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CRITERIA OF LEGITIMATE RESTRICTION OF OWNERSHIP DURING PROPERTY ARREST IN CRIMINAL PROCEEDINGS IN THE LIGHT OF PRACTICE OF THE ECHR

Abstract. *The article deals with the topical questions for modern law-enforcement practice, which are connected with determining the lawfulness of the state's interference into the right to peaceful possession of property in criminal proceedings while applying such a measure to ensure criminal proceedings as seizure of property. It is noted the important role of the Convention for the Protection of Human Rights and Fundamental Freedoms, Article 1 of Protocol No. 1 to the Convention, which sets out the criteria of assessing the lawfulness of interference in the property rights. The authors analyze in detail these criteria – legitimacy, legitimate purpose, necessity in a democratic society. This analysis is made on the extensive use of the case law of the European Court of Human Rights. It is highlighted, that the development of the criteria of the legitimate restriction of the persons' rights in criminal proceedings is urgent, because during arresting the property the legislator demands from the legislative judges to take into account among others the reasonableness and proportionality of restraint of property rights in the criminal proceedings and to apply the least burdensome way of arrest, which will not result in the restraint of lawful entrepreneurship of a person or other consequences which have the significant effect on the interests of others. On the basis of generalization of the practice of giving the rulings by the investigative judges on satisfaction or dismissal a satisfaction of the motion of the investigator, prosecutor about seizure of property, it is concluded that national courts gradually accept*

the novelties and requirements of the law and practice of the ECHR, but most often during deciding the motion of the investigator in the declaration of the ruling the standard argumentation of the general nature is used, the general content of the articles of the CPC is quoted without attempts to analyze the legality of the restriction, the purpose of such restriction, the proportionality of the interference of the state in the rights of a person, which corresponds the purpose. Meantime, it is important to have a proper systematic, logical, consistent argumentation, which, as a rule, is lacking in the rulings.

The article develops and proposes a model of logical argumentation, following which the investigative judges will be able to formulate correctly the declaration of the ruling on satisfaction or dismissal a satisfaction of the motion to seizure of property. The authors emphasize that the legitimacy of the purpose of seizure of property is established basing on the requirements of the law. A measure which is objectively necessary in the presence of certain grounds and conditions is reasonable. Suitable is a mean by which the desired aim can be achieved. The measure is necessary, if there is no other, equally suitable but less burdensome for a person, and just it is necessary for solving an urgent social problem. Proportional may be the measure, using which the encumbrance that will be imposed on a person, taking into account all the circumstances and risks, will be proportionate to the aim, which may be achieved during applying this restriction. At the final stage, an assessment is made whether the desired result, taking into account all the analyzed conditions, is commensurate with the restriction of a person's right to a peaceful possession of property.

In the view of the authors, the proposed model of argumentation is universal, capable during deciding the question of arresting of property to restrict the discretion of the law enforcer, to protect a person from arbitrariness of public authorities, as well as to become a methodological basis for making a criminal procedural decision.

Key words: *inviolability of property rights; legality; measures of ensuring criminal proceedings; seizure of property, criteria for the admissibility of human rights restrictions.*

In Article 41 of the Constitution of Ukraine it is stated that: "Everyone shall have the right to own, use, or dispose of his property and the results of his intellectual or creative activities… No one shall be unlawfully deprived of the right for property. The right for private property shall be inviolable… Confiscation of property may be applied only pursuant to a court decision, in the cases, to the extent, and in compliance with the procedure established by law". Thus, the Constitution, in establishing the inviolability of property rights, provides that it is not absolute, but its restriction is possible only in cases provided for by law and solely by court decision.

Such a provision of the Constitution correlates with the requirement of a number of international legal documents, which enshrine the principle of inviolability of property rights. Among them there is the Universal Declaration of Human Rights (Art. 17, Part 2 Art. 29);[1] Inter-

[1] Загальна декларація прав людини від 10 December 1948 p. URL: https://zakon.rada.gov.ua/laws/show/995_015 (дата звернення 17.07.2019).

national Covenant on Civil and Political Rights (Articles 2, 17);[1] International Covenant on Economic, Social and Cultural Rights (Articles 3, 4),[2] Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter referred to as the Convention).[3]

In more detail, the right to respect for property is enshrined in the First Protocol to the Convention.[4] This protocol was signed on 20 March 1952 and included the right to protection of property in the list of rights guaranteed by the Convention. Appeal to Art. 1 "The right to property" of Protocol No. 1 to the Convention gives grounds to state that it contains at least three rules that are of importance to national criminal justice, to which scholars and practitioners have always drawn attention: "Every natural 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*. However, the preceding provisions shall in no way limit the right of a State to enforce such laws as *it deems necessary* to control the use of property in the *general interest* or to secure taxes or other charges or penalties." (Emphasis ours – O. K.)[5]

The European Court of Human Rights (hereinafter – the ECHR, Strasbourg Court, Court) has interpreted the provisions of this article, stating that "The first rule, which is of a general nature, enounces the principle of peaceful enjoyment of property; it is set out in the first sentence of the first paragraph. The second rule covers deprivation of possessions and subjects it to certain conditions; it appears in the second sentence of the same paragraph. The third rule recognizes that the States are entitled, amongst other things, to control the use of property in accordance with the general interest, by enforcing such laws as they deem necessary for the purpose; it is contained in the second paragraph.[6]

In the case of *James and Others v. The United Kingdom*, the ECHR ex-

[1] Міжнародний пакт про громадянські і політичні права від 16 December 1966 р. URL: https://zakon.rada.gov.ua/laws/show/995_043 (дата звернення 17.07.2019).

[2] Міжнародний пакт про економічні, соціальні і культурні права від 16 December 1966 р. URL: https://zakon.rada.gov.ua/laws/show/995_042 (дата звернення 17.07.2019).

[3] Конвенція про захист прав людини і основоположних свобод від 4 November 1950 р. URL: https://zakon.rada.gov.ua/laws/show/995_004 (дата звернення 17.07.2019 р.).

[4] Перший Протокол до Конвенції про захист прав людини і основоположних свобод від 20 Marh 1952 р. URL: https://zakon.rada.gov.ua/laws/show/994_535/ed19520320 (дата звернення 17.07.2019 р.).

[5] Протокол до Конвенції про захист прав людини і основоположних свобод зі змінами, внесеними Протоколом 11, ратифікований Законом 475/97-ВР від 17.07.97. URL: https://zakon.rada.gov.ua/laws/show/994_535 (дата звернення 17.07.2019).

[6] ECHR decision in the case «Спорронг і Лоннрот проти Швеції» (Sporrong and Lonnroth v. Sweden), 23 September 1982, Application no. 7151/75 and 7152/75, § 61; «Депаль проти Франції» (Depalle v. France), 29 March 2010, Application no. 34044/02, § 77; «Зеленчук і Цицюра проти України» (Zelenchuk and Tsytsyura v. Ukraine), 22 May 2018, Application no 846/16 and 1075/16, § 56; «Андрій Руденко проти України» (Andriy Rudenko v. Ukraine), 21 Desemder 2010, Application no. 35041/05, §§ 35–37.

plained the relationship between the three sentences above and stated that "The three rules are not, however, "distinct" in the sense of being unconnected. The second and third rules are concerned with particular instances of interference with the right to peaceful enjoyment of property and should therefore be construed in the light of the general principle enunciated in the first rule."[1] The same is stated by the ECHR in the case of *Papastavrou and Others v. Greece,* underlining that the second and third rules, which are concerned with particular instances of interference with the right to peaceful enjoyment of property, are to be construed in the light of the general principle laid down in the first rule.[2] Extrapolating the provisions of international documents to criminal justice, we can state that property rights are not absolute, which makes it possible to be regulated and limited by the state. However, in exercising such powers, the state must adhere to the established principles of permissible lawful interference. Such legal intervention should be guided by international standards and provisions of national law. In addition to the Constitution of Ukraine, the inviolability of property rights is reflected in sectoral legislation. In particular, Article 16 of the Criminal Procedure Code (CPC) provides that the deprivation or restriction of the right to ownership shall be made only upon a motivated court's decision adopted as prescribed in the Code. Temporary arrest of property is allowed without a court decision on grounds and according to the procedure prescribed in the Code.

Since during the arrest of property a person *de jure* is not deprived of ownership, but only temporarily, until its cancellation in accordance with the CPC, is restricted the right to alienation, disposal and/or use, the ECHR recognizes the arrest of the property by means of control over the use of the property,[3] and requires that the actions of the authorities not contradict the third rule of Art. 1 of Protocol No. 1 to the Convention referred to above.

For the purpose of controlling the property, Protocol No. 1 gives states broad powers, "which they deem necessary". It is important that the rights of the state to interfere with the right to peaceful ownership of property should be governed by law.

Since, as noted above, all three provisions of Art. 1 of Protocol No. 1, which positioned as interconnected rules, the powers that the state has to interpret should be systematically linked to the

[1] ECHR decision in the case «Джеймс та інші проти Сполученого Королівства» (James and Others v. the United Kingdom), 21 Februaru, 1986, Application no. 8793/79, § 37.

[2] ECHR decision in the case «Папаставру та інші проти Греції» (Papastavrou and Others v. Greece), 10 April 2003, Application no. 46372/99 § 33.

[3] ECHR decisions in the cases «Раймондо проти Італії» (Raimondo v. Italy), 22 February 1994, Application no. 12954/87, § 27; «Эндрюс проти Сполученого Королівства» (Andrews v. the United Kingdom), 26 September 2002, Application no. 49584/99; «Адамчик проти Польщі» (Adamczyk v. Poland), 7 November 2006, Application no. 28551/04; «Боржонов проти Росії» (Borzhonov v. Russia), 22 January 2009, Application no. 18274/04, § 57.

second rule; therefore, state-owned property controls must be carried out in the public interest.

Since, in the course of restriction of property rights, the state interferes with individual law in one way or another, the conditions of such interference must meet the requirements specified in Art. 8 of the Convention, according to which: "Everyone has the right to respect for his private and family life. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others".

Thus, Article 8 of the Convention sets out the conditions under which a state may interfere with the exercise of a protected right and which are often referred to as the criteria for intervention. According to the Convention, restrictions are permissible if they are "prescribed by law", "necessary in a democratic society" and pursue one of the legitimate goals envisaged. As we can see, these criteria are consistent with the provisions, which are also contained in Art. 1 of Protocol No. 1 of the Convention. And it should be noted that despite the construction of Part 2 of Art. 8 of the Convention, the court assesses the adherence of the specified conditions separately by the state in the following order: "legality", "legitimate purpose", "necessity".[1] This is constantly stated in the ECHR decisions. In particular, in the case of *Shvydka v. Ukraine*, the Court noted that "in order for an intervention to be justified …, it must be "established by law", pursue one or more legitimate goals … and be "necessary in a democratic society" – that is, proportionate the goal pursued".[2]

Having been introduced into the ECHR practice, criteria for assessing the lawfulness of state interference with the rights guaranteed by the Convention were named the "three-part test". [3] Meanwhile, as it is well known, the ECHR has "borrowed" from the German roots in the right-to-practice practice and the principle of proportionality, which is now existing in many legal systems,[4] which, although not directly enshrined

[1] Harris, O'Boyle, and Warbrick Law of the European Convention on Human Rights (3rd edn, Oxford university press 2014).

[2] ECHR decision in the cases «Швидка проти України» (Shvydka v. Ukraine), 30 October 2014, Application on. 17888/12, § 33. See also: Case of «Гладишева проти Росії» (Gladysheva v. Russia), 6 December 2011, Application on. 7097/10, § 77; «Брумереску протии Румунії» (Brumarescu v. Romania), 23 January 2001, Application no. 28342/95, § 78; «Спорронг і Лоннрот протии Швеції» (Sporrong and Lonnroth v. Sweden), 23 September 1982, Application no. 7151/75 and 7152/75, § 69–74.

[3] Фулей Т. І., Застосування Конвенції про захист прав людини і основоположних свобод та практики Європейського Суду з прав людини при здійсненні правосуддя (BAITE 2017) 38.

[4] Бажанов А. А., Обоснование принципа соразмерности в практике Федерального Конституционного Суда Германии (1950–1960 гг.) (2018) 5 Вестник Университета имени О. Е. Кутафина (МГЮА) 159–168.

in the Convention, is one of the most important principles that is part of the rule of law, has become the principle of the Convention interpretation[1] and most commonly applied by the Court. Moreover, elements of this principle have been known in ancient times,[2] its content has gradually evolved over several centuries, but only nowadays it has received a "new breath" through constitutional justice and international judicial institutions.

The first and most important requirement of Article 1 of Protocol No. 1 of the Convention is that any interference by the state in the unimpeded use of property must comply with *the law.*

If one tries to understand the concept of "law", "provided for by law", "in accordance with the law" used in the Convention, then one should refer to the ECHR practice in which the Strasbourg Court developed a legal position and formed an autonomous concept of "law". One of the first and most common cases of the ECHR in which it has been formulated in these terms is the case of T*he Sunday Times v. the United Kingdom*.[3] The complaint concerned a possible violation of Art. 10 of the Convention due to the ban by UK national courts to publish articles in the *Sunday Times* dedicated to discussing a "high-profile" lawsuit that had not been completed yet. Such a ban was due to contempt of court, which was expressed in the fact that the comments in the press could be seen as influences and assumptions that were incompatible with the principle of independence and impartiality of the court and the trial. One of the aspects that needed to be considered by the Court was the interpretation of the term "provided for by law" in the light of the interference with the rights protected by the Convention.

The ECHR, in particular, noted that: "The word "law" in the formula "provided for by law" covers not only statutes but also unwritten law… Considering that a restriction, by virtue of com-

[1] Гюлумян В. Г., Принципы толкования Европейской конвенции прав человека (критика и защита) (2015) 3 (45) Журнал конституционного правосудия 17; Дудаш Т. І. Практика Європейського суду з прав людини: герменевтичний аналіз (2009) 21 Практика Європейського суду з прав людини: загальнотеоретичні дослідження, Серія І. Дослідження та реферати 26–40; Рабінович П. М., Федик С. Є., Особливості тлумачення юридичних норм щодо прав людини (за матеріалами практики Європейського суду з прав людини) (2004) 5 Праці Львівської лабораторії прав людини і громадянина Науково-дослідного інституту державного будівництва та місцевого самоврядування академії правових наук України 27.

[2] Бажанов А. А., Соразмерность как принцип права (дис канд юрид наук, Російський університет дружби народів 2019); Євтушок Ю. О. Принцип пропорційності як необхідна складова верховенства права (дис канд юрид наук, Університет економіки та права «КРОК» 2015); Погребняк С. П., Принцип пропорційності у судовій діяльності (2012) 2 Філософія права і загальна теорія права 49–50; Цакиракис С., Пропорциональность: посягательство на права человека? (2011) 2 (81) Сравнительное конституционное обозрение 47–51; Фоскулле А., Принцип соразмерности (2015) 1 (104) Сравнительное конституционное обозрение 159.

[3] ECHR de decision sn the case ««Санді Таймс» проти Сполученого Королівства» (The Sunday Times v. the United Kingdom), 26 April 1979, Application no. 6538/74.

mon law, does not refer to "provided for by law" solely on the ground that it is not enshrined in law, and then it deprives a state participating in the common law Convention, protection… and cuts down the very roots of this state's legal system. This would clearly contradict the intentions of the drafters of the Convention…"

In the Court's view, the following two requirements are followed from the expression "provided for by law". First, the right must be adequately accessible: citizens must be able, in appropriate circumstances, to navigate what legal rules are applied to the case. Secondly, a norm cannot be regarded as a 'law' unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able – if need be with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. These consequences need not be predicted with absolute certainty: experience has shown that this is unattainable… Accordingly, "many laws are inevitably couched in terms which, to a greater or lesser extent, are vague and whose interpretation and application are questions of practice."[1]

Thus, the ECHR has formulated several requirements that must be satisfied by national law in order to comply with the rule of law as enshrined in the preamble to the Convention and makes sense of the whole Convention. First, it is a fairly broad understanding of the concept of "national law", which includes not only current law but also the interpretation given to it by national courts, established practice, including judicial one. Secondly, it is a requirement concerning the "quality of the law": accordingly to its accessibility and predictability.

The ECHR continues to recall the requirements of the concept of law formulated in the judgment of *The Sunday Times v. United Kingdom*, complementing it with new content. In particular, in the case of *Silver and Others v. The United Kingdom*, it was stated that "accessibility, indeed, provides an opportunity to read the texts of acts containing rules";[2] "the principle of legality also provides that the applicable provisions of national law are accessible, clear and predictable in their application."[3] Since interference with the right of property borders with the possibility of arbitrary restriction, the state must not only ensure the quality of the law, but also provide remedies against the arbitrary interference of the authorities in the exercise of the rights guaranteed by the Convention. Thus, "legislation must determine with sufficient certainty the extent of freedom

[1] ECHR de decision in the case ««Санді Таймс» проти Сполученого Королівства» (The Sunday Times v. the United Kingdom), 26 April 1979, Application no. 6538/74.

[2] ECHR de decision in the case «Сільвер та інші проти Сполученого Королівства» (Silver and Others v. the United Kingdom), 25 Marh 1983, Application no. 5947/72, 6205/73, 7052/75, 7061/75, 7107/75, 7113/75 and 7136/75, §§ 87–88

[3] ECHR de decision in the cases «Зеленчук і Цицюра проти України» (Zelenchuk and Tsytsyura v. Ukraine), 22 May 2018, Application no. 846/16 and 1075/16, § 98, and «Будченко проти в України» (Budchenko v. Ukraine), 24 April 2014, Application no. 38677/06, § 40.

of action and the way in which they are exercised"[1] and "there must be a measure of legal protection in domestic law against arbitrary interferences by public authorities."[2]

An example is the case of *Denisova and Moiseyeva v. Russia*, in which the ECHR found a violation of Art. 1 of Protocol No. 1 of the Convention. The reason for this was the seizure of the property (and subsequently its confiscation) of his wife on the basis of a judgment passed against her husband. At that time, the Supreme Court of the Russian Federation had already provided an explanation for such cases, stating that the confiscation of jointly-owned property is possible only within the share of a spouse found guilty of a crime. Due to the fact that the seizure of his wife's property was not "in accordance with the law", the Court found a violation of Art. 1 of Protocol No. 1 of the Convention.[3] There is another example. Latvian citizen V. M. Baklanov decided to move from Latvia to Russia, agreed with the realtor to buy an apartment, withdrew the amount of $ 250 thousand from his bank account and transferred this sum to his acquaintance B. for sending to Moscow. On arrival at the airport, B. without specifying the amount in the customs declaration at the passage of customs control was detained. He was charged with smuggling, and subsequently he was sentenced to two years of probation. The court ordered the funds stored in the customs terminal to be converted into government revenue as a smuggling item. The ECHR, having considered the case, noted that the first and most important requirement of Art. 1 of Protocol No. 1 is that any interference by public authorities in the peaceful possession of property should be lawful; deprivation of property is possible only "under the conditions provided by law". In assessing compliance with the law in this case, the European Court has stated, among other things that, according to the law, the *instruments of crime belonging to the accused, money and other objects of crime* are subject to seizure. (Emphasis ours – O. K.) Meanwhile, no one was alleged, nor was there any evidence that the applicant's money had been "illegally acquired". Taking into account failure to bring legal provisions before national courts as grounds for withdrawing a substantial sum of money and the apparent contradictions of the case law regarding national legislation, the Court noted that the national legislation at issue had not been formulated with such precision that the applicant could have foreseen the consequences of his actions to the extent reasonable to the circumstances of the case. Therefore, the interference with the applicant's property could not be regarded as legitimate

[1] ECHR de decision in the case «Маестрі проти Італії» (Maestri v. Italy), 17 February 2004, Application no. 39748/98, § 30.

[2] ECHR de decision in the case «Крюслен проти Франції» (Kruslin v. France), 24 April 1990, Application no. 11801/85, § 30.

[3] ECHR de decision in the case «Денисова і Мойсеєва проти Росії» (Denisova and Moiseyeva v. Russia), 1 April 2010, Application no. 16903/03, §§ 55–65.

in the sense of Art. 1 of Protocol No. 1 of the Convention, and consequently there has been a violation thereof.[1]

Thus, this makes it possible to conclude that since the mechanism of the protection of rights provided by the Convention is subsidiary in comparison with the protection at the national level, and the ECHR does not replace the national courts. That is why the regulatory potential of the law is of key importance. The state at national level should create safeguards to protect the rights of the person against arbitrary interference during, inter alia, the seizure of property in criminal proceedings, which necessitates the adoption of the relevant legislation, and the quality of the law, which imposes additional obligations on the state, aimed at preventing the defects of the criminal procedural legislation, creating a clear and predictable procedure, and the mechanism of the court appeal of the lawfulness of the intervention, is of particular importance.

In order that the interference with the property right was legitimate in the sense of Art. 1 of Protocol No. 1 of the Convention, as stated above and follows from the second rule of Art. 1, it should be carried out in the public interest. The ECHR will consider the existence of a *legitimate purpose* for interfering with the property after the legality of the intervention has been established. As the ECHR recalled in the case of *Tregubenko v. Ukraine*, the court reiterates that deprivation of property can only be justified if it is shown, *inter alia*, in the "public interest" and the "conditions provided for by law". Moreover, any interference with property rights must necessarily comply with the principle of proportionality. As the Court has repeatedly stated, a "fair balance" should be maintained between the requirements of the general interest of society and the requirements of the protection of fundamental human rights, and that "the necessary balance will not be respected if the person concerned carries an "individual and excessive burden", moreover, "the correct application of the law is undoubtedly of public interest."[2]

In the case of *Sukhanov and Ilchenko v. Ukraine*, it was also stated that "the first and foremost rule of Article 1 of Protocol No. 1 is that any interference by public authorities with the right to peaceful possession of property should be lawful and should pursue a legitimate purpose in the interests of society".[3]

Moreover, an analysis of the ECHR's practices makes it possible to conclude that in determining the lawfulness of the purpose of the intervention, the Court gives states the discretion,[4] since it is the

[1] ECHR de decision in the case «Бакланов проти Росії» (Baklanov v. Russia), 9 July 2005, Application no. 68443/01, § 39–46.

[2] ECHR de decision in the case «Трегубенко проти України» (Tregubenko v. Ukraine), 2 November 2004, Application no. 61333/00, § 53–54.

[3] ECHR de decision in the case «Суханов та Ільченко проти України» (Sukhanov and Ilchenko v. Ukraine), 26 June 2014, Application no. 68385/10 та 71378/10, § 53.

[4] ECHR de decision in the case «Олссон проти Швеції (1)» (Olsson v. Sweden (1)), 24 Marh 1988, Application no. 10465/83, § 67.

authorities themselves that are more aware of the needs of their society, and are therefore more favorably placed than the judge of the ECHR in assessing the public interest of their country. Supervision of the ECHR in this part is limited to cases of abuse of power and blatant mischief.

With regard to such a component as the possibility of restricting rights to the extent necessary in a *democratic society*, the ECHR explained that, taking into account the case-law of the ECHR, "the notion of necessity implies that the interference corresponds to a pressing social need and, in particular, that it is proportionate to the legitimate purpose pursued."[1] The ECHR noted that "whilst the adjective "necessary"… is not synonymous with the adjective "indispensable", neither has it the flexibility of such expressions as "admissible", "ordinary", "useful", "reasonable" or "desirable".[2]

The ECHR also developed the components to be assessed in determining whether interference was necessary in a democratic society: the importance of protected rights; the nature of a democratic society; the possibility of a European and international consensus; the importance and objective nature of the protected interest; the availability of a judicial evaluation of the intervening interest.

Within this criterion of admissibility of interference with a person's right, the proportionality is assessed between the need for interference with human rights in a democratic society and the possibility of securing a legitimate purpose during the intervention. As the ECHR stated in the above-mentioned Decision in the case of *Sukhanov and Ilchenko v. Ukraine*: "Any interference should also be proportionate to the objective pursued. In other words, a "fair balance"" should be struck between the general interests of society and the duty to protect the fundamental rights of the individual. The necessary balance will not be achieved if the individual or persons are burdened with personal and excessive burden."[3]

Therefore, interference with individual rights is disproportionate if it does not lead to the achievement of legitimate purposes. The resolution of the issue of proportionality is often about balancing the various factors, which is often difficult for both the ECHR itself and law enforcers trying to justify their interference with the rights of individuals. The ECHR often speaks of a "fair balance" between the interests of society and the interests of the individual, but finding that balance is very difficult. In other words, human rights restrictions applied by the state should be proportionate to the content and scope of the law itself and may not be so severe

[1] ECHR de decision in the case «Олссон проти Швеції (1)» (Olsson v. Sweden (1)), 24 Marh 1988, Application no. 10465/83, § 58.

[2] ECHR de decision in the case «Хендісайд проти Сполученого Королівства» (Handyside v. the United Kingdom), 7 December 1976, Application no. 5493/72, § 48.

[3] ECHR de decision in the case «Суханов та Ільченко проти України» (Sukhanov and Ilchenko v. Ukraine), 26 June 2014, Application no. 68385/10 and 71378/10, § 53.

or violate the very essence of the law.

For example, in the case of *Bokova v. Russia*, a complaint was filed by a citizen Bokova that after convicting her husband and his accomplices for committing particularly large-scale fraud, the perpetrators were obliged to pay more than USD 9 million to the victim. Due to the need to secure a civil suit, the house of Bokova was arrested. Not receiving legal protection at the national level, the applicant appealed to the ECHR, which in her decision stated, inter alia, that she had obtained the house prior to the criminal activity of her husband, and therefore had a legitimate reason to demand the abandonment of at least a part of it, namely the part which was not subjected to repair at the expense of a man's criminal proceeds. In addition, the decision to confiscate the house was not accompanied by sufficient procedural safeguards to avoid arbitrariness, as no domestic court examined the amount of the proceeds of the crime, and did not give the applicant the opportunity to present arguments regarding the protection of his share of the property. This approach has led the ECHR to unanimously acknowledge the violation of Art. 1 of Protocol No. 1 of the Convention.[1] Therefore, it can be seen that the interference with the applicant's property rights was disproportionate to the purpose pursued by the state authorities. The applicant was subjected to undue burdens, had an undue influence on her property rights, and was not provided with any procedural safeguards to protect her property.

As it was stated above, the right to peaceful possession of property is a fundamental right, but it is not absolute and may be limited under certain conditions, but a violation of Art. 1 of Protocol No. 1 of the Convention will take place when it is established a significant imbalance, a disproportionate effect "between the means employed and the aim sought to be realized".[2]

For a more thorough understanding of the essence of the principle of proportionality, we should turn to modern doctrinal approaches to its understanding.[3]

If, as noted above, the ECHR uses the following stages of lawfulness restriction assessment: "legality", "legitimate purpose", "necessity in a

[1] ECHR de decision in the case «Бокова проти Росії» (Bokova v. Russia), 16 April 2019, Application no. 27879/13, § 54, 59.

[2] ECHR de decision in the cases «Джеймс та інші проти Сполученого Королівства» (James and Others v. the United Kingdom,), 21 February 1986, Application no. 8793/79, § 50, and ««East/West Alliance Limited» проти України» (East/West Alliance Limited v. Ukraine), 23 January 2014, Application no. 19336/04, § 168.

[3] Barak A., Proportionality. Constitutional Rights and their Limitations (Cambridge University Press 2012) 638. Бажанов А. А., Проблемы реализации принципа соразмерности в судебной практике (2018) 6 (т. 13) Труды Института государства и права РН 124–157; Коэн-Элия М., Порат И., Американский метод взвешивания интересов и немецкий тест на пропорциональность: исторические корни (2011) 3 Сравнительное конституционное обозрение 59–81; Погребняк С. П., Принцип пропорційності у судовій діяльності (2012) 2 Філософія права і загальна теорія права 49–55.

democratic society", then scholars propose their own vision of algorithmizing lawfulness assessment activities. In particular, A. Barak distinguishes four elements (stages) of the proportionality test: 1) identification of the legitimate purpose of law restriction; 2) determining the existence of a rational link between the legitimate purpose and the means chosen to achieve it (the relevance of the means employed); 3) assessment of the necessity of the measures applied; 4) comparing the benefits of achieving a legitimate purpose and the limitations to which human rights have been subjected (proportionality in a narrow sense or "weighing").[1]

There are approaches according to which the number of steps proposed by A. Barak is reduced to two, but there are criteria for determining the proportionality of the intervention.[2]

Thus, as we can see, basic details of the proportionality principle of the legitimacy determination of human rights restriction, which are developed in the doctrine, applied in national legal systems and used in the ECHR, are the same.

Consideration of the issues raised above becomes even more relevant in view of the fact that Art. 173 of the CPC provides that in deciding whether to seize property, the court should take into account, inter alia, the reasonableness and proportionality of the restriction of ownership to the task of criminal proceedings. In addition, if the investigator's request for the seizure of the property is satisfied, the court should apply the least onerous manner of arrest that will not result in the suspension or undue restriction of the person's legitimate business activity or other consequences that significantly affect the interests of others (Para. 5 Part 2, Part 4, Art. 173 of the CPC). So, as we can see, the domestic legislator tried to unify the international legal standards contained in Art. 1 of Protocol No. 1 of the Convention and national practice to ensure that the rights of the seized person are respected. Such a move by the legislator is a positive one, since the ECHR, as mentioned above, states that it is for the state to establish the goals of interference with the exercise of individual rights of the individual and to determine a fair balance between the needs of such intervention and the general interests of society. Criminal proceedings belong to those types of state activity where the possibility of using coercion permeates all its stages and proceedings, facilitates the exercise of evidentiary activity, is a means of ensuring the participants in criminal proceedings of their duties, etc. Therefore,

[1] Barak A. Proportionality. Constitutional Rights and their Limitations (Cambridge University Press 2012) 638; Бажанов А. А., Проблемы реализации принципа соразмерности в судебной практике (2018) 6 (т. 13) Труды Института государства и права РН 129.

[2] Коэн-Элия М., Порат И., Американский метод взвешивания интересов и немецкий тест на пропорциональность: исторические корни (2011) 3 Сравнительное конституционное обозрение 61; Погребняк С. П., Принцип пропорційності у судовій діяльності (2012) 2 Філософія права і загальна теорія права 51.

it is inevitable to raise awareness of the criteria for the legitimacy of the rights restriction of persons in criminal proceedings, including whilst the arrest of property, as well as their widespread implementation in law enforcement practice.

Referring to the practice of national courts shows that judges are gradually adopting the new legal requirements and requirements. Cases with reference to Art. 1 of Protocol No. 1 of the Convention in the rulings on the satisfaction or satisfaction refusal of the investigator's request for the arrest of property. As a positive trend, it should be noted that in some rulings investigative judges try to make an argument and evaluate the proportionality of the means of limiting the rights of the person being pursued, but such argumentation is very lapidary; the components of the proportionality test are not analyzed in detail, judges do not explain exactly how public interest is compared, the purpose the law enforcer wants to achieve and the rights of the individual.

In particular, having considered the request of the investigator for the arrest of "movable and immovable property" in the case, which was initiated on the grounds of the crime under Part 3 of Art. 212 of the Criminal Code "Tax evasion, fees (mandatory payments)", the investigating judge concluded that it was necessary to refuse to grant the request of the investigator and in the ruling stated that "the investigators were not provided with adequate and admissible evidence by the court that in this criminal proceeding any person was informed of suspicion, the possibility of using property as evidence in criminal proceedings, since the petition is based only on the assumption of tax evasion of this individual, the court has also not proved the reasonableness and proportionality of the restriction of ownership by the criminal proceedings. Since… seizure of… the account will completely stop the activity… of the individual and because of the inability to purchase poultry feed will lead to its maturity, that is, it will have irreversible consequences…"[1]

Another order of the investigating judge stated: "the petition does not specify the basis and purpose of seizure of the vehicle in accordance with Art. 170 of the CPC of Ukraine and the necessity of such arrest is not duly substantiated. And the need for an examination is not a basis for taking such a measure to secure criminal proceedings as seizure of property. In addition, according to Part 4 of Art. 173 of the CPC of Ukraine, the investigating judge, the court is obliged to apply in such a way the seizure of property, which will not lead to the suspension or undue restriction of the legitimate business activity of the person, or other consequences that significantly affect the interests of other persons. Thus, the imposition of arrest implies the deprivation of the right to alienate, dispose and/or use the property, so in the case of arrest of a car owned and used in the business activity of JSC Iceberg in

[1] Ухвала слідчого судді Ужгородського міськрайонного суду від 23 February 2017 р., справа 308/1740/17. URL:. http://reyestr.court.gov.ua/Review/64906747 (дата звернення: 20.06.2019).

the form of LLC, it may lead to a restriction of legitimate business activity of the company… the court was not provided with adequate and admissible evidence that there were risks that the individual entrepreneur PERSON_3 may conceal, lose, transfer, alienate it, since during this period he had sufficient time and opportunities to dispose of the funds from the stated accounts of the petition." In view of the foregoing, the judge denied the application.[1]

Meanwhile, it should be noted that in the motivating part of the decisions of investigative judges, the standard argumentation of the general nature is most often applied, the relevant parts of Art. 170–174 of the CPC, there are formal criteria without attempting to introduce a discretionary scheme, which undoubtedly are grounds for satisfaction or refusal to grant a request, but the proper systematic, logical, consistent reasoning, which is usually lacking, is important. Certainly, it is not easy to construct such a sequence, but based on the ECHR's practice and the above approaches of scholars, we will try to offer a model of argumentation algorithm that can be used by the investigating judge when considering a motion for seizure of property, as well as by an investigator in making a request for seizure of property. In our view, the value of developing such an algorithm is obvious. The use of coercion pervades all criminal proceedings by virtue of its specificity, so the question arises about determining the admissibility criteria for restricting the rights of persons involved in criminal proceedings and using them in petitioning for the seizure of property, as well as the decision of investigating judges to grant or refuse their satisfaction.

The conducted research gives us grounds to propose the following algorithm whereby the investigating judge, or the investigator who drafts it, should resolve the following questions:

1) what is the purpose of interfering with a person's right;

2) whether the purpose of interfering with a person's right is legitimate, that is, whether it is provided by law;

3) whether the purpose can be achieved through the seizure of property, whether it is reasonable, appropriate and necessary for the achievement of that purpose, and whether the evidence is necessary;

4) whether there is any other means less burdensome than the seizure of property by which this purpose can be achieved;

5) whether the means used are proportionate to the purpose which the state wishes to achieve;

6) whether the degree of restriction of the person's right they wish to achieve is proportionate.

The proposed questions give reason to conclude on a three-stage solution to these issues. In the first stage, the first two questions concerning the definition of purpose are solved. In the second stage, the third and fourth questions

[1] Ухвала слідчого судді Берегівського районного суду Закарпатської області від 26 June 2017 р., справа 297/1390/17. URL: http://reyestr.court.gov.ua/Review/67410143 (дата звернення: 20.06.2019).

concerning the choice of a means of restriction are addressed. Finally, the third stage addresses the issue of proportionality between the right of the individual and the purpose to be achieved.

The legitimacy of the purpose is established based on the requirements of the legislation. A measure which is objectively necessary in the presence of certain grounds and conditions is *reasonable*. *Suitable* is a means by which the desired purpose can be achieved. The means is *necessary*, if there is no other, equally suitable, but less burdensome person, and it is necessary to solve an urgent social problem. When, of all the means by which a legitimate purpose can be achieved, it is the most appropriate one, it is capable of ensuring its achievement as effectively as possible. *Proportional* may be the means to which the burden is imposed on the individual, given all the circumstances and risks will be commensurate with the purpose to be attained in the application of this restriction and also of benefit to society. That is, it is necessary to "weigh" the degree of influence that a person should exert on the one hand, and the public interest protected by the state on the other one. In other words, the benefits to society of applying this measure are obvious and more important than the burdens a person carries. It is also necessary to determine the degree of intensity of influence on the person, since when seized property may be different. Not only the achievement of the purpose but also the gravity of the crime committed, the risks involved and the person to whom the measure is applied are to be taken into account. Finally, one can then conclude whether the desired result, taking into account all the conditions analyzed, is commensurate with the restriction of a person's right to peaceful possession of property.

In our opinion, our model of argumentation is universal, capable in the decision to arrest property to restrict the discretion of the law enforcer, to protect a person from arbitrariness of public authorities, and also to become a methodological basis in making a criminal procedural decision.

The algorithm developed seems to be capable of resolving the value conflict arising from the use of property arrest as a measure of criminal proceedings related to the possibility of interfering with bodies conducting criminal proceedings in a law guaranteed by the Constitution of Ukraine (Article 41), the Convention and its Protocol No. 1, as well as the CPC (Article 16) by determining such a correlation between the legitimate purpose of the intervention and the extent of the intervention, which will strike a balance between the values protected by law, between which there is a conflict as a result of such intervention.

The proposed approaches, on the one hand, will ensure the inviolability of property rights and, on the other, the possibility of restricting them in necessary cases, while ensuring the priority of human rights and the proportionality of such restrictions.

Conclusions. Property arrest is a measure of ensuring criminal proceedings, during which the interference with the fundamental right of a person to

peaceful possession of property is interfered with, which is protected by the Constitution of Ukraine and international legal acts. Against this background, it is inevitable to raise awareness of the criteria for the legitimacy of the person's rights restriction in criminal proceedings, as well as their widespread incorporation into law enforcement practice. Such criteria have been developed, based on the provisions of the Convention, Art. 1 of Protocol No. 1 to the ECHR, in the ECHR's case-law, and were called the "three-part test", the elements of which are to analyze the legitimacy of an interference with a person's right, legitimate purpose, and address the need for such interference in a democratic society, its proportionality to the purpose that the state wants to achieve.

The analysis of such criteria becomes even more relevant due to the fact that Art. 173 of the CPC provides that, in deciding whether to arrest property, the court should take into account, inter alia, the reasonableness and proportionality of the restriction of property to the task of criminal proceedings, and to apply the least aggravated method of arrest which will not result in the suspension or undue restriction of the person's legitimate business activity or other consequences which have a significant effect on the interests of others. Thus, the domestic legislator tried to unify the international legal standards contained in Art. 1 of Protocol No. 1 of the CPC and national practice in order to ensure the rights of the person the property of which is seized are respected.

National judges are gradually accepting the ECHR legislation and practices, but most often the standard reasoning is generally used when deciding on a seizure request for property arrest; the contents of the relevant articles of the CPC are provided without attempting to reason and to give detailed and substantiated grounds for satisfying or denying the petition. Meanwhile, it is important to have a proper systematic, logical, consistent argument, which is generally lacking in the rulings.

The model of gradual logical argumentation, developed and proposed by the authors of the article, is universal, capable of restricting the discretion of the law enforcer in the decision to arrest property, to protect the person from arbitrariness of public authorities, and also to become a methodological basis for making a criminal procedural decision.

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