

# ПРОБЛЕМИ СУЧАСНОГО КОНСТИТУЦІОНАЛІЗМУ

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## TRANSFER TO THE STATE TREASURY OF THE PROPERTY OF WAR SUPPORTERS IN THE LIGHT OF THE CONSTITUTION OF THE REPUBLIC OF POLAND. LEGAL ASPECTS IN THE CONTEXT OF THE PARLIAMENTARY BILL ON THE AMENDMENT OF THE CONSTITUTION OF THE REPUBLIC OF POLAND

**Abstract.** This paper contains an analysis of the issue of the scope and manner of restriction of the right to property on the grounds of the provisions of the Constitution of the Republic of Poland of 2 April 1997 (Journal of Laws of 1997, No. 78, item 483, as amended), hereinafter referred to as the Constitution, in the context of the Parliamentary bill on the amendment of the Constitution of the Republic of Poland of 7 April 2022 (print no. 2263). This draft postulates the introduction of Chapter XIa, entitled Threat to State Security, into the Constitution and containing a single provision, Article 234a, stipulating the premises for the State Treasury's seizure of the assets of entities supporting armed aggression located on the territory of Poland. The rationale for the need to introduce the described editorial unit into the Basic Law is, in the opinion of the drafters, the need for the Polish state to respond to the aggression of the Russian Federation against Ukraine that began on 24 February 2022. At the same time, it should be emphasized, that the assets seized in the above-described manner would be used in full to support the victims of Russian aggression. This amendment, which is indispensable in the opinion of the drafters – in the face of Russian aggression against Ukraine – will be assessed by the author of the study in the light of the provisions of the Constitution regulating the general prerequisites of property restriction (preservation of the statutory basis, non-infringement of the essence of the right to property, justification of the restriction by one of the values..indicated in Article 31(3) Constitution and preservation of the principle of proportionality), the prerequisites of expropriation and forfeiture. At the same time, in this summary, the author would like to point out that entities financially supporting the actions of the Russian Federation vis-à-vis Ukraine can and should be subject to sanctions in the form of seizure of their assets located on the territory of Poland, because Russian aggression war is a manifestation of an action that finds no justification.

**Key words:** Constitution, expropriation, forfeiture, property rights, property.

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## **ПЕРЕДАЧА ДО ДЕРЖАВНОГО КАЗНАЧЕЙСТВА МАЙНА СУБ'ЄКТІВ ГОСПОДАРЮВАННЯ, ЩО ЗАБЕЗПЕЧУЮТЬ ВЕДЕННЯ БОЙОВИХ ДІЙ У СВІТЛІ КОНСТИТУЦІЇ РЕСПУБЛІКИ ПОЛЬЩА. ПРАВОВІ АСПЕКТИ У КОНТЕКСТІ ПАРЛАМЕНТСЬКОГО ЗАКОНОПРОЕКТУ ПРО ВНЕСЕННЯ ЗМІН ДО КОНСТИТУЦІЇ РЕСПУБЛІКИ ПОЛЬЩА**

**Анотація.** Це дослідження містить аналіз питання обсягу та способу обмеження права власності на підставі положень Конституції Республіки Польща від 2 квітня 1997 року (Законодавчий вісник 1997 р., № 78, поз. 483, з наступними змінами), далі – Конституція, в контексті Парламентського законопроекту про внесення змін до Конституції Республіки Польща від 7 квітня 2022 року (друк. № 2263). Цим проектом передбачається внесення до Конституції розділу XIa «Загроза державній безпеці», який міститиме єдину норму – статтю 234a, що передбачає підстави для арешту Державною скарбницею активів суб'єктів, які підтримують збройну агресію, розташованих на території Республіки Польща. Обґрунтуванням необхідності внесення зазначеної редакційної правки до Основного Закону виступає, на думку розробників, необхідність реагування польської держави на агресію Російської Федерації проти України, яка розпочалася 24 лютого 2022 року. При цьому, слід підкреслити, що активи, конфісковані у вищеописаний спосіб, будуть у повному обсязі використані для підтримки жертв російської агресії. Ця поправка, яка є необхідною, на думку розробників, в умовах російської агресії проти України, оцінюється автором дослідження у світлі положень Конституції, що регулюють загальні передумови обмеження права власності (збереження законної підстави, непорушення змісту права власності, обґрунтованості обмеження як однієї з цінностей, зазначених у ч. 3 ст. 31 Конституції, так і дотримання принципу пропорційності), передумови експропріації та конфіскації. Водночас у цій анотації автор хотів би зазначити, що до суб'єктів, які фінансово підтримують дії Російської Федерації щодо України, можуть і повинні бути застосовані санкції у вигляді арешту їхніх активів, розташованих на території Польщі, оскільки російська агресивна війна є проявом дії, яка не має жодного виправдання.

**Ключові слова:** Конституція, експропріація, конфіскація, право власності, майно.

**Introduction.** On 7 April 2022, the Speaker of the Sejm of the Republic of Poland received the Parliamentary bill on the amendment of the Constitution of the Republic of Poland of 7 April 2022 (print no. 2263) [1] introducing into the Basic Law [2] Chapter XIa entitled *Threat to State Security* and containing one provision of Article 234a, which, in the intention of the drafters, would constitute the legal basis for the State Treasury to take over the assets of certain entities. According to the draft, the condition for seizure of assets by the State Treasury would be an armed attack carried out by a foreign state on the territory of the Republic of Poland (hereinafter referred to as the Republic of Poland) or on the territory of another state, causing at the same time a direct threat to the internal security of the Republic of Poland. The property taken over here would be the property of natural persons who are not Polish citizens, legal persons and other entities, which is located on the territory of the Republic of Poland. The basis for the aforementioned takeover would be the existence of a presumption that the assets are or may be used in any part to finance or otherwise support an armed attack perpetrated by a foreign state or actions related to such an attack, in particular due to personal, organisational or financial links of the owner of the assets with public authorities of that state. At the same time, the seizure of this property would take place by operation of law and without compensation, while the detailed procedure (scope of the presumption and exemptions from the presumption) would be determined by law.

The rationale for the need to introduce the described editorial unit into the Basic Law is, in the opinion of the draft-

ers, the need for the Polish state to respond to the aggression of the Russian Federation against Ukraine that began on 24 February 2022. The assets seized in the above-described manner would be used in full to support the victims of Russian aggression. At the same time, in the justification of the project in question, its authors draw attention to the institution of expropriation with just compensation currently existing in the legal order (Article 21(2) of the Constitution), which, in the opinion of the project proponents, cannot be applied in the case of the above-mentioned entities.

The author of this paper wishes to answer three fundamental questions: In the light of the Constitution, is such a far-reaching interference with private property as proposed in the bill on the amendment of the Constitution permissible? If constitutional regulations allow such interference, are there already constitutionally founded institutions in the legal order that make such a takeover possible? How should the proposed amendment be assessed from the point of view of the requirements for constitutional norms?

**Previous scientific studies of the discussed issue.** The subject of this scientific article has not been the subject of wider scientific research in Poland so far. Short monographs (for example opinion of the Polish Supreme Bar Council – NRA) based on arguments focused on international and EU law, without deeper anchoring in Polish constitutional law.

**Main purpose of research.** The author of this paper wishes to answer fundamental question: how should the parliamentary bill on the amendment of the Constitution of the Republic of Poland of 7 April 2022 (print no. 2263) be assessed

from the point of view of the requirements for constitutional norms.

**The right to property in the light of the Constitution.** Two provisions of the Constitution, i.e. Articles 21 and 64 [3], are of fundamental importance for the issue at hand, although the Basic Law also refers to property in other provisions (Article 46, Article 165, Article 218). The norms of constitutional law, as well as the concepts used in them, are characterised by exceptional generality and higher abstractness than ordinary laws, while “their content is saturated to a large extent with elements of political ideology” [4]. As such, one should not expect exceptional precision in the provisions of the Basic Law: “for the Constitution speaks – in *the language of legal principles*” [5]. Very importantly, in one of its rulings, the Constitutional Tribunal (hereinafter referred to as the TK) expressed the view that, taking into account the provisions of Articles 20, 21(1), 64 and 165(1), “on the grounds of the Constitution of the Republic of Poland there is a uniform understanding of the notion of property” [6]. On the other hand, in another ruling, the Constitutional Tribunal states that, taking into account the constitutional norms in the Polish state, there is no justification for the thesis that the notion of “ownership” appearing in the content of Article 64 of the Constitution, “should be ascribed a broad character and identified with the entirety of property rights” [7].

On the basis of the fundamental law in force, all property has been equalised in the sense of legal protection, therefore its subjective form is of no significance [8]. The use of a kind of silence in Article 21 (the legislator does not explicitly specify whether all property is subject

to protection, both private property, referred to in the preceding provision, as well as public property) is of great significance for the discussed subject matter, because it indicates the will of the legislator to guarantee all property and thus not to limit itself only to private property [9]. All property is subject to the protection of the state. Both the one which satisfies the needs of the owner, as well as collective, state or communal property [10]. In turn, all the cited types of property correspond to the disposition of Article 140 of the Civil Code [11]. It should also be mentioned that the Constitutional Tribunal noted [12], that the provision of Article 64, paragraph 1 grants the right to property, the right of inheritance and the right to other property rights to everyone, whereas paragraph 2 concerns the subjective equality of these rights.

#### **The problem of the scope of permissible restrictions on the right to property**

Under the Polish Constitution, as in the case of other modern fundamental laws of contemporary democratic states, property is not an absolute right. Limitations of property are therefore legally permissible on the grounds of the Constitution. From this it follows that the protection of property is not absolute either [13]. As early as in the 19th century, the view was developed that the right to property should be exercised in such a way that its benefits include not only the owner, but also society [14].

In its judgment of 12 January 2000, the Constitutional Tribunal noted that the right to property may be subject to limitations, despite the fact that it is the most complete of all property rights. Therefore, it is not a matter of debate whether the legislator may introduce

certain limitations as such, but it is, after all, important to observe “the constitutional framework within which a right subject to constitutional protection may be limited” [15]. As regards the latter, various constitutional standards apply, e.g. the principle of equality, the legality and fairness of the interference, their statutory basis [16]. According to the Constitutional Tribunal, the indication of the prerequisites of limitations to the right to property does absolutely not exclude the consideration of the general principle from Article 31(3) of the Constitution. For the function of this provision “boils down to the determination of certain impassable limits of state interference (...) in the sphere of constitutionally guaranteed rights and freedoms of the individual” [17]. It is not permissible to treat Article 64, paragraph 3 of the Constitution as a special provision and thus to exclude the general principle of Article 31, paragraph 3. In view of the above, it should be recognised that the admissibility, on the grounds of the Constitution, of limitations to the right to property must be viewed through the prism of the two aforementioned provisions of the Constitution. Therefore, 4 basic prerequisites for this legal interference can be mentioned: 1) preservation of the statutory basis, 2) non-infringement of the essence of the right to property, 3) justification of the restriction by one of the values...indicated in Article 31(3). Constitution, 4) preservation of the principle of proportionality [18].

As regards the first condition mentioned, the exclusive statutory route as understood by the Court is to be understood literally. This means that the possibility of subdelegation, i.e. “the delegation of legislative competence to

another body, is excluded, by analogy with the exclusion of such a possibility with regard to regulations implementing laws” [19]. Explaining the meaning of the second premise, the essence of the right would be violated when the restrictions would affect “the fundamental powers constituting the content of the right in question and prevent the right from performing the function it is intended to perform in the legal order” [20]. Thirdly, Article 31(3) of the Constitution indicates that the limitations in question may be established only when it is necessary “for its security or public order or for the protection of the environment, public health and morals, or the freedoms and rights of other persons”. At the same time, the Constitutional Tribunal noted that limitations may be imposed only in the situations enumerated in Article 31(3) [21]. Fourthly, the Constitutional Tribunal notes that the premise of necessity expressed in Article 31(3) thus encompasses the postulate of necessity, usefulness and proportionality of limitations [22].

The legislature’s interference with the right to property, which is the most far-reaching interference, is the forcible expropriation of it [23]. The Constitution knows two such cases, namely expropriation and forfeiture. Expropriation is regulated by Article 21(2) of the Constitution, which states that it is possible with just compensation and only when it is done for public purposes. Just compensation – is just compensation”, i.e. it must show equivalence, “as only such does not violate the essence of compensation for the property taken (...)” [24]. Finally, it should correspond to the economic value of the property [25]. It is absolutely right to admit to the authors of the pro-

posed amendment to the Fundamental Law that the essence of the institution of expropriation excludes the possibility of its application to entities supporting the aggression, since granting them compensation would be at odds with the sense of the proposed amendments to the Constitution, aimed at eliminating the possibility of financing this armed aggression from the territory of the Republic of Poland.

In conclusion, it is worth emphasizing once again the fundamental, developed purpose, worked out in the historical development of the law, behind the encoding into constitutional provisions of norms which, being of key importance for the functioning of the state, provide the basis for such interference. “For, as a rule, the constitutional justification for the restrictions determining the content and scope of protection of the right to property is the social function” [26]. It is worth noting that, for example, in the Basic Law of the Federal Republic of Germany, Article 14 states that “the right to property and the right of inheritance shall be ensured”, while “the content of these rights and their limits shall be determined by law” [27]. Of particular interest is the second drafting unit of the same provision: “Property obliges. The enjoyment of it is at the same time to serve the common good” [28].

**Forfeiture.** In the Polish public space, there have been many voices questioning the legitimacy of the discussed draft law on amending the Constitution in the described scope. Among others, the Supreme Bar Council (NRA) expressed its critical view [29]. In the justification of its position, the NRA indicated that in international law and in the law of the European Union there are

already legal regulations allowing for the ‘freezing’ of funds of entities supporting terrorism, while in the Polish constitutional order there is an institution of forfeiture, which may cover with its application the assets of entities specified in the bill. The present study is based on an argumentation devoid of references to international and EU law, not only because its object is to discuss the issue of deprivation of a certain category of entities’ assets only on the grounds of the Polish Constitution, but also due to the content of the TK judgment of 7 October 2021 [30] being an emanation of the view on the relationship between domestic law and EU law of that part of the political milieu from which the authors of the proposed amendment to the Fundamental Law originate.

The institution of forfeiture, regulated by Article 46 of the Constitution, constitutes the most severe interference with the right to property. It is a complete expulsion from property. The provisions of the Constitution do not provide for any compensation in connection with forfeiture [31]. Forfeiture does not always have to be a measure of criminal repression – “the point is to prevent infringing actions from becoming a source of benefit (...)” [32]. The object of forfeiture may be things and its basis may be a final court decision. The forfeiture of things is always decided by the court having jurisdiction over the case, and the constitutional norm of Article 46 empowers the legislator to define by law the situations in which the forfeiture may take place [33]. These judicial proceedings must always be of a substantive nature and not merely of a controlling nature [34]. While the primary purpose of expropriation is to transfer property to



the state in connection with the achievement of public purposes, the primary purpose of the forfeiture of property is to deprive a specific subject of property. Secondly, the basis for the application of asset forfeiture is the commission of an act judged reprehensible by the subject of the right or a third party, including an unlawful act [35]. The basis for expropriation lacks the reprehensible act of a specific person. Thirdly, the forfeiture of an item involves the deprivation of ownership of the item leading to a depletion of property on the part of the owner. This is different in the case of expropriation, as compensation is intended, in principle, to preserve the dimension of the existing property [36].

The issue of the concept of 'thing' within the meaning of Article 46 of the Constitution has become contentious in the doctrine. According to some views, this term, on the grounds of the aforementioned provision, should be understood in the meaning given to it by civil law [37]. Accordingly, the object of forfeiture in this sense could be primarily movable and immovable property. In view of the guarantee character of Article 46 of the Constitution and the reference of the forfeiture to things, and not to property, it is inadmissible in the perspective of the Basic Law to pronounce the forfeiture (confiscation) of all the property of a specific subject [38].

Article 234a, the introduction of which into the Constitution is postulated by the bill under discussion, uses the concept of 'property'. As is known, this term does not have a legal definition in the Polish legal order. It is indicated in case law and doctrine that this concept should be distinguished from the concept of „property”. Although these terms are

sometimes considered to be identical, they do not have an identical conceptual scope. The term property is used in two senses. In the narrower sense, it means only assets, i.e. property rights, which can be equated with the concept of property. In the broader sense, it means the totality of property rights and obligations of a legal entity. Assets are components of property which can be distinguished as a set of assets and a set of liabilities being the subject of turnover, inheritance, the basis for liability for obligations [39]. The legal definition of property, however, is contained in Article 44 of the Civil Code [40].

It is also worth noting that there are views that the term 'thing' used in Article 46 of the Constitution has a broader meaning than the one resulting from the provisions of civil law. In the light of the well-established position of the Constitutional Tribunal, the meaning of particular terms adopted in laws may not prejudice the manner in which constitutional provisions are interpreted, for then the guarantees they contain would lose any sense. On the contrary, it is the constitutional norms that should dictate the manner and direction of interpretation of the provisions of other laws [41]. This, on the other hand, implies the conclusion that Article 46 of the Constitution is autonomous in nature and that it also includes the forfeiture of objects, property benefits and conglomerates of things and rights that are functionally related to each other (including, for example, an enterprise) [42].

**Summary.** In the light of the provisions of the Polish Basic Law, it is possible to interfere with the right to property even by depriving a given subject of this right altogether. For example, it should

be pointed out that the Constitution knows the concept of forfeiture which may be applied to an entity whose behaviour is assessed as reprehensible, including illegal. Referring to the entities described in the bill in question, financing or supporting an armed attack perpetrated by a foreign state on the territory of the Republic of Poland or on the territory of another state, thus causing a direct threat to the internal security of the Republic of Poland, is conduct worthy of the highest condemnation. Applying this to the realities existing as of 24 February 2022. – entities financially supporting the actions of the Russian Federation vis-à-vis Ukraine can and should be subject to sanctions in the form of seizure of their assets located on the territory of the Republic of Poland. Such a reaction would be a manifestation of disapproval of the violation of international treaties and agreements, for an aggression war is a manifestation of an action that finds no justification.

As the proponents rightly point out, and as was also explained in the study in question, the institution of expropriation regulated by the Constitution cannot be applied to the above mentioned entities. The author of the present study has, however, far-reaching doubts due to divergences in interpretation, whether the institution of forfeiture in the form as it currently exists in the Constitution may be applied in order to deprive the property of entities supporting armed aggression located on the territory of Poland, even if this particular forfeiture would be regulated by a separate act. The application of forfeiture, e.g. at one time, of an entire enterprise belonging to an entity financing the public authorities of an aggressive state, could expose such a

ruling to criticism from the point of view of constitutional norms. This would, in turn, further undermine the principle of legal certainty.

I consider the proposed amendment of the Constitution by introducing a new Chapter XIa, as unnecessary. This is supported by the following arguments. As has been noted, constitutional norms should define the principles on which the social and political system of the state is based. In my opinion, the provision of Article 234a touches upon a matter so detailed that it should not fill the Basic Law. The detailed manner of deprivation of property of subjects of a certain category should be regulated by an ordinary law. What is important, however, is that the provisions of such a law should be consistent with the Constitution. At the same time, having in mind the doubts concerning the issue of constitutional legitimacy of interference with the right to property in the form of deprivation of all “property”, I propose to amend the provision of Article 46 of the Constitution and make it read: “The forfeiture of *property* may take place only in cases specified by law and only on the basis of a final court decision”. Such a solution would enable the State Treasury to seize property in the narrower sense meaning only assets, i.e. property rights, which is identical to property understood as ownership and other property rights, but at the same time it would not preclude the adjudication – as e.g. in criminal proceedings to date – of the forfeiture of individual items or a collection of items. The ordinary law in question would then not use the concept of “seizure of property”, but “forfeiture of property”.

It is also worth noting, only in passing, that according to the draft, the “sei-



zure” of assets would be possible “in particular” from an entity linked personally, organisationally or financially with public authorities of the aggressor state. The drafters, however, lose sight of the situation in which the aforementioned entity may be linked in one of the indicated ways, e.g. with a commercial law entity operating or having its registered office on the territory of the aggressor state and financially supporting public authorities of this state.

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