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PROPORTIONALITY OF INTERFERENCE WITH THE RIGHT TO PEACEFUL ENJOYMENT OF PROPERTY DURING THE SEIZURE OF PROPERTY IN CRIMINAL PROCEEDINGS IN UKRAINE*

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Summary: 1. Introduction. – 2. Principle of peaceful enjoyment of property in ECtHR case-law. – 3. The ECtHR criteria for assessing the legitimacy of state interference in the right of peaceful enjoyment of the property. – 3.1. *Grounds of the state interference provided by law.* – 3.2. *The purpose of interfering with property rights.* – 4. 4. Determination of the principle of proportionality in the Ukrainian legal doctrine and its meaning for the limits of interference with property rights chosen. – 5. Conclusions.

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This article considers relevant science and law enforcement practice issues of state intervention's legitimacy in the right to peaceful property enjoyment in criminal proceedings during property seizure. These issues are considered everywhere through international instruments' prism, particularly the Convention for the Protection of Human Rights (ECHR) and Fundamental Freedoms, Article 1 of Protocol No. 1 to the Convention and the ECtHR case-law. Based on the ECtHR case law, the authors analyze the conditions under which the state may interfere in exercising a protected right, often called criteria for intervention. Based on the fact restrictions are permissible if they are prescribed by law, necessary in a democratic society and pursue a legitimate goal, the authors consider these conditions through the lens of national law enforcement practices of Ukrainian criminal proceedings. The authors emphasize the relevance of these criteria of the legality of individual rights restriction in criminal proceedings since when applying for property seizure, the Ukrainian legislator requires investigating judges to consider reasonableness and restriction proportionality of property rights, and apply the least onerous seizure method, not suspend or excessively restrict a person's lawful business activities, or other consequences significantly affecting others' interests. Due to the amendment of the Ukrainian criminal procedure legislation, the practice is slowly approaching the European Court of Human Rights practice's European standards. However, proper systematic, logical and consistent court decisions limiting the human right to peaceful property possession remain critical. Based on the study, the authors offer a model of logical reasoning, following which the investigating judges can correctly formulate the motivational part of the decision to satisfy or deny the request for property seizure. Particular attention is paid to the reasonableness, suitability, necessity, and proportionality of the means of restricting the right to peaceful enjoyment of the property and describes each of them.

Keywords: *the seizure of property in criminal proceedings; proportionality of interference in constitutional law; the right to peaceful enjoyment of property; measures to ensure criminal proceedings; inviolability of property rights; criteria for the admissibility of restrictions of human rights.*

1. INTRODUCTION

Art. 41 of the Constitution of Ukraine states: 'Everyone has the right to own, use and dispose of their property, the results of their intellectual, creative activity... No one may be unlawfully deprived of property rights. The right of private property is inviolable... Confiscation of property may be applied only by court decision in cases, to the extent and in the manner prescribed by law.' This provision of the Constitution of Ukraine correlates with several international legal documents enshrining the inviolability of property rights principle, such as the Universal Declaration of Human Rights (art. 17, para 2 art. 29);¹ the International Covenant on Civil and Political Rights (art. 2, 17)²;

1 UN General Assembly, *Universal Declaration of Human Rights* [1948] 217 (III) A <https://www.ohchr.org/en/udhr/documents/udhr_translations/eng.pdf> accessed 5 November 2020.

2 The United Nations General Assembly, *International Covenant on Civil and Political Rights* [1966] Treaty Series 999 <<https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>> accessed 5 November 2020.

the International Covenant on Economic, Social and Cultural Rights (art. 3, 4),³ the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)⁴ and the Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms.⁵ This protocol was signed on 20 March 1952, supplementing rights guaranteed by the Convention, including the right to property protection. Art. 1 of the right to property of the First Protocol to the Civil Procedural Code contains three rules pertinent to national criminal proceedings, to which scholars and practitioners regularly pay attention:

Every natural or legal person is entitled to the peaceful enjoyment of his or her possessions. No one shall be deprived of their 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.⁶

Thus, the Basic Law of Ukraine, international legal acts establishing the inviolability of property rights, is not absolute. Procedural guarantees must accompany any state intervention in the property's peaceful possession to protect this vital right. This fully applies to the criminal process because it involves activities affecting human rights and freedoms. Criminal procedure inextricably links with criminal procedural coercion, measures to ensure criminal proceedings, including property concerns. That is why statutory guarantees exist to protect against abuse by the bodies conducting criminal proceedings. Such a bureaucratic order of ensuring criminal proceedings will fairly balance general societal interest and protect fundamental individual rights. Established law strictly prohibits human rights interference necessary in a democracy.

Hence, Ukrainian judges, investigative judges, prosecutors, investigators, detectives, and lawyers need to remain aware of Art. 1 of the First Protocol to the Civil Procedural Code and the ECtHR interpretation. This article attempts to address these issues through international instruments' prism, the ECtHR case law, and the Ukrainian law doctrine.

2. PEACEFUL ENJOYMENT OF PROPERTY PRINCIPLE IN EUROPEAN CONVENTION ON HUMAN RIGHTS CASE-LAW

The ECtHR noted:

'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 recognises that the States are entitled, amongst other things, to control the use of property in accordance with the general

3 The United Nations General Assembly, *International Covenant on Economic, Social and Cultural Rights* [1966] Treaty Series 993 <<https://www.ohchr.org/en/professionalinterest/pages/cescr.aspx>> accessed 5 November 2020.

4 Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms* [1950] ETS 5 <https://www.echr.coe.int/documents/convention_eng.pdf> accessed 5 November 2020.

5 Council of Europe, *Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocol No 11* [1952] ETS 9 <<https://www.coe.int/en/web/conventions/search-on-treaties/-/conventions/rms/090000168006377c>> accessed 5 November 2020.

6 Protocol to the Convention (n 5).

interest, by enforcing such laws as they deem necessary for the purpose; it is contained in the second paragraph.⁷

In *James and Others v. the United Kingdom*, the ECtHR explained this relationship claiming:

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.⁸

The ECtHR cited the same in the case of *Papastavrou and Others v. Greece*, emphasizing ‘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.’⁹

The general first rule declares the right to property respect (right to peaceful enjoyment of property). The other two, engendering exceptionality, regulate depriving property. These conditions constitute a denial of such a right is only justified for societal interests, and they must follow the law. Interference with property rights can take two forms: deprivation of possessions and control of property use. Moreover, these provisions are interrelated and must be interpreted in conjunction.

Based on international criminal proceedings, the right of ownership does not remain absolute, revealing the need for its regulation and state restriction. When exercising such powers, the state must adhere to permissible lawful interference principles. International standards of national law should provide the guidelines for lawful interference. In addition to the Ukrainian Constitution, sectoral legislation reflects property rights inviolability. In particular, Art. 16 of the Criminal Procedure Code of Ukraine (CPC) designates criminal proceedings must follow the CPC when depriving or restricting property rights based on a reasoned court decision adopted. Without a court decision, the property’s temporary seizure is allowed. While the property’s seizure, the person *de jure* is not deprived of property rights but is only temporarily (until CPC abolishes it) being limited by the right to alienation, disposal, and property use. Thus, the ECtHR recognizes the property seizure as a control measure¹⁰ and requires authorities not to contradict the third rule of Art. 1 of the First Protocol to the ECHR. Specifically, the Contracting Parties have the right to control the property use following public interest’s needs; thus, such laws are enacted to achieve these objectives.

7 *Sporrong and Lönnroth v Sweden* (Apps Nos 7151/75 and 7152/75) ECHR 23 September 1982, § 61 <<http://hudoc.echr.coe.int/eng?i=001-57580>> accessed 5 November 2020; *Depalle v France* (App No 34044/02) ECHR 29 March 2010, § 77; *Zelenchuk and Tsytsyura v Ukraine* (Apps Nos 846/16 and 1075/16) ECHR 22 May 2018, § 56; *Andriy Rudenko v Ukraine* (App No 35041/05) ECHR 21 December 2010, §§ 35-37.

8 *James and Others v the United Kingdom* (n 8).

9 *Papastavrou and Others v Greece* (App No 46372/99) ECHR 10 April 2003, final from 10 July 2003, § 33 <<http://hudoc.echr.coe.int/eng?i=001-61019>> accessed 5 November 2020.

10 *Raimondo v Italy* (App No 46372/99) ECHR 22 February 1994, § 27; *Andrews v the United Kingdom* (App No 49584/99) ECHR 26 September 2002; *Adamczyk v Poland* (App № 28551/04) ECHR 7 November 2006; *Borzonov v Russia* (App No 18274/04) ECHR 22 January 2009, § 57.

The First Protocol to the ECHR establishes broad powers to exercise control over property, ‘as it deems necessary.’ The state’s rights to interfere with the right to peaceful enjoyment of property must be regulated by law. These three provisions of Art. 1 of the First Protocol to the ECHR are interrelated. The state’s powers should systematically connect it with the second rule. Therefore, the property control the state implements should portray public interest.

While restricting property rights, the state intervenes in individual law. During this process, the interference must adhere to the requirements specified in Art. 8 of the ECHR, according to which:

Everyone has the right to respect for his private and family life, his home and his correspondence. 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 the protection of the rights and freedoms of others.¹¹

Thus, ECHR Article 8 formulates the conditions under which the state may inhibit this protected right, criteria for intervention. Therefore, according to the ECHR, permissible limitations include situations provided by law, necessary in a democratic society and pursuing intending legitimate goals. These criteria correlate with the provisions contained in Art. 1 of the First Protocol to the ECHR. Despite Part 2 of Art. 8 of the ECHR design, the court separately assesses state compliance with these conditions in the following order: legality, legitimate purpose, necessity.¹² Decisions of the ECtHR continuously emphasise this premise. Notably, in the case of *Shvydka v. Ukraine*, the Court mentioned:

for the interference to be justified [...], it must be ‘prescribed by law,’ pursue one or more of the legitimate aims listed in the second paragraph of that provision and be ‘necessary in a democratic society’ – that is to say, proportionate to the aim pursued.¹³

The criteria introduced into the ECtHR practice to evaluate state interference legitimacy in the rights guaranteed by the ECHR have been called the ‘three-component test.’¹⁴ The principle of proportionality has German roots. Since ancient times, many legal systems have embraced it,¹⁵ gradually developing its tenets over several centuries, but recently, it has received a new breath through the constitutional judiciary and international judicial institutions. Although the Convention does not directly incorporate this ideal,

11 Convention (n 4).

12 H O’Boyle, Warbrick, *Law of the European Convention on Human Rights* (3rd edn, Oxford university press 2014).

13 *Shvydka v Ukraine* (App No 17888/12) ECHR 30 October 2014, § 33 <<http://hudoc.echr.coe.int/eng?i=001-147445>> accessed 2 November 2020. See also *Gladysheva v Russia* (App No 7097/10) ECHR 6 December 2011, § 77; *Brumarescu v Romania* (App No 28342/95) ECHR 23 January 2001, § 78; *Sporrong and Lonnroth v Sweden* (Apps Nos 7151/75) ECHR 23 September 1982, and 7152/75, § 69-74.

14 TI Fulei, *Application of the Convention for the Protection of Human Rights and Fundamental Freedoms and the case law of the European Court of Human Rights in the administration of justice* (BAITE 2017) 38.

15 AA Bazhanov, ‘Substantiation of the principle of proportionality in the practice of the Federal Constitutional Court of Germany (1950—1960)’ [‘Obosnovanye Prynyspa Sorazmernosti V Prakteke Federalnoho Konstytutsyonnoho Suda Hermanyi’] (2018) 5 *Journal of the University of OE Kutafina (MSLUK)* 159-168.

it embodies an essential rule of law element. Therefore the ECtHR uses the principle of proportionality to interpret legislation.¹⁶

3. EUROPEAN CONVENTION ON HUMAN RIGHTS CRITERIA OF ASSESSING STATE INTERFERENCE LEGITIMACY IN THE RIGHT OF PEACEFUL PROPERTY ENJOYMENT

3.1. *Legitimacy of State Interference in Property Rights*

The first and most crucial requirement of Article 1 of Protocol No. 1 to the ECHR encompasses State interference with the unimpeded property use must comply with the *law*.

Understanding several law concepts the ECtHR uses remains paramount: law, provided by law, in accordance with the law. Referring to the ECtHR legal position has formed an autonomous concept of law. One of the first and most common ECtHR cases, formulating these concepts entailed *The Sunday Times v. the United Kingdom*.¹⁷ The complaint concerned the possible violation of Art. 10 of the ECHR in connection with the ban by the national courts of the United Kingdom to publish articles in the newspaper 'Sunday Times' to discuss the 'scandalous' trial, which at that time had not yet been completed. Such a ban was due to contempt to court because press comments could influence and predict incompatibility with the principle of independence and court and judiciary impartiality. One aspect the Court needed to consider comprises interpreting prescribed by law in the light of the interference with the ECHR's rights.¹⁸

The ECtHR noted: 'The word 'law' in the expression "prescribed by law" covers not only statute but also unwritten law. ... It would clearly be contrary to the intention of the drafters of the Convention to hold that a restriction imposed by virtue of the common law is not "prescribed by law" on the sole ground that it is not enunciated in legislation: this would deprive a common-law State which is Party to the Convention of the protection of Article 10 (2) (art. 10-2) and strike at the very roots of that State's legal system.' In paragraphs 2 of Articles 9, 10 and 11 of the Convention, both the French and English texts use the equivalent expression '*prevue par la loi*' and '*prescribed by law*.' However, if the French text retains the same expression in Art. 8 § 2 of the Convention, in Art. 1 of the First Protocol to the European Convention on Human Rights and Art. 2 of the Fourth Protocol, the English text, respectively, says otherwise: in accordance

16 VG Gulumyan, 'Principles of interpretation of the European Convention on Human Rights (criticism and defense)' [*Pryntsyvy Tolkovaniya Evropeiskoi Konventsiyi Prav Cheloveka (krytyka Y Zashchyta)*] (2015) 3 (45) *Journal of Constitutional Justice* 17; TI Dudash, 'The case law of the European Court of Human Rights: a hermeneutic analysis' [*Praktyka Yevropeiskoho Sudu Z Prav Liudyny Hermenevtychnyi Analiz*] (2009) 21 *The case law of the European Court of Human Rights: general theoretical research, Series I. Research and abstracts* 26-40; PM Rabinovich, SE Fedik, 'Peculiarities of interpretation of legal norms on human rights (based on the case law of the European Court of Human Rights)' [*Osoblyvosti Tlumachennia Yurydychnykh Norm Shchodo Prav Liudyny (za Materialamy Praktyky Yevropeiskoho Sudu Z Prav Liudyny)*] (2004) 5 *Proceedings of the Lviv Laboratory of Human and Citizen Rights of the Research Institute of State Building and Local Self-Government of the Academy of Legal Sciences of Ukraine* 27.

17 *The Sunday Times v the United Kingdom* (App No 6538/74) ECHR 26 April 1979 <<http://hudoc.echr.coe.int/eng?i=001-57584>> accessed 5 November 2020.

18 *The Sunday Times v the United Kingdom* (App No 6538/74) ECHR 26 April 1979 <<http://hudoc.echr.coe.int/eng?i=001-57584>> accessed 5 November 2020.

with the law, provided by law and in accordance with law. Thus, when confronted with several versions of a legally binding international treaty, each of which is authentic but not the same, the Court must provide them with an interpretation that brings them as close as possible and is consistent with the treaty's goals and objectives.

According to the ECtHR, the expression prescribed by law implies the following two requirements. First, the law must be adequately accessible: citizens must have the appropriate circumstances to navigate which legal rules apply to the case. Secondly, a norm cannot be considered a law if it is not formulated with sufficient precision to enable a citizen to agree with it: he or she must be able, using advice if necessary, to predict, to a reasonable degree according to the circumstances, the consequences that this action may cause. These consequences do not have to be predicted with absolute certainty: experience shows that this is unattainable... Accordingly, many laws inevitably use terms that are more or less vague: their interpretation and application are the tasks of practice.¹⁹

Thus, the ECtHR has formulated several requirements national law must meet to comply with the rule of law, enshrined in the ECHR's Preamble and embodies the meaning of the ECHR. First, it is a relatively broad understanding of national law, which includes the current law and the interpretation given to it by national courts, established practice, including judicial. Secondly, it is a requirement concerning the quality of the law: its accessibility and predictability, respectively.

The ECtHR still always reminds formulated in the decision *The Sunday Times v. the United Kingdom* requirements for the concept of law, supplementing it with a new meaning. In particular, in the decision *Silver and Others v. the United Kingdom*, it was stated that:

the law must be adequately accessible: the citizen must be able to have an indication that is adequate, in the circumstances, of the legal rules applicable to a given case²⁰; 'the principle of lawfulness presupposes that the applicable provisions of domestic law are sufficiently accessible, precise and foreseeable in their application.'²¹

Also, in the Decision in the case *Serkov v. Ukraine*, the ECtHR indicated

the scope of the concept of foreseeability depends to a considerable degree on the content of the instrument in issue, the field it is designed to cover and the number and status of those to whom it is addressed. The mere fact that a legal provision is capable of more than one construction does not mean that it fails to meet the requirement of "foreseeability" for the Convention. The role of adjudication vested in the courts is precisely to dissipate such interpretational doubts as remain, taking into account the changes in everyday practice. The task of the supreme courts in securing a uniform and coherent application of the law cannot be underestimated in this regard. A failure by a supreme court to cope with that

19 *The Sunday Times v the United Kingdom* (App No 6538/74) ECHR 26 April 1979 <<http://hudoc.echr.coe.int/eng?i=001-57584>> accessed 5 November 2020.

20 *Silver and Others v the United Kingdom* (Apps Nos 5947/72, 6205/73, 7052/75, 7061/75, 7107/75, 7113/75 and 7136/75) ECHR from 25 March 1983, §§ 87-88 <<http://hudoc.echr.coe.int/eng?i=001-57577>> accessed 5 November 2020.

21 *Zelenchuk and Tsytsyura v Ukraine* (Apps Nos 846/16 and № 1075/16) ECHR 22 May 2018, § 98 <<http://hudoc.echr.coe.int/eng?i=001-183128>> accessed 5 November 2020; *Budchenko v Ukraine* (App No 38677/06) ECHR 24 April 2014, § 40 <<http://hudoc.echr.coe.int/eng?i=001-142517>> accessed 2 November 2020.

task may produce consequences incompatible, inter alia, with the requirements of Article 1 of Protocol No. 1. The Court admits that it is primarily for the national authorities to interpret and apply domestic law. However, the Court is required to verify whether the way in which the domestic law is interpreted and applied produces consequences that are consistent with the principles of the Convention, as interpreted in the light of the Court's case-law.²²

As interference with the right of property borders on the possibility of arbitrary restriction, the state must ensure the quality of the law and provide remedies against arbitrary interference by the authorities in the exercise of the rights guaranteed by the Convention. Thus

the law should be accessible to the persons concerned and formulated with sufficient precision to enable them to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail²³ and 'there must be a measure of legal protection in domestic law against arbitrary interferences by public authorities with the rights.'²⁴

The ECtHR reiterated this provision in the Decision *Feldman and Slovyanskyy bank v. Ukraine*, also having predicted that

the concepts of lawfulness and the rule of law in a democratic society require that measures affecting fundamental human rights be, in certain cases, subject to some form of adversarial proceedings before an independent body competent to review the reasons for the measures and the relevant evidence. It is true that Article 1 of Protocol No. 1 contains no explicit procedural requirements and the absence of a judicial review does not amount, in itself, to a violation of that provision. Nevertheless, it implies that any interference with the peaceful enjoyment of possessions must be accompanied by procedural guarantees affording to the individual or entity concerned a reasonable opportunity of presenting their case to the responsible authorities for the purpose of effectively challenging the measures interfering with the rights guaranteed by this provision.²⁵

An example is the case of *Denisova and Moiseyeva v. Russia*, in which the ECtHR found a violation of Art. 1 of the First Protocol to the ECHR. The reason for this was the wife's property seizure (subsequent confiscation) based on a court judgment against her husband. At that time, the Supreme Court of the Russian Federation had already interpreted such cases, stating the confiscation of jointly acquired property is possible only within the share of the spouses found guilty of the crime. Since the seizure of his wife's property was not carried out in accordance with the law, the Court found a violation of Art. 1 of the ECHR.²⁶

Another example can be given. *Latvian citizen V.M. Baklanov* decided to move from Latvia to Russia, agreed with a realtor to buy an apartment, withdrew from his bank account the amount of 250 thousand US dollars and gave them to his friend B. to

22 *Serkov v Ukraine* (App No 39766/05) ECHR 7 July 2011, § 35-36 <<http://hudoc.echr.coe.int/eng?i=001-105536>> accessed 6 November 2020.

23 *Maestri v Italy* (App No 39748/98) ECHR 17 February 2004, § 30 <<http://hudoc.echr.coe.int/eng?i=001-61638>> accessed 6 November 2020.

24 *Kruslin v France* (App No 11801/85) ECHR 24 April 1990, § 30 <<http://hudoc.echr.coe.int/eng?i=001-57626>> accessed 6 November 2020.

25 *Feldman and Slovyanskyy bank v Ukraine* (App No 42758/05) ECHR 21 December 2017, § 55 <<http://hudoc.echr.coe.int/eng?i=001-179557>> accessed 6 November 2020.

26 *Denisova and Moiseyeva v Russia* (App No 16903/03) ECHR 1 April 2010, §§ 55-65 <<http://hudoc.echr.coe.int/eng?i=001-98018>> accessed 6 November 2020.

send to Moscow. B. was detained on arrival at the airport as he had not specified the currency amount in the customs declaration during customs control, he was charged with smuggling, and he was later sentenced to two years' probation. According to the court's decision, the money stored in the customs terminal had to be turned over to the state as smuggling evidence. Having heard the case, the ECtHR noted the first and most imperative requirement of Art. 1 of the First Protocol to the ECtHR emphasises any public authorities interference in the property's peaceful possession must remain lawful; deprivation of property can only occur under lawful conditions. In this case, the Court stated, under the law, 'instruments of crime belonging to the accused, money and other objects acquired by criminal means' remain subject to confiscation. In the meantime, no one claimed, nor had there been any evidence the applicant's money had been criminally obtained. Considering the domestic court's failure to cite legal provisions as grounds for confiscating this substantial sum of money and the apparent contradiction between case law on domestic law, the Court asserted the domestic law in question had not been worded precisely enough for the applicant to reasonably foresee the case circumstances. Consequently, the interference with the applicant's property rights could not be regarded as lawful within the meaning of Art. 1 of the First Protocol to the ECHR, indicating a violation.²⁷ Since the ECHR's protection remain subsidiary to national protection and the ECtHR does not replace national courts, the law's regulatory potential remains crucial. Nationally, the state should protect individual rights from arbitrary interference during property seizure in criminal proceedings, adopting relevant legislation. Essentially law imposes additional obligations on the state to prevent defects in criminal procedure, creating a transparent and predictable procedure for court appeals questioning interference legality.

3.2. Determining the legitimacy of the purpose of interfering in property rights

For interference with property rights to remain lawful within the meaning of Art. 1 of the First Protocol to the ECHR, it should follow the second rule of Art. 1, carried out in societal interests. The ECtHR considers whether a legitimate purpose exists for interfering with property rights after establishing lawful interference. As in the case *Tregubenko v. Ukraine*, 'the Court reiterates that a deprivation of property can only be justified if it is shown, inter alia, to be "in the public interest" and "subject to the conditions provided for by law.' Moreover, any property interference must also satisfy the requirement of proportionality. As the Court has repeatedly stated, a

fair balance must be struck between the demands of the community's general interest and the requirements of the protection of the individual's fundamental rights, the search for such a fair balance being inherent throughout the Convention. The Court further observes that the requisite balance will not be struck where the person concerned bears an 'individual and excessive burden.'²⁸

In the case of *Sukhanov and Ilchenko v. Ukraine*, it was also stated that

²⁷ *Baklanov v Russia* (App No 68443/01) ECHR 9 July 2005, § 39-46 <<http://hudoc.echr.coe.int/eng?i=001-69317>> accessed 6 November 2020.

²⁸ *Tregubenko v Ukraine* (App No 61333/00) ECHR 2 November 2004, § 53-54 <<http://hudoc.echr.coe.int/eng?i=001-67248>> accessed 6 November 2020.

the first and most important requirement of Article 1 of Protocol No. 1 is that any interference by a public authority with the peaceful enjoyment of possessions should be lawful and that it should pursue a legitimate aim ‘in the public interest.’²⁹

ECtHR case-law analysis determining legitimate intervention purpose gives states discretion because the authorities remain most aware of their societal needs. Therefore, they hold a more advantageous position than an ECtHR judge. The ECtHR’s supervision in this part remains limited to power abuse cases and apparent arbitrariness.

The respondent state must determine interference purpose or objectives when exercising an individual right, the Convention protects. Such purposes may include public order protection, national security interests, public peace, riot and crime prevention, ensuring any lawful obligation fulfillment, right and others’ freedom protection, morality protection, state economic welfare and judiciary healthcare³⁰ interests.³¹ The legitimate aim of interfering with individual rights must also be provided for in national law. The criminal procedure legislation contains legitimate property seizure purposes (Articles 2, 170 of the CPC).

Concerning restricting the right to the extent necessary in a democratic society, the ECtHR explained given the ECtHR case law,

the notion of necessity implies that the interference corresponds to a pressing social need and, in particular, that it is proportionate to the legitimate aim pursued.³² The ECtHR professed ‘whilst the adjective “necessary” [...] is not synonymous with “indispensable” [...] neither has it the flexibility of such expressions as “admissible,” “ordinary,” “useful,” “reasonable” or “desirable.”’³³

The ECtHR characterized a democratic society as having two distinctive features: tolerant and open. While interference with a protected right may hold ‘necessary in a democratic society,’ a democracy may bind state-justified interference. However,

given the diversity of historical, cultural and political differences in Europe [...], the formation of its own idea of democracy is the prerogative of each state, which, accordingly, has some discretion in determining the means necessary to protect this particular democratic order.³⁴

In assessing whether the interference remained proportionate to the legitimate aim, the ECtHR referred to the discretion doctrine the state implements when its authorities initially assess the interference. This doctrine was first formulated in the ECtHR’s decision in the case *Handyside v. the UK*.

29 *Sukhanov and Ichenko v Ukraine* (Apps Nos 68385/10 and 71378/10) ECHR 26 June 2014, § 53 <<http://hudoc.echr.coe.int/eng?i=001-145014>> accessed 6 November 2020.

30 See *Olsson v Sweden* (n 31) (N^o 1) from 24 March 1988, complaint N^o 10465/83, § 58; VA Tumanov (ed), *European Court of Human Rights Selected decisions in 2 vols* [Evropeiskiy Sud Po Pravam Cheloveka Izbrannyye Resheniya] (Vol 1, Norm, 2000); D Harris, M O’Boyle, K Warbrick, *Law of the European Convention on Human Rights* (OUP 2014).

31 *East/West Alliance Limited v Ukraine* (App No 19336/04) ECHR 23 January 2014, § 185. <<http://hudoc.echr.coe.int/eng?i=001-140029>> accessed 4 November 2020.

32 *Olsson v Sweden* (n 31).

33 *Handyside v the United Kingdom* (App No 5493/72) ECHR 7 December 1976, § 48 <<http://hudoc.echr.coe.int/eng?i=001-57499>> accessed 4 November 2020.

34 D Harris, M O’Boyle, K Warbrick, *Law of the European Convention on Human Rights* (Third Edition, OUP 2014) Art 513.

However, it was later applied to any court case appraisal of state discretion in determining whether the interference demonstrated a democratic societal necessity. According to this doctrine, the Court considers states possess discretion.

Because of their direct and continuous contact with the vital forces of their countries, State authorities are in principle in a better position than the international judge to give an opinion on the [...] “necessity” of a “restriction” or “penalty” [...] It is for the national authorities to make the initial assessment of the reality of the pressing social need implied by the notion of “necessity” in this context. Nevertheless, Convention does not give the Contracting States an unlimited power of appreciation. The Court [...] is responsible for ensuring the observance of those States’ engagements [...], the domestic margin of appreciation thus goes hand in hand with a European supervision. Such supervision concerns both the aim of the measure challenged and its “necessity”; it covers not only the basic legislation but also *the decision applying it*, even one given by an independent court. The Court must decide, on the basis of the different data available to it, whether the reasons given by the national authorities to justify the actual measures of “interference” they take are *relevant and sufficient*.³⁵

The ECtHR has also developed evaluation components when determining whether an intervention proved necessary in a democratic society: protected right importance; democratic society nature; European and international consensus; importance and objective interest being protected; intervened interest judicial assessment availability.

Within the criterion admissibility framework of interference with a person’s right, the proportionality between interference with human rights necessity in a democratic society and ensuring a legitimate interference goal is assessed. As the ECtHR contended in *Sukhanov and Ilchenko v. Ukraine*:

Any public authority interference with the peaceful possession enjoyment should remain lawful and pursue a legitimate public interest aim. Any interference must also remain reasonably proportionate to the desired objective. In other words, a fair balance must be realised between community interest and individual fundamental right protection. The requisite balance will not be found if the concerned person or persons have borne an individual and excessive burden.³⁶

Thus, interfering with individual rights holds disproportionate if it does not achieve legitimate goals. Resolving proportionality involves balancing various factors, often challenging for the ECtHR and law enforcement officials trying to justify interfering with individual rights. The ECtHR highlights a fair balance between societal and individual interests, but reaching such an equilibrium has proven quite onerous. In other words, the state-applied human rights restrictions must remain proportionate to the law’s content and scope and cannot be so severe or violate the law’s essence.

For example, in *Bokova v. Russia*, Bokova filed a complaint after her husband, and his accomplices were convicted of committing large-scale fraud. The perpetrators had to pay the victim more than 9 million USD. Bokova’s house was seized to secure a civil lawsuit. Claiming she did not receive domestic legal protection, the applicant

35 *Handyside v the United Kingdom* (n 35).

36 *Sukhanov and Ilchenko v Ukraine* (n 30).

applied to the ECHR. She professed she had received the house before her husband's criminal activities, so she had legitimate grounds to demand she should retain at least part, explicitly, the share not obtained criminally. Additionally, sufficient procedural safeguards to avoid arbitrariness did not accompany the house seizure. No domestic court examined the amount of money criminally invested in the house and did not allow the applicant to present arguments to protect her property share. This approach gave the ECtHR grounds to recognize a violation of Art. 1 of the First Protocol to the ECHR unanimously.³⁷ Thus, the interference with the applicant's property rights was held disproportionate to the state authorities' aim. The applicant incurred an excessive burden, excessively affecting her property rights, and she was not given any procedural guarantees to protect her property.

Hence, the right to peaceful property possession embodies a fundamental right, but it does not remain absolute and may be limited under certain conditions. However, the violation of Art. 1 of the First Protocol to the ECHR, when significantly imbalanced, represents disproportion 'between the measures taken and the aim pursued'.³⁸

4. UKRAINIAN PROPORTIONALITY PRINCIPLE AND DETERMINING PROPERTY RIGHTS INTERFERENCE LIMITS

Understanding proportionality's essence requires exploring modern doctrinal approaches. In national court practice, often constitutional, this principle tests proportionality as a formalized procedure for verifying the legality and validity of state coercive measures restricting human rights. Scientists have developed the principle's analytical epitome. However, they disagree regarding its nomenclature because sometimes they call it the principle of proportionality,³⁹ dimensionality,⁴⁰ adequacy,⁴¹ prohibition of redundancy,⁴² and proportionality of human rights restrictions.⁴³ Concerning their elements, most of these concepts aim to assess this principle's significance for law enforcement practice. P.M. Rabinovych pointed out the principle of proportionality restricting human rights illustrates a restriction legitimacy guarantee. The triad of criteria for this principle constitutes real human rights protection, fairly

37 *Bokova v Russia* (App No 27879/13) ECHR 16 April 2019, § 54, 59. <<http://hudoc.echr.coe.int/eng?i=001-192463>> accessed 5 November 2020.

38 *James and Others* (n 8); *East/West Alliance Limited v Ukraine* (n 33).

39 YO Yevtoshuk, 'The principle of proportionality as a necessary component of the rule of law' ['Pryntsyv Proportsiinosti Yak Neobkhidna Skladova Verkhovenstva Prava'] (Candidate of Law Thesis, University of Economics and Law 'KROK' 2015).

40 PM Rabinovych (ed), OM Lutsiv, SP Dobryansky, OZ Pankevich, SP Rabinovych, *The principle of the rule of law: problems of theory and practice [Pryntsyv Verkhovenstva Prava Problemy Teorii Ta Praktyky]* (Spolom 2016) Art 65.

41 SP Pogrebnyak, 'The principle of proportionality in judicial activity' ['Pryntsyv Proportsiinosti U Sudovii Diialnosti'] (2012) 2 Philosophy of law and general theory of law 49-55.

42 A Fosculle, 'The principle of proportionality' (2015) 1 (104) Comparative constitutional review 159-163.

43 OI Andreeva, *The ratio of rights and responsibilities of the state and the individual in the rule of law and the specifics of its manifestation in the field of criminal proceedings (theoretical aspect)* [Sootnoshenye Prav I Obiazannosti Hosudarstva I Lychnosti V Pravovm Hosudarstve I Spetsyfika Eho Proiavlennya V Sfere Uholovnoho Sudoproyzvodstva (teoretycheskyi aspekt)] (MK Sviridova ed, Tomsk University Publishing House 2004) 138.

balancing personal protection requirements and public interest protection, democratic society standards compliance.⁴⁴

S.P. Pogrebnyak voiced

In a state governed by the rule of law, the prohibition of excessive state interference with individual liberty is seen as an axiomatic requirement: the state has the right to restrict human rights only when it is really necessary, and only to the extent that is proportionate to the pursued goal. In other words, the principle of proportionality (adequacy) is proclaimed and operates in this sphere. It is based on the idea that the general interest of the state cannot be such as to suppress the freedom of the individual... It is designed to protect the individual when he or she remains face to face with the state, and is a prerequisite for regulatory intervention to be appropriate to the goals it achieves.⁴⁵

Y.O. Yevtoshuk defined the principle of proportionality as pivotal to the rule of law, and believed in a 'broad sense it means that all subjects of power that directly or indirectly interfere in the private autonomy of the individual should take only reasonable measures (appropriate, necessary, proportionate in the narrow sense) to achieve a legitimate public goal.'⁴⁶ D.G. Shustov stressed the principle of proportionality 'allows determining whether the degree of restriction of the right is reasonably proportionate to the goal pursued by law and necessary to achieve the goal and whether the means are reasonably proportional to the goals.'⁴⁷ R.A. Maidanyk also purported according to the principle of proportionality, the authorities,

cannot impose obligations that exceed the limits of necessity arising from the public interest on citizens in order to achieve the goals required to be achieved by the applied measure (or actions of the authorities). Accordingly, the measure applied must be proportionate (must meet) the objectives.⁴⁸

Ex-chairman of the SCU, Y.M. Romanyuk, emphasized:

Interference with property rights, even if it meets the first two criteria (i.e. has a legitimate purpose, and is carried out in accordance with national law and in the public interest), will still be considered a violation of Art. 1 of the First Protocol, if a reasonable proportionality between the interference with the right of a person and the interests of society has not been ensured.⁴⁹

The ECtHR uses the following stages to evaluate legitimate law restriction: legality, legitimate purpose, democratic society necessity. However, experts have offered their vision an activity's legality assessment algorithmization. A. Barak distinguished four

44 SP Rabinovych, 'Peculiarities of interpretation of legal norms on human rights (based on the case law of the European Court of Human Rights)' ['Osoblyvosti Tlumachennia Yurydychnykh Norm Shchodo Prav Liudyny (za Materialamy Praktyky Yevropeiskoho Sudu Z Prav Liudyny)'] in *Proceedings of the Lviv Laboratory of Human and Civil Rights* (Series I, Research and abstracts, Issue 5, Astron 2004) p 31-32.

45 Pogrebnyak (n 43) 49-55.

46 Yevtoshuk (n 41).

47 DG Shustov, *The principle of proportionality in the constitutional law of Israel* [Pryntsyp Proportsyonalnosti V Konstytutsyonnom Prave Yzraylia] (Legenda 2015) 99.

48 R Maidanyk, 'Proportionality and property rights: doctrine and case law' 'Proportsiunist (spivrozmiirnist) I Pravo Vlasnosti Doktryna I Sudova Praktyka' (2016) 1 Law of Ukraine 41-54.

49 Y Romanyuk, 'Interference with property rights in terms of its compliance with Article 1 of the First Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms: criteria of the European Court of Human Rights and the experience of Ukraine on some examples of case law' (2016) 1 Law of Ukraine 14-24.

proportionality test stages: 1) identifying legitimate restrictive right purpose, 2) a rational relationship between the legitimate aim and the chosen means (relevance of the means used), 3) applicable measures need assessment and 4) comparing advantages of achieving a legitimate goal and the subjected restrictions human rights (proportionality in the narrow sense or weighing).⁵⁰

Some scholars have reduced the number of stages to two, indicating criteria to establish the intervention's proportionality.⁵¹ For example, M. Cohen-Elia and I. Porat, S.P. Pogrebnyak proposed establishing the authorities' actions engender a limited, certain right. At the second stage, the authorities must demonstrate they pursued a legitimate objective, and the restriction remained proportionate to that goal. Three criteria establish proportionality: first, the means intended to achieve the power goal must suit achieving this goal (*appropriateness*); secondly, of all the appropriate options, the least restrictive to a person's right (*necessity*) should be chosen; thirdly, the right restriction harm must remain proportionate to the government's benefit in achieving the pursued objective (*proportionality in the narrow sense*).⁵²

Thus, when determining the restriction legitimacy on human rights developed in national legal doctrine, generally, the proportionality principle coincides with ECtHR practice. ECtHR case-law exemplifies the court gradually appraising the state's property right interference legality, guaranteed nationally and internationally. In *Borzonov v. Russia*, the court assessed property seizure compliance under Art. 1 of the First Protocol to the ECHR. The case involved a criminal tax evasion case instituted against the applicant. The bus belonging to the applicant was seized to secure a possible civil action and confiscate property. The investigation lasted for six years, and when the case was closed, the applicant was not notified, and the property seizure was not cancelled until the complaint was lodged with the ECtHR. Considering, inter alia violations of Art. 1 of the First Protocol to the ECHR, the Court, after examining the domestic law (lawfulness of the interference), articulated:

not only must an interference with the right of property pursue, on the facts as well as in principle, a 'legitimate aim' in the 'general interest,' but there must also be a reasonable relation of proportionality between the means employed and the aim sought to be realised by any measures applied by the State, including measures designed to control the use of the individual's property. That requirement is expressed by the notion of a 'fair balance' that must be struck between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights.⁵³

The court also considered the accused's property seizure could not be criticized given the second paragraph of Art. 1 of the First Protocol to the Convention. However, it excessively burdens a person to dispose of property and should provide procedural

50 A Barak, *Proportionality. Constitutional Rights and their Limitations* (Cambridge University Press 2012) 638; AA Bazhanov, 'Problems of realization of the principle of proportionality in judicial practice' (2018) 6 (13) *Proceedings of the Institute of State and Law* RN 129.

51 M Cohen-Elia, I Porat, *The American Method of Weighing Interests and the German Proportionality Test: Historical Roots* (2011) 3 *Comparative Constitutional Review* 61; Pogrebnyak (n 43) 51.

52 Cohen-Elia (n 54); Pogrebnyak (n 43) 49-55.

53 This approach can be seen in the Judgment of the ECHR in the case *Edwards v Malta* (App No 17647/04) ECHR 24 October 2006, § 69 <<http://hudoc.echr.coe.int/eng?i=001-77655>> accessed 10 November 2020.

safeguards to ensure the system's functioning, and its impact on applicant property rights must not be arbitrary or unpredictable.

Although inevitably, any seizure or confiscation poses a detriment, the Court also reminded the impairment must not exceed the actual damage for that measure to remain compatible with Art. 1 of the First Protocol. The parties did not deny that the bus was of some commercial value to the applicant. However, following a change in the criminal law excluding confiscation from criminal offenses and the absence of a civil action against the applicant, the domestic authorities must reassess the legality and necessity of the property seizure order. The investigator must lift the arrest if the measure no longer remains necessary. However, no progress existed in this case. The authorities did not leave the bus with the applicant, prohibiting him from disposing of it. Although the alternative solution did not interfere with the applicant's rights, it essentially helped decide whether the means chosen was reasonable and appropriate to achieve the legitimate goal pursued. Hence, the Court concluded the authorities failed to strike a fair balance between the general interest requirements and the need to protect the applicant's right to respect property, maintaining the arrest warrant for more than six years.⁵⁴ In this decision, the ECtHR judges' reasoning gave a comprehensive argument.⁵⁵ Hence, property seizure must be executed following the law, pursue the public interest, remain necessary for a democratic society, and restriction right must remain proportionate to the measure's purpose.

The Court took a different approach when examining the proportionality of the interference with property rights, considering the case concerned Italian mafia members. In the case of *Raimondo v. Italy*,⁵⁶ Mr. Raimondo challenged the seizure of sixteen properties and six vehicles. The court found national law provided for such a measure. Its purpose was not to deprive the applicant of the property but only to prohibit its use. It portrayed an intermediate measure, further ensuring property confiscation, considered obtained illegally. The common interest justifies such a measure, and given the adverse economic power of the Mafia, the arrest at this proceedings stage stood disproportionate to the pursued goal. Consequently, no violation of Article 1 of the First Protocol on this position of the ECHR's complaint was ruled. Thus, in this case, the ECtHR demonstrated the balance between the rights of a person suspected of committing crimes and the public interest in combating organized crime; the latter was highly valued and given priority.⁵⁷

In *Gabric v. Croatia*, a Serbian citizen was detained at the Croatian-Serbian border for failing to declare 30,500 West German marks. The applicant's 20,000 marks (allowable allowance excess) were seized and later confiscated. She was also sentenced to six months in prison with probation and a fine of 600 Croatian crowns. Having considered the case, the ECtHR unanimously ruled 'the confiscation of the entire amount to be

54 *Borzonov v Russia* (n 10).

55 The same detailed argumentation can be observed in judgement in the case *East/West Alliance Limited v Ukraine* (n 33).

56 *Raimondo v Italy* (n 10).

57 J McBride, *European Convention on Human Rights and Criminal Procedure. The practice of the European Court of Human Rights*, 2nd ed (KIS, Council of Europe 2019) 101- 102.

declared as an additional sanction to the fine is a disproportionate measure which placed a disproportionate burden on the applicant.⁵⁸

Moreover, since Art. 173 of the CPC stipulates when deciding to seize property, the court must consider the property restriction's reasonableness and proportionality rights. If the investigator's request for property seizure is granted, the court must apply the least onerous arrest method, not suspending or excessively restricting lawful business activities of the person or other consequences significantly affecting the others' interests (clause 2, part 4 of Article 173 of the CPC). Thus, the domestic legislator tried to unify the international legal standards in Art. 1 of the First Protocol to the ECHR and national practice to ensure observing personal rights of those whose property was seized. This positive legislator step has indicated the state should set goals for interfering with individual rights and fairly balancing intervention needs with the general societal interests.

Criminal proceedings pertain to state activities where coercion could permeate its stages and proceedings, facilitating evidentiary activity implementation to ensure participants in criminal proceedings perform their duties. Therefore, the question inevitably arises about the awareness of the legality criteria regarding restricting a persons' rights in criminal proceedings, including during property seizure and in law enforcement practice execution.

Reference to national court practice has revealed judges have gradually adopted the law's novelties and requirements. Many cases reference Art. 1 of the First Protocol to the ECHR in decisions about satisfaction or refusal to satisfy the investigator's request to seize property. Hence, in some rulings investigating judges have argued and assessed the proportionality of the means restricting the rights of the person pursued. However, such arguments have remained concise, do not detail the proportionality test; judges did not explain how to ensure the public interests, the goal the law enforcer wants to achieve and individual rights.

Considering the investigator's petition to seize 'movable and immovable property' in the case, initiated on the grounds of a crime under Part 3 of Art. 212 of the Criminal Code Evasion of taxes, fees (mandatory payments),⁵⁹ the investigating judge resolved the investigator request must be denied claiming,

investigators have not proved to the court proper and admissible evidence that in this criminal case any person was informed of the suspicion, the possibility of using property as evidence in criminal proceedings, as the petition is based only on allegations of tax evasion of this natural person-entrepreneur, the court also did not prove the reasonableness and proportionality of restricting property rights in criminal proceedings. Because... seizure of... accounts will completely stop the activity of natural person and due to the impossibility of purchasing feed for poultry will lead to its death, i.e. will have irreversible consequence.⁶⁰

58 *Gabric v Croatia* (App No 9702/04) ECHR 5 February 2009, § 39 <<http://hudoc.echr.coe.int/eng?i=001-91134>> accessed 10 November 2020.

59 *Criminal Code of Ukraine* (Law of Ukraine of 5 April 2001 № 2341-III) <<https://zakon.rada.gov.ua/laws/show/2341-14>> accessed 10 November 2020.

60 Case No 308/1740/17 (Uzhhorod City District Court, 23 February 2017) <<http://reyestr.court.gov.ua/Review/64906747>> accessed 10 November 2020.

Another decision of the investigating judge stated:

the petition does not specify the grounds and purpose of the vehicle's seizure per Art. 170 of the CPC of Ukraine and the necessity of such arrest is not duly substantiated. Moreover, the need for an examination is not a basis for applying such a measure to ensure criminal proceedings as property seizure. Also, following Part 4 of Art. 173 of the CPC of Ukraine, the investigating judge, the court is obliged to apply such a method of seizure of property, which will not lead to the suspension or excessive restriction of lawful business activities of the person, or other consequences that significantly affect the interests of others. Thus, the seizure involves deprivation of the right to alienate, dispose of, and use the property. For example, in the case of seizure of a car owned and used in business JV 'Iceberg' in the form of LLC, it may limit its legitimate business activities of the company... The court was not proved by proper and admissible evidence that there are risks that private entrepreneur PERSON_3 can hide, lose, transfer, alienate the property because, during this period, he had had enough time and opportunities to alienate funds from the accounts specified in the petition.⁶¹ Given the above, the judge denied the petition.⁶¹

However, in the motivating decisions of investigating judges, the standard argument of general character has been most often applied. The corresponding CPC Art. 170-174 outlines formal criteria are given without introducing a judgment scheme. Such a standard argument undoubtedly engenders grounds for application satisfaction or denial; however, the proper systematic, logical, consistent argument remains vital but is usually lacking. Such a sequence is not easy to build, but based on the ECtHR's case law and scholarly approaches, an argumentation algorithm model investigating judges and investigators can apply when considering a property seizure.

Since coercion permeates all criminal proceedings, determining the criteria restricting the rights of persons involved in criminal proceedings filing a motion to seize property and investigating judges' decisions about satisfaction or refusal of satisfaction has rendered such an algorithm invaluable.

5. CONCLUSIONS

Assessing the legitimacy of restricting a person's rights to peaceful property possession following an algorithm, where the investigating judge examining the petition or the investigator filing must resolve the following questions:

1. purpose of interfering with a person's right
2. whether the purpose is legitimate, whether the law provided for it;
3. whether seizing property achieves the purpose, whether it is a reasonable, suitable, and necessary means to accomplish this goal, and whether necessary evidence exists for it;
4. whether another less burdensome means other than the property seizure can achieve this aim;
5. whether the means used are proportional to the objective the state wishes to achieve;
6. whether the restriction degree of the person's right is proportional to the goal they wish to achieve.

61 Case № 297/1390/17 (Berehiv District Court of the Zakarpatsky Region, 26 June 2017) <<http://reyestr.court.gov.ua/Review/67410143>> accessed 10 November 2020.

The proposed questions validate the three-stage solution. At the first stage, the first two questions address goal setting. In the second stage, the third and fourth items concerning the choice of redress resolve means. Finally, the third stage addresses proportionality between the individual's right and the desired goal.

The law requirements legitimise the aim. Such a measure proves reasonable when applied objectively and necessarily if particular grounds and conditions exist. A suitable means entails one by which the desired goal can be achieved. The means is necessary if no other, equally suitable, but less burdensome means exists for the person, and it remains necessary to solve an urgent social problem. When all the possible means by which a legitimate goal can be achieved are met, the most acceptable means emerge, ensuring effective realisation. Proportionality can be considered a means by which the burdens imposed on the person, considering all the circumstances and risks, will adequately accomplish applying this restriction and stand useful to society. Meaning, the degree of influence that a person should experience must be weighed against the state-protected public interest. Applying this measure's societal benefits must remain apparent and more critical than a person's burdens. Personal influence intensity when seizing property may vary in severity. This method considers the goal achievement, crime gravity, existing risks, and the person to whom the measure is applied. Hence, whether the desired result, analyzing all conditions, adequately restricts a person's right to peaceful property enjoyment.

Since implementing the three-stage test poses a challenge for law enforcement, and the subjective assessment may dominate determining restriction proportionality on individual rights, scholars have purported the need to apply an absolute value scale protecting against subjectivity.⁶² In this regard, R. Pound proclaimed

legal experts had paid great attention to developing a way to establish the value of various interrelated interests, based on which it would be possible to say with confidence which interest is more important than others. Were it possible, it would greatly simplify legislators, judges, and lawyers' tasks, contribute to the more excellent stability of regulation achievehieving justice in the state... However, no matter how widespread the search for such a method among philosophers and lawyers is, it must be recognized that today these efforts are futile. A lawyer probably can no more than recognize the problem and try to consider it in the light of all social interests and maintain balance and harmony to recognize them as much as possible.⁶³

When considering the essence of the public interest and defining the problem of weighing interests, Cardozo advised judges to rely on justice in society, 'knowledge of life, personal experience and inferences, as does the legislator.'⁶⁴

It is also possible to cite the President of the Supreme Court of Israel's point of view, Aaron Barak, who pointed out finding a common denominator in the balance between individual rights and public interest can embody 'social significance.' The author, in particular, noted

62 TA Aleinikoff, 'Constitutional Law in the Age of Balancing' (1987) 96 (5) *The Yale Law Journal* 943–1005; Bazhanov (n 53).

63 R Pound, *Jurisprudence*, vol. 2. (West Publishing Co 1959) 330–331.

64 BN Cardozo, *The Nature of the Judicial Process* (Yale University Press 1921). <<https://archive.org/details/NatureOfTheJudicialProcess/page/n183>> accessed 2 November 2020.

when the public interest is on one side of the balance (such as national security or public safety) and the other side we find a constitutional right (such as freedom of expression or human dignity), the comparison is between the marginal social importance of the benefits gained by advancing the public interest and the marginal social importance of the benefits gained by preventing the harm to the constitutional right. Thus a shared base – or a common denominator – exists; it is in the form of the marginal social importance in fulfilling the public purpose and the marginal social importance in preventing the harm to the constitutional right.⁶⁵

However, such a proposal does not entirely solve the problem, as social significance also remains evaluative and does not engender clear understanding guidelines. So, value commensurability has proven quite complicated, and subjectivity always epitomizes a risk. The law enforcer's professionalism remains vital in balancing interference proportionality with a person's right to the desired state goal.

A universal, substantial limit must regulate law enforcer discretion when deciding property seizure, protecting a person from public authorities' arbitrariness, and offering a methodological basis for criminal proceedings. Such algorithmization can resolve the value of conflict during property seizure. The Constitution of Ukraine (Article 41) guarantees this criminal proceedings measure, associated with criminal authority interference. ECHR, its first protocol, and the CPC (Article 16) have defined such a relationship between the legitimate intervention purpose and degree, balancing conflicting protected values resulting from such intervention.

The State must thoroughly protect fundamental rights, especially the right to peaceful enjoyment of possessions, regardless of restriction, acting in the public interest. The proposed approaches will ensure, on the one hand, property rights inviolability and, on the other hand, necessarily restricting them while prioritising human rights and restriction proportionality.

65 Barak (n 53) 484.