



OPINION

Opinion for the Constitutional Court's on the draft law amending the Article 46 of the Constitution (referral no. 249c/2021)

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This Opinion is issued in response to Constitutional Court's request nr. PCC-01/249c/16 from January 18, 2022, addressed to the Institute for European Policies and Reforms.

This Opinion is presented in relation to the draft law amending Article 46 of the Constitution - "The right to private property and its protection", specifically paragraph (3) "Lawfully acquired property may not be confiscated. The lawful nature of the acquisition shall be presumed".

Our conclusion is that considering the extent of corruption in the public sector of the Republic of Moldova and the failure of the law enforcement bodies to eradicate this phenomenon through the existing legal levers, the proposed constitutional amendment is justified, as the public interest prevails in this case over the interest of a limited group of subjects, represented by public officials.

At the same time, we reiterate the need to ensure sufficient safeguards in relation to the subjects covered by the proposed amendment to exclude any cases of abusive application of the provision in question. It is also recommended to clarify the circle of subjects covered by the proposed amendment to make the law more predictable and clearer.

CONTEXT

The issue of illicit acquisition of property by some state officials, as a result of fraudulent activity in the exercise of public service, has been intensely discussed in the Republic of Moldova in the last period. The main argument that brings the property issue of some employees working in the public or private state sector (*hereinafter - public officials*) into the spotlight is that, as they are remunerated with average wages, they still manage, inexplicably for the public opinion, to accumulate and own properties that apparently far exceed the declared legal income. Under these circumstances, it is inherently questionable whether the state has sufficient legal and functional mechanisms or tools to eradicate this phenomenon and to punish those responsible for causing damage to public interests.

IPRE considers that the amendment of the national legal framework, including the constitutional framework governing the legal regime of property, is necessary and timely. This need is not an unfounded one, and results including from the fact that in the Republic of Moldova many public officials have been involved in episodes that are the subject of numerous criminal investigations, such as the "bank fraud", the Russian "laundromat", the file on the concession of the Chisinau International Airport, the fraudulent activity within Metalferos S.A., fraud cases in the insurance sector, with loans offered by insurance companies to enterprises located in offshore areas, etc.

The operation of constitutional amendments involves an analysis of their necessity, whether they are not contrary to the law and whether there are other legal remedies through which the goal of eradicating corruption can be achieved.

THE PROPOSED AMENDMENTS

The draft amendment to the Constitution proposes to complete the sentence of Article 46 para. (3) of the Constitution with the text "**with the exception of the wealth of persons holding public office positions**".

The authors of the draft, 56 MPs from the Moldovan Parliament, argue that although Article 46 para. (3) of the Constitution establishes the presumption of lawful acquisition of wealth, in the case of persons holding public office positions, this guarantee must be limited to ensure the integrity of public service and the proper management of public funds. The norm will provide a constitutional framework that will allow the establishment of more effective legal procedures for the control and sanctioning of persons holding public functions who have unjustified wealth, thus raising the level of accountability and making the fight against corruption more effective. At the same time, the amendments will allow the confiscation of unjustified wealth of public officials, which will lead to the eradication of corruption in the public service and in the country.

THE RELEVANT NORMATIVE FRAMEWORK

Constitution of the Republic of Moldova

Article 46. Right to private property and its protection.

- (1) The right to private property, as well as the debentures on the State are guaranteed.
- (2) No one may be expropriated, except for a public utility reason, established by law, with fair and prior compensation.
- (3) Lawfully acquired wealth cannot be confiscated. Lawful acquisition is presumed.

Article 127 Property

„ (1) The state protects the property. (2) The State shall guarantee the enforceability of the right of ownership in the forms requested by the owner if they do not conflict with the interests of society. [...]"

Article 142 Revision Limits

(2) No revision can be made if it results in the suppression of the fundamental rights and freedoms of citizens or their guarantees.

Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, adopted on March 20, 1952

Article 1. Protection of property

Every individual or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms, adopted on December 4, 2000

Article 1. General prohibition of discrimination.

1 The enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

2 No one shall be discriminated against by any public authority on any ground such as those mentioned in paragraph 1.

Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism, adopted in Warsaw on May 16, 2005 and ratified by the Republic of Moldova by Law No. 165-XVI of 13 July 2007, M.O. 117-126/532, 2007

Article 3. Confiscation measures

„[...] Each Party shall adopt such legislative or other measures as may be necessary to require that, in respect of a serious offence or offences as defined by national law, an offender demonstrates the origin of alleged proceeds or other property liable to confiscation to the extent that such a requirement is consistent with the principles of its domestic law”.

Article 5. Freezing, seizure and confiscation

„Each Party shall adopt such legislative and other measures as may be necessary to ensure that the measures to freeze, seize and confiscate also encompass: a) the property into which the proceeds have been transformed or converted; b) property acquired from legitimate sources, if proceeds have been intermingled, in whole or in part, with such property, up to the assessed value of the intermingled proceeds; c) income or other benefits derived from proceeds, from property into which proceeds of crime have been transformed or converted or from property with which proceeds of crime have been intermingled, up to the assessed value of the intermingled proceeds, in the same manner and to the same extent as proceeds.”

THE CURRENT LEGAL FRAMEWORK ON THE ENFORCEMENT OF CONFISCATION

Articles 106 and 106¹ of the Criminal Code use the terms "special confiscation" and "extended confiscation". Thus, "special confiscation" implies the free transfer of goods (or their counter-value if they no longer exist) to the State's property which:

- a) were used or intended for a criminal offence,
- b) are the result of a criminal offence, or
- c) are proceeds of a criminal offence, or d) were offered to commit a criminal offence.

Article 106¹ of the Criminal Code establishes that extended confiscation procedures is also applied to property that was obtained five years before and five years after the offence was committed, with a list of offences set out in the Criminal Code, provided that the value of the legally obtained property is substantially exceeded and that the court has established, on the basis of the evidence in the case file, that the property is derived from criminal activity.

In the case of both Article 106 and 106¹ of the Criminal Code, confiscation (special or extended) applies when it is proved by evidence that these assets were obtained in connection with the committed offences. The difference between special and extended confiscation being that the lawfully obtained proceeds for a period of 5 years before and 5 years after the offence are considered. The burden of proof in this case is set solely on the criminal investigation body. The Constitutional Court examined the constitutionality of the rules in Article 106¹ of the Criminal Code.

Thus, the Constitutional Court, by [Decision No. 6 of the 16th April 2015](#), found that the provisions of Article 106¹ are constitutional, based on the following main arguments:

- a) extended confiscation is applied on the basis of a burden of proof from the public authority and is thus in line with the provisions of Article 46 of the Constitution;
- b) extended confiscation applies to serious crimes that substantially affect social relations;
- c) extended confiscation is used as a tool to prevent and deter committing offences.

In addition to the forms of special confiscation and extended confiscation, provided for in the Criminal Code, Law No. 132/2016 on the National Integrity Authority, also provides for the confiscation of unjustified wealth in the case of a substantial difference between the income obtained during the period of holding public office or public dignity positions and the wealth held during the same period. The confiscation of unjustified wealth in this case only concerns wealth obtained during the period of holding the public office or public dignity positions and only after the definitive act remains final. The confiscation action itself occurs based on a separate action of the NIA in court and the confiscation is executed by the Ministry of Finance.

ANALYSIS OF THE PROPOSED AMENDMENTS

The positive endorsement of the project implies that the text of the amendments should be in line with the provisions of Article 142 para. (2) of the Constitution, which states that *"no revision may be made if it results in the suppression of the fundamental rights and freedoms of citizens or their guarantees"*. At the same time, it is necessary to establish whether the amendments do not contravene to any of the provisions of Article 21 of the Constitution -Presumption of innocence.

Article 46 para. (3), has previously been the subject of examination by the Constitutional Court. Thus, in [Decision no.21 of the 20th of October 2011](#), the Court notes "the presumption of the lawful acquisition of property, provided for in paragraph (3) of Article 46 of the Constitution, represents a constitutional guarantee of the right to private property, being fully consistent with paragraph (1) of the same article, according to which: The right to private property, as well as debentures on the State are guaranteed. This presumption is based on the general principle that any legal act or fact is lawful until proven otherwise, thereby requiring proof of the unlawful acquisition of a person's assets".

Thus, currently, the right of ownership in regard to the property comprising a person's wealth is inextricably linked to the presumption of lawful acquisition of the wealth.

The proposed amendment seeks to **reverse the burden of proof regarding the lawful acquisition of property for public officials, by proposing to confiscate the property, the lawful acquisition of which cannot be proved**. It would therefore entail that the wealth of a public servant would be presumed to have been acquired unlawfully until proven otherwise by the owner. At the same time, this right of the holder of the assets does not prevent the State, in the guise of the prosecuting authority, from proving the illegality of income obtained by public officials.

The Court is to determine whether the removal of this presumption would entail the deprivation of a constitutional guarantee of the right to property.

IPRE considers that the operation of the proposed amendments does not suppress the constitutional guarantees of citizens' property rights nor contravene Article 16 (Equality before the law) of the Constitution because:

- a. The changes will not apply to the property rights of all citizens but only to the wealth of persons holding public office positions.

In [Opinion No.1 of the 25th of April 2006](#) on the draft law regarding the exclusion of the sentence "Lawful acquisition is presumed" from para. (3) of Article 46 of the Constitution of the Republic of Moldova, the Court noted "...the State may regulate procedures whereby the accused person is obliged to prove the lawful character of their assets. However, the impossibility of proving the lawful nature of the property presumes the unlawful nature of its acquisition and the person's tendency to evade tax obligations towards society or administrative or criminal liability".

Unlike the draft approved by the Court in 2006, the currently proposed draft does not exclude the presumption of lawful acquisition of goods but applies an exception from this principle for public officials. The exception in question is therefore not to be applied *erga omnes* (it will continue to apply to persons working outside the public or private sector of the State), but to a limited group of persons acting in the public or private sector of the State.

- b. The presumption of illegality concerning the acquisition of wealth will not produce permanent legal effects but will only apply for the period of time a person holds a public office position.
- c. The aim is not to suppress the property rights of citizens but to protect the public interest from possible abuses of public officials in the process of managing public money; thus, the public interest prevails over the interests of a limited number of public officials.
- d. The changes are justified in the context of the numerous abuses and frauds committed by public officials during the office terms.
- e. Making the changes will reduce the perception of impunity that prevails in the public opinion regarding the wealth and property of public officials.

The modification of the presumption of lawful acquisition of wealth by public officials could raise discriminatory elements for the latter, in case of an accusation of unlawful acquisition of goods, the burden of proof would not be on the person making the allegation, but on the holder of the goods.

In IPRE's view, the aim is not to discriminate against public officials but to protect the public interest and to ensure that public officials assume their limitations and responsibilities, whose income must come from legal and transparent sources.

In the separate opinion formulated by the CC Judge, Mircea Iuga, under CC Opinion no.1/2006 it is mentioned that "According to current international legal doctrine and practice, state-citizen relations are to be regulated according to the principle of equality. The individual personally, in his/her legal relations with state institutions, claims legal treatment based on equality. In this context, the State, according to para. (6) of Article 131 of the Constitution, is obliged not to allow any budgetary expenditure without establishing the source of financing. Based on the principle of equality of relations between the citizen and the State, the citizen also cannot admit expenditure and acquire revenue without establishing the source of financing".

Another argument justifying the operation of constitutional amendments is the inefficiency and difficulties faced by law enforcement bodies in investigating cases related to unjustified or undeclared wealth of public officials.

In Decision No.21/2011 the Court underlines "...accordingly, para. (4) of Article 46 of the Constitution provides that goods intended for, used in, or resulting from offences or misdemeanours may be confiscated only in accordance with the law. Thus, the presumption established by para. (3) of Article 46 of the Constitution does not impede the investigation of the unlawful nature of the acquisition of wealth, although the burden of proof lies with the person claiming such a nature. If the interested party proves that a person has unlawfully acquired goods, confiscation may be ordered against those goods acquired unlawfully, in accordance with the law."

Previously IPRE issued an [opinion](#) on the subject of confiscation, which comprehensively presented the legislative shortcomings related to the application of confiscation. Thus, we note that the current legal framework on the application of confiscation, set out in the Criminal Code, implies a number of limitations on the mass of goods that can be subject to special or extended confiscation. Accordingly, confiscation is limited only to property that has been established by evidence and court judgment to be the result of, or related to, criminal activity.

Extended confiscation also applies for a time limit during which they were acquired - 5 years before and 5 years after the offence was committed. The Criminal Assets Recovery Agency, prosecutors and prosecuting bodies are required to take several steps in relation to the analysis of the possessed goods, including those registered through intermediaries, and to demonstrate that these persons knew, or foreseeably knew, that these goods were the result of, or otherwise related to, the commitment of an offence.

Similarly, a considerable limitation is that the duty of the authorities is to determine when certain goods have been obtained both legally and illegally, and it is necessary to determine which part of the goods has been obtained illegally so that their value may be confiscated.

Finally, extended confiscation only applies to a limited group of offences, as set out in the Criminal Code. In other words, confiscation does not extend to other offences covered by the Criminal Code such as: bribery of voters (Article 181¹), illegal financing of political parties (Article 181²), fraud (Article 190), embezzlement of foreign assets (Article 191), etc.

On the other hand, the confiscation of unjustified wealth requested by the National Integrity Authority is limited only to the difference between the wealth possessed and the income obtained during the period of holding public office or of public dignity positions.

Thus, the amendment in question divides the burden of proof between the state authorities, that are to be designated to prove the illegality of the assets, but the verification is to be made on the basis of the obligations of declaration of assets according to the integrity legislation established for public officials. Any discrepancy between the declarations submitted and the actual goods will be considered as illegal goods until proven otherwise, thus liable for confiscation. Moreover, the public official concerned will have to justify the detected discrepancy. On the other hand, the proposed amendments will exclude the possibility of their abusive use.

It is imperative to provide safeguards for the subjects in respect of whom the exception is to be applied. Thus, confiscation is to be ordered by the court following an assessment of the evidence available. The public official is to have access to an effective remedy against the court's decision to apply confiscation. Confiscation is to be ordered after the final court decision has become enforceable.

The circle of subjects covered by the proposed changes will also be reviewed. The information note on the draft law amending Article 46 of the Constitution states that „for the purposes of this draft, the notion of public officials includes both dignitary public officials and holders of civil servant status with general or special status, as well as other subjects employed in the public sector who, by virtue of their activity, act in the public interest within local, central or autonomous entities, manage public assets and are subject to the declaration of wealth and personal interests. This category also includes judges, prosecutors, criminal prosecution and investigation officers, military personnel, etc. The draft exception will also apply to employees of legal entities belonging to the State, regardless of the position held, and to employees of State-owned enterprises if the State has full control of the entity or a blocking stake in the entity”.

We consider it appropriate to restrict the circle of subjects covered by the proposed amendments to the subjects mentioned in [Article 3 of Law No. 133/2016 on the declaration of wealth and personal interests](#), and to supplement this list of subjects with officials of state-owned enterprises if the state has full control of the entity or the blocking stake in the entity.

CONCLUSIONS

The fight against corruption constitutes a national prerogative of the Republic of Moldova, this objective has been included in various national strategic documents such as the Government Action Plan 2021-2022, the Strategy on Ensuring the Independence and Integrity of the Justice Sector for 2022-2025 and the Action Plan for its implementation.

The Constitutional Court itself has enshrined in its jurisprudence the danger that corruption poses to the rule of law. Thus, in [Decision No. 4 of the 22nd April 2013](#), the Constitutional Court underlines that "corruption undermines democracy and the rule of law, leads to the violation of human rights, undermines the economy and erodes the quality of life. The fight against corruption is therefore an integral part of ensuring respect for the rule of law."

Under these circumstances, considering the extent of corruption in the public sector of the Republic of Moldova and the failure of the law enforcement bodies to eradicate this phenomenon through the existing legal levers, we consider that the proposed constitutional amendment by the Parliament is justified, as the public interest prevails in this case over the interest of a limited group of subjects, represented by public officials.

At the same time, we reiterate the need to ensure sufficient safeguards in relation to the subjects covered by the proposed amendment to exclude cases of abusive application of the provision in question. It is also recommended to clarify the circle of subjects covered by the proposed amendment to make the law more predictable and clearer.



The Institute for European Policies and Reforms (IPRE) was established in March 2015 as an independent, nonprofit and apolitical analysis and research centre. The mission of IPRE is to accelerate the European integration of the Republic of Moldova by promoting systemic reforms, enhancing participatory democracy and strengthening the role of citizens in national and local decision-making processes.

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