in the Commentary of the LO of the RK, which states that according to these legal provisions it is not possible to require the return of sums paid without legal grounds in the name of reimbursement of damage due to physical injury, health damage or death, provided that the injured person who received these sums was acting in good faith.¹⁷

3. EXEMPTION FROM COUNTER-EXECUTION

The Creditor/counter-executor has a legal right in the execution procedure in which they were the debtor even after the execution has ended, to request that the Court issue a decision ordering the debtor to return what they have taken on the basis of the execution procedure. This process requires the fulfillment of the conditions for the initiation of the counter-execution procedure, as stipulated by Article 54 of the LEP of RK.

In the counter-execution procedure, the counter-execution body acts on the basis of legal acts that indicate the legal basis for the right to submit a counter-execution procedure.

In the counter-execution procedure, the former debtor now creditor, fulfills the statutory obligation. The legal effect of this fulfillment is determined by Article 348 of the LO

¹⁵ DAUTI, N., BERISHA, R., VOKSHI, A., ALIU, A. *Commentary on the Law on Obligations - Book I*. Pristina: UNDP Mission in Kosovo in cooperation with the Ministry of Justice, 2013, pp. 278-279. In: *Kosovo Judicial Institute* [online]. [2019-04-05]. Available at: <<http://jus.igjk.rks-gov.net/763/>>; Legal Attitude of the Supreme Court of the Republic of Croatia taken at the first session of the Civil Branch of the Supreme Court of the Republic of Croatia, 29 January 2007.

¹⁶ See eg. Ruling CML.nr.9/2013, dated 24 June 2013 of the Supreme Court of the Republic of Kosovo.

¹⁷ DAUTI, N. et al. *Commentary on the Law on Obligations - Book I*. p. 278.

of the RK, which stipulates that “A debtor that performs a statute-barred obligation shall not have the right to demand the return of that provided, even if the debtor did not know that the obligation was statute-barred.”¹⁸

Article 349 of the LO of the RK stipulates that “when the statute-barring period expires a creditor whose claim is secured by a pledge or a mortgage may only be repaid from the encumbered thing if it is in the creditor’s hands or if the creditor’s right is recorded in a public register.”

In the procedure of counter-execution, there are objects and means that are exempted from being executed. In the counter-execution procedure the main objects are the items or means that have been executed, but also under these circumstances it may occur that items have changed attributes both in the legal and factual terms. Destruction of a thing may be a material change in accordance with the aforesaid article. Or the change of the owner may be a change in the legal point of view. If there are any changes in these items that make the execution impossible, actions can be taken such that the counter-execution procedure proceeds with other items of the debtor in support of Article 57 of the LEP of RK.

Even in the counter-execution procedure there are exceptions to execution. These include the following exceptions such as clothes, shoes, underwear and other personal belongings, linen, kitchen utensils, furniture, stove, refrigerator, and other objects with common values that serve for satisfying the basic needs of the household, if they are needed by the debtor and the members of his/her household; three (3) months supply of food and heating materials used by the debtor and the members of his/her household; labor and breed livestock, agricultural equipment and other tools, seeds, food for the livestock, tools, machines and other objects that the debtor - farmer or craftsman needs for maintaining of his/her agricultural work, respectively for performing the craftsmen activity, necessary to achieve minimum income necessary to support him/herself and the members of his/her family; books and other objects needed by the debtor who independently and with personal labor, performs a scientific, artistic or other professional activity; cash of the debtor which is permanent monthly income up to the monthly amount, which according to the law is exempt from enforcement, proportionally with time-limits, until next payment; the debtor’s decorations, medals, military honor certificates and other decorations or recognitions of honor, a marriage ring, personal letters, manuscripts or other personal documents which belong to the debtor as well as family pictures; and medical aids given to a disabled person or to some other person with physical handicap in accordance with regulations, or which he/she has personally obtained and which are necessary for performing his/her life functions.¹⁹

The right of financial maintenance, which means financial support and material support, cannot be subject of coercive execution.²⁰ The right of financial maintenance cannot be subject of execution or security of claim, because it enjoys privileged status in the execution procedure.

¹⁸ Article 348 of the LO of the RK.

¹⁹ See Article 85 of the LEP of RK.

²⁰ PODVORICA, H. *Family Law*. Pristina: University of Pristina “Hasan Prishtina”, Faculty of Law, 2005, p. 229.

The right of financial maintenance is a strictly personal right and it serves to ensure the existence of a person's life. If it would be allowed to execute the claim of a person with confiscation of the right of financial maintenance which the debtor has, in this way his existence will be questioned. Practically, in this way, the right of financial maintenance would pass to the other person who is a creditor from another legal relationship to the person who takes the financial maintenance. In fact, the maintenance would be taken by the other person, and not by the person for whom it is supposed to serve its existence.

Article 111, paragraph 1 of the LEP of RK stipulates that *“Incomes from financial maintenance are excluded from enforcement, if not related to the credits of the same type.”*²¹ Also, Article 354, paragraph 3 of LO of the RK states that *“The right to maintenance pertaining to someone by law may not become statute-barred.”* This provision was taken entirely from the old LO of the SFRY. This provision is also absorbed by lawmakers of the Civil Code of the Republic of Kosovo in the latest published project of this code.²²

4. CONCLUSION

The implementation of execution procedure and its conclusion cannot always be considered done once and for all between the parties, because in practice occur cases where these parties (the creditor and the debtor) in the counter-execution procedure change roles.

The counter-execution procedure is considered to be a special procedure in the branch of the judicial execution procedure but its implementation in practice has certain legal consequences. Dualism arises between the Law on Execution Procedure and the Law on Obligations. This situation requires a solution and it should be sought in undertaking measures through the harmonization of civil legislation, not excluding its codification. The purpose of the changes in legislation have a common denominator, namely to increase every citizen's legal certainty, and increase trust in lawmakers and others who play the role of legal guardian.

Such a mission would be impossible to accomplish without radical legal reforms, and action should be undertaken today. This situation will boomerang back and lead to the downfall of achievements made so far, although these achievements are only considered symbolic achievements.

²¹ Regarding ex-Yugoslavian legislation, see: Article 92, point 1 of the old LEP of the SFRY, PR No. 692, Belgrade, 30 March 1978, in force from 01 October 1978.

²² Projekt – Kodi Civil i Republikës së Kosovës. In: *Republika e Kosovës. Ministria e Drejtësisë* [online]. [2019-04-06]. Available at: <<https://md.rks-gov.net/page.aspx?id=1,94>>.