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Aspects of implementing the principle of proportionality in the execution of a decision on a search permit for a person's home or other property

Dmytro Zaitsev*

Postgraduate Student

National Academy of Internal Affairs

03035, 1 Solomyanska Sq., Kyiv, Ukraine

<https://orcid.org/0009-0009-1383-1085>

Abstract

Trust in the state is an urgent problem for the countries of Central-Eastern and Eastern Europe. Since building partnerships between the state and society is possible only if the principle of procedural fairness is observed, restriction of a person's right to inviolability of housing or other property in criminal proceedings is one of the most pressing problems of modern Ukrainian legislation. The purpose of the study is to highlight certain legislative and enforcement aspects of the procedure for executing a decision on permission to search a person's home or other property that do not comply with the requirements of the principle of proportionality and create problems for ensuring a reasonable balance of private and public interests. Empirical, general, heuristic, and special legal methods of scientific knowledge were used to achieve this goal. It is established that the insufficiently regulated by the legislator issues concerning the determination of subjects authorised to comply with the decision on permission to search a person's home or other property, the seizure of property, the impossibility of prompt appeal against such a court decision, create an imbalance between private and public interests in criminal proceedings. It is generalised that the restriction of rights in the execution of a decision on permission to search a person's home or other property cannot be conducted if the means of restriction are not commensurate with the goal that the investigator or prosecutor seeks to achieve. A procedural situation in which the principle of proportionality can be violated in favour of not only the public interest but also the private one was modelled, which allowed outlining opportunities for potential abuse by a person, the rights of which were restricted. The study analyses the specific features of implementing such a resolution under martial law and highlights the criteria compliance with which will contribute to the implementation of the principle of proportionality. Recommendations for solving the problems outlined above are proposed. The results of the study will be useful not only for improving the relevant provisions of the Criminal Procedure Code of Ukraine and investigative practice but also for the possibility of developing additional guarantees of legitimate restriction of a number of other rights guaranteed by the Constitution of Ukraine during the implementation of the decision on permission to search a person's home or other property in criminal proceedings.

Keywords:

balance of interests; Inquirer; pre-trial investigation; individual rights; law enforcement; prosecutor; investigator

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*Corresponding author



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Introduction

Along with the rapid democratisation of all spheres of public life, the highest social value is defined as a person, their natural and positive rights. However, ensuring that human rights in Ukraine is not exclusively a political and legal slogan that does not correspond to actual trends that determine the construction of various types of public relations, the mechanism of the state must properly perform the tasks assigned to it. In the context of the development of modern criminal procedural relations, one of the essential tasks of the state is to ensure the human rights guaranteed by the Constitution of Ukraine, one of which is the right to inviolability of housing. Despite the detailed regulation of the implementation of the decision on a permit to search a home or other possession of a person in the Criminal Procedure Code (CPC) of Ukraine, this legal activity in the context of maintaining a reasonable balance of interests is accompanied by a number of problems. When forming the prescriptions of this norm, the legislator did not consider all the needs of modern criminal procedure practice, there is a violation of the principle of legal certainty, which hinders sustainable law enforcement in this area. Violating a reasonable balance of private and public interests in implementing these activities by authorised entities will lead to public distrust of law enforcement agencies and the lack of partnership between the individual and the state, creating problems for ensuring legal order in other areas. That is why achieving procedural justice is impossible without examining and solving problems related to the implementation of a decision on permission to search a person's home or other property and at the same time ensuring a balance between private and public interests in the future in criminal procedure legislation and law enforcement.

The rule of law, as a fundamental value of any modern democratic state, is ensured through a number of legal principles. One of these principles is the principle of proportionality, which indicates the need to ensure a reasonable balance between private and public interests in society, and therefore, its implementation in the implementation of procedural measures automatically indicates compliance with the rule of law. The examination of certain aspects of the implementation of the principle of proportionality in the direct execution of a decision on permission to search a home or other property will allow the investigator, prosecutor to prevent unjustified restriction of the rights of participants in criminal proceedings despite the legislative uncertainty of this legal procedure. It will allow forming a more thorough knowledge of the problem under study and choosing the method of procedural restrictions that will be necessary and sufficient to fulfil the tasks of criminal proceedings. Scientific analysis will serve as a doctrinal basis for improving the criminal procedure legislation.

The analysis and examination of problems related to the implementation of certain aspects of the rule of

law, the principle of proportionality, and a reasonable balance of interests in criminal proceedings attracted the attention of many scientists. Thus, researchers from Kutztown University of Pennsylvania, P.C. Bolger & G.D. Walters (2019) substantiated the importance of fair restriction of human rights by law enforcement officers in the implementation of procedural measures and has proved that this approach encourages society to cooperate with them and, as a result, increases the effectiveness of their activities in general. Other American researchers C.N. Braaten & M.S. Vaughn (2023) conducted an analysis of judicial practice in the United States of America regarding the appeal of illegal and unauthorised actions of authorised entities during the housing search. The conclusions proposed by researchers can serve as a guide for solving problems related to the lack of the possibility of prompt appeal against the implementation of the above definition in the criminal process of Ukraine. Researchers M.T. Rossler & M.J. Suttmoeller (2022) proved that the ambiguous nature of the formation by a legislator of the authorising norms of the US procedural legislation leads to a misunderstanding of their powers by law enforcement officers and causes confusion. The researcher U. Moeller (2020) quite rightly investigated and identified the principle of proportionality with the principle of expediency in German criminal proceedings.

Among Ukrainian researchers, O. Kaplina & S. Fomin (2020) conducted thorough research on the place and role of the principle of proportionality in the legal system of Ukraine and its importance in ensuring the constitutional rights of a person in criminal proceedings. A substantial contribution to the coverage and resolution of doctrinal and legislative problems related to the observance of European human rights standards when searching for a person's home or other property was made by M. Komarova (2018), which highlighted accurate recommendations for the legitimate seizure of property as a method of countering procedural abuse. V. Voloshyna & D. Shylin (2021) considers a search as a measure that can only be conducted in the event of a substantial procedural need since it substantially restricts a person's rights.

Thus, the purpose of the study is to improve Ukraine's criminal procedure legislation and form recommendations for investigative practice on the proper implementation of the principle of proportionality in the execution of the decision of the investigating judge to authorise a search. This can be achieved by highlighting and analysing the specifics of the problems of regulating this procedure, determining by the legislator the range of subjects authorised to carry out this investigative (search) action, whether they have opportunities for procedural abuse and, taking into account the achievements of national and foreign legal science, the realities of modern investigative practice in Ukraine, offering reasonable recommendations for their solution.

Materials and Methods

A number of empirical, general, heuristic, and special legal methods were used in the study. Among the empirical methods of legal research to analyse the implementation of the decision on permission to search a person's home or other property as a type of legal activity, the method of observation was used, which allowed perceiving this investigative (search) action as a complex systemic procedural activity, authorised entities, regulated by the CPC of Ukraine. With the help of the comparative legal method, legislative shortcomings were identified regarding the definition of subjects authorised to comply with the decision on permission to search for housing or other property and the possibility of receiving foreign experience in the field of criminal procedure in Ukrainian legislation and criminal procedural law enforcement was determined. Among the general scientific methods in the study, the most widely presented method of analysis, the use of which allowed eliminating the components of the procedure for executing a decision on permission to search a person's home or other property and identify those that create problems for the implementation of the principle of proportionality and disrupt the balance of private and public interests. The method of induction in the study allowed determining how a single problem hinders the implementation of the principle of proportionality when executing a decision on permission to search a person's home or other property in general. A number of analogies were used to identify the procedure for performing such a procedure with other criminal procedural measures, the application of which provides for the restriction of individual rights and justifies ambiguous approaches of the legislator regarding the mutual coordination of various institutions of criminal procedural law among themselves, which also affected the problem under study. The modelling method was used to create a model of a procedural situation where the principle of proportionality can be violated in favour of the public interest and the private one. This allowed identifying opportunities for potential abuse by a person whose rights to the inviolability of a housing or other property were restricted.

The heuristic method of collective stimulation is used to determine the expert assessments of Ukrainian and foreign researchers, which were useful for promoting the doctrinal basis for improving the Ukrainian criminal procedure legislation and implementing the principle of proportionality. The formal legal method allowed determining the specifics of the legislative formation of Article 236 of the Criminal Procedure Code of Ukraine¹, the shortcomings made in it regarding the implementation of the principle of proportionality as an

integral legal structure drawn up from a number of separate regulations (norms), and analyse the provisions of the Constitution of Ukraine, decisions of the Constitutional Court of Ukraine (hereinafter referred to as the CCU), the Supreme Court, and the European Court of Human Rights (hereinafter referred to as the ECHR) of 2004, 2019, 2020, and 2021 concerning the principle of proportionality and legitimate restriction of a person's right to inviolability of housing or other property.

Results

After Ukraine gained state independence, all types of legal relations, including criminal procedural ones, were rethought and democratised. The first documents of sovereign Ukraine immediately recognised the rule of individual rights and freedoms over class and public interests, which became the basis for forming modern criminal procedure legislation (Shybiko, 2021). Article 8 of the Constitution of Ukraine enshrined the principle of the rule of law, and Section II of the Basic Law defined the list of fundamental rights and freedoms of a person, the obligation to guarantee which was assumed by the state². S. Kelbia *et al.* (2021) indicate that "the rule of law functions as a special mechanism of social regulation that ensures the correct interaction of the principles, organisation, and functioning of a modern democratic society".

This means that each type of public relations must comply with fundamental principles and be conducted in a manner and manner that makes it impossible to restrict individual rights and freedoms illegitimately. Most of the restrictions on human rights and freedoms are applied in criminal proceedings, which indicates the need to focus the attention of the legislator on the development of additional tools to guarantee constant consideration of new realities in criminal procedural legal relations.

Article 30 of the Constitution of Ukraine has established a rule according to which a search of a home can be conducted solely on the basis of a court decision². From the content of this constitutional norm, it is clear that its legal content is a prerequisite for the formation of certain aspects of conducting criminal procedural measures in a person's home, and the basis for the legitimacy of such activities is defined.

Indeed, the provisions of the Criminal Procedure Code of Ukraine accept constitutional norms on the principle of the rule of law and the right of a person to inviolability of the housing as separate bases of criminal proceedings. According to the content of Article 8 of the Criminal Procedure Code of Ukraine, one of the fundamental principles of criminal proceedings is the rule of law, and in the provisions of Article 13 of the

¹ Criminal Procedure Code of Ukraine. (2012, April). Retrieved from <https://zakon.rada.gov.ua/laws/show/4651-17#Text>.

² Constitution of Ukraine. (1996, June). Retrieved from <https://zakon.rada.gov.ua/laws/card/254%D0%BA/96-%D0%B2%D1%80>.

Criminal Procedure Code of Ukraine, the legislator, as a separate basis of criminal proceedings, also fixed the constitutional rule on the impossibility of searching for housing without a court decision¹. It is quite obvious that compliance with these principles when conducting procedural actions in a person's home will indicate their legitimate nature.

An important feature of the principles of criminal proceedings is that they are interrelated, they continue to maintain their own value and do not interfere with the implementation of others (Pochtovyi, 2020). Without the application of a developed system of legal principles in the implementation of the regulation of public relations, it is impossible to ensure the functioning of a state governed by the rule of law in which the rights of the individual are adequately respected (Tsyhanii & Kuzmichova-Kyslenko, 2022).

Considering in more detail the basis of the rule of law, in the context of legal regulation, it is not stable. Considering its widespread use in the legislation and law enforcement of all developed democratic countries, it includes a number of legal principles that have emerged with the development of national and foreign legal theory and practice. In modern conditions, such principles remain its integral parts, they require separate compliance and implementation both in the legislative regulation of a certain type of legal relationship and in practical law enforcement. Among the elements of the rule of law principles, the principle of proportionality is defined. Constitutional Court Decision No. 3-RP/2012 of January 25, 2012, states that "one of the elements of the rule of law is the principle of proportionality"². Identifying the principle of proportionality with the phenomenon of social justice, another decision of the Constitutional Court No. 15-RP/2004 of November 02, 2004, states that restrictions on a person's constitutional rights should be conducted considering the requirements of the principle of proportionality, which provides for the legitimacy of applying restrictions only when it is necessary to achieve a socially justified goal³.

In the modern doctrine of criminal procedure law of Ukraine, proportionality is proposed to be understood as a legal means that provides for the application of restrictions useful to society to a person that adequately considers the degree of influence necessary and sufficient to achieve the desired public interest by state (Kaplina & Fomin, 2020). Justifying the need to maintain a reasonable balance of private and public

interests, some representatives of the legal doctrine emphasise that it is necessary to differentiate cases of achieving a social goal into legal and non-legal ones. In this regard, it should be understood that when referring to a democratic state, evidence obtained in violation of the procedural procedure defined by law cannot be used in making decisions (Blikhar *et al.*, 2021).

The same legal properties of the principle of proportionality are also distinguished in the Federal Republic of Germany and other countries of the European Union. Thus, in the German science of criminal procedure, the principle of proportionality is called the principle of expediency, proportionality, and adequacy of the state's application of restrictions on individual rights. Considering criminal procedural activity as a type of state-power activity, proportionality is defined not only as a criterion for a reasonable balance between private and public interests but also the need for the state to save its resources, the use of such a volume of measures and means that is justified by a potential socially useful result (Moeller, 2020). A similar nature of the implementation of the principle of proportionality in the legal relations of the European Union countries is evidenced by a number of decisions of the ECHR, in particular in the cases "Ramazyan v. Armenia" of February 14, 2019⁴, "Kaminskas v. Lithuania" of August 4, 2020⁵, etc. Considering the primacy of international law over private law, all decisions of the ECHR concerning the interpretation and compliance with the principle of proportionality are binding on Ukrainian national law enforcement (Barabash *et al.*, 2022). In this way, and considering the requirements of part 2 of Article 8 of the Criminal Procedure Code of Ukraine⁶, the specifics of the principle of proportionality defined in the decisions of the ECHR are implemented in Ukraine's criminal process.

Considering this, compliance with the principle of proportionality in criminal proceedings will mean compliance with the rule of law and fair application of procedural restrictions to a person. From a practical point of view, this will not only improve the level of legal order in the state but also improve the effectiveness of pre-trial investigation bodies, prosecutor's offices, and operational units. Fair use by law enforcement agencies of the means of procedural restrictions available to them is one of the key factors that motivates society to cooperate with them and, therefore, increases their effectiveness (Bolger & Walters, 2019).

¹ Criminal Procedure Code of Ukraine. (2012, April). Retrieved from <https://zakon.rada.gov.ua/laws/show/4651-17#Text>.

² Decision of the Constitutional Court of Ukraine No. 3-RP/2012. (2012, January). Retrieved from <https://zakon.rada.gov.ua/laws/show/v003p710-12#Text>.

³ Decision of the Constitutional Court of Ukraine No. 15-RP/2004. (2004, November). Retrieved from <https://zakon.rada.gov.ua/laws/show/v015p710-04>.

⁴ Judgment of the European Court of Human Rights in the case No. 54769/10 "Ramazyan v. Armenia". (2019, February). Retrieved from <https://hudoc.echr.coe.int/rus#%7B%22fulltext%22%3A%5B%22Case%20of%20Ramazyan%20v.%20Armenia%22%5D%7D>.

⁵ Judgment of the European Court of Human Rights in the case No. 44817/18 "Kaminskas v. Lithuania". (2020, August). Retrieved from <https://hudoc.echr.coe.int/rus#%7B%22fulltext%22%3A%5B%22Case%20of%20Kaminskas%20v.%20Lithuania%22%5D%7D>.

⁶ Criminal Procedure Code of Ukraine. (2012, April). Retrieved from <https://zakon.rada.gov.ua/laws/show/4651-17#Text>.

As mentioned above, the inviolability of the housing as a fundamental constitutional right of a person can be restricted only on the basis of a court decision or in urgent cases. In the context of criminal proceedings, such a court decision is a decision on permission to search a person's home or other property. The requirements that a decision on a permit to search a person's home or other property must meet are defined in Article 235 of the Criminal Procedure Code of Ukraine¹. Consequently, the execution of a decision on a permit to search a person's home or other property is an investigative (search) action in which authorised entities restrict a person's right to inviolability of housing. If the process of making such a decision by an investigating judge consists in investigating the grounds for applying restrictions, then conducting a search is a direct process of implementing criminal procedural influence on the habitual life of a person.

In the science of criminal procedure of Ukraine, a search is considered a restriction of human rights, which should be justified and be in the plane of law and common sense, and its conduct should be appropriate in each individual case since the expected result of the search should exceed the scope of restrictions on the rights of the person whose property it concerns, and one without which the set goals of criminal proceedings cannot be achieved by other means (Voloshyna & Shylin, 2021). V. Tishchenko *et al.* (2022) consider a search to be an investigative (search) action aimed at verifying and investigating information obtained by pre-trial investigation bodies or the prosecutor's office during preliminary investigative (search) actions. That is, according to the researchers, the execution of a search permit order cannot be conducted solely for the purpose of obtaining information about the commission of criminal proceedings or obtaining information for further planning of a pre-trial investigation and the scope of procedural coercion characteristic of a search can be implemented exclusively in connection with an urgent procedural need justified by the evidence already collected. An essential feature of the search is that its conduct, in comparison with other investigative (search) actions, is complicated not only by the legislative procedure and the need to apply more forensic recommendations to fulfil the goal set by the investigator, prosecutor but also by their compliance with the rights of participants in criminal proceedings since there are more risks for their illegitimate restriction (Pavlova, 2021).

Considering the above, it is reasonable to assume that procedural restrictions in the implementation of

the definition under study cannot be regarded as legitimate without observing the principle of proportionality. The requirements of the principle of proportionality must necessarily be considered by the subject conducting this investigative (search) action in its individual procedural aspects.

Criminal procedural regulation of the execution of a decision on permission to search a person's home or other property is provided for in Article 236 of the Criminal Procedure Code of Ukraine. Part 1 of Article 236 of the Criminal Procedure Code of Ukraine stipulates that "a decision on permission to search a person's home or other property may be executed by an investigator or prosecutor"². However, this provision of the Criminal Procedure Code of Ukraine is inconsistent with the content of other institutions of modern Criminal Procedure Law of Ukraine, particularly the Institute of the inquirer as a subject of pre-trial investigation in criminal proceedings. This makes it difficult to exercise public interest in law enforcement. At first glance, it may seem that in a situation in which there is a procedural need to search by an Inquirer, the requirements of Part 1 of Article 40-1 of the Criminal Procedure Code of Ukraine should be followed, according to which, "the inquirer is given the powers of an investigator when conducting an inquiry";³ however, judicial practice indicates that this understanding is incorrect. In resolving the issue of subjects authorised to execute a warrant to search a person's home or other property, the Supreme Court adheres to the principle of literal interpretation of Article 236(1) of the CPC of Ukraine⁴ and states that "a warrant to search a person's home or other property may be executed by an investigator or prosecutor; no exceptions are provided for operational units"⁵. This approach of the court practice implies that part 2 of Article 41 of the CPC of Ukraine⁶, which allows operational units to use the powers of an investigator, detective, or prosecutor on the basis of an order of an investigator, does not apply to the situation with the execution of a warrant to search a person's home or other property.

Requirements of Part 1 of Article 40-1 of the CPC of Ukraine⁷ in terms of legal properties are identical to Part 2 of Article 41 of the Criminal Procedure Code of Ukraine⁸. In the context of providing operational units and the inquirer as subjects of criminal proceedings with the opportunity to comply with the decision on permission to search housing or other property, problems for law enforcement are formed. Ultimately, it may be unreasonably used by a person whose right to inviolability of home or other property has been restricted.

¹ Criminal Procedure Code of Ukraine. (2012, April). Retrieved from <https://zakon.rada.gov.ua/laws/show/4651-17#Text>.

² Ibidem, 2012.

³ Ibidem, 2012.

⁴ Ibidem, 2012.

⁵ Resolution of the Joint Chamber of the Criminal Court of Cassation as Part of the Supreme Court No. 663/820/15-K, proceedings No. 51-2075km20. (2021, December). Retrieved from <https://reyestr.court.gov.ua/Review/101829915>.

⁶ Criminal Procedure Code of Ukraine. (2012, April). Retrieved from <https://zakon.rada.gov.ua/laws/show/4651-17#Text>.

⁷ Ibidem, 2012.

⁸ Ibidem, 2012.

Due to gaps in legislative technology, such a person has the opportunity for abuse since implementing this resolution is an integral part of conducting pre-trial investigations of a number of committed criminal offences in the order of inquiry.

It is impossible to avoid the situation of conducting a search in the context of the Russian-Ukrainian war since such procedural activities are conducted in conditions that are dangerous to the life and health of its participants. Notably, when introducing the legal regime of martial law, the Constitution of Ukraine provides for the restriction of many individual rights, including the right to inviolability of housing¹. This is an objectively justified approach because in some places, it is impossible to ensure a general procedural procedure during a search. This also applies to the implementation of the principle of proportionality.

There is no need to consider all the innovations in the CPC of Ukraine that regulate the conduct of this investigative (search) action under the legal regime of martial law, and it is only necessary to analyse the general approach, compliance with which will ensure a reasonable balance of interests. It is quite logical that, given the different intensity of hostilities in certain regions of Ukraine, the analysis of the legality of this procedural activity should also be approached individually. Thus, for example, the legislator simplified the procedure for conducting a search of a person's home or other property under martial law, in particular, allowing the implementation of this investigative (search) action without witnesses if there is a threat to their life and health, which is fixed in paragraph 1 of part 1 of Article 615 of the CPC of Ukraine². The application of this norm of the Criminal Procedure Code of Ukraine will be proportional only to conditions of military operations, and other real threats to people's lives and health.

The legal regime of martial law declared throughout Ukraine is not a reason for simplifying the procedure for executing a decision on permission to search a person's home or other property. If the above provision is applied, the actions of the investigator or prosecutor should be subject to a legal assessment during further examination of evidence collected in criminal proceedings. The impossibility of executing a search permit order in a general manner may also be justified by the need to document war crimes promptly (Tataryn *et al.*, 2021). However, it should be remembered that the possibility of restricting a person's right to inviolability of housing or other property under martial law does not mean legitimising criminal procedural arbitrariness since human rights are subject to protection and protection regardless of the operation of special legal regimes (Chasnyk, 2022).

In general, one of the most important characteristics of restricting a person's right to inviolability of housing

or other property when conducting a search on the basis of a court decision is that at the stage of pre-trial investigation, such procedural activities of an investigator or prosecutor are not subject to appeal. A person whose rights are restricted due to this criminal procedural measure does not have an appropriate range of legal guarantees that will reduce the negative consequences for them in connection with possible abuses on the part of these entities. Considering this, it is appropriate to provide for the possibility of prompt appeal against a decision on a permit to search a person's home or other property after its execution and the results of this investigative (search) action in the CPC of Ukraine. The problem is that a person whose right to inviolability of housing or other property has been restricted can get acquainted with the arguments of a search request only after the pre-trial investigation is completed. In case of falsification of such materials of criminal proceedings, the CPC of Ukraine does not provide for any possibility to restore one's rights and ensure an appropriate balance of interests. The existence of such a mechanism in the criminal procedure legislation will in no way contribute to abuse and obstruction of pre-trial investigation by a person whose right has been restricted because until the fact that an investigator or prosecutor has committed procedural violations or falsifications by an investigating judge is established, their actions will be considered legitimate (Braaten & Vaughn, 2023).

Violating a reasonable balance of private and public interests in implementing these activities by authorised entities will lead to public distrust of law enforcement agencies and the lack of partnership between the individual and the state, creating problems for ensuring legal order in other areas. That is why it is clear that achieving procedural justice is impossible without examining and solving problems related to the implementation of the decision on permission to search a person's home or other property and simultaneously ensuring a balance between private and public interests in criminal procedure legislation and law enforcement.

Discussion

Similar problems of legislative powers of law enforcement officials occur in the law enforcement activities of the United States, which are proposed to be solved by legislative improvements in procedural legislation. This applies, in particular, to various areas of criminal procedure in the United States, when the legislator did not clearly define specific officials for the implementation of a particular procedural action, and therefore, it can be mistakenly performed by an unauthorised person, which leads to unjustified restriction of individual rights (Rossler & Suttmoeller, 2022).

This approach is now relevant to the criminal process in Ukraine. However, for example, V. Mohyla (2021)

¹ Constitution of Ukraine. (1996, June). Retrieved from <https://zakon.rada.gov.ua/laws/card/254%D0%BA/96-%D0%B2%D1%80>.

² Criminal Procedure Code of Ukraine. (2012, April). Retrieved from <https://zakon.rada.gov.ua/laws/show/4651-17#Text>.

proposes to solve this problem not by unifying the criminal procedural legislation of Ukraine but in such a way that the investigating judge identifies a specific subject authorised to implement it when making a decision. I. Basysta (2021) also believes that an investigating judge can solve this problem when deciding on permission to search a person's home or other property, considering the specifics of a particular criminal proceeding and procedural needs. Other Ukrainian procedural scholars, in particular S. Davydenko & D. Mavdryk (2021). All of the above confirms the imbalance of procedural guarantees between private and public interests in this aspect of the execution of a warrant to search a person's home or other property, and therefore, of course, requires legislative improvements.

Restriction of private interest in the implementation of the resolution under study also occurs in the case of seizure of property. N. Akhtyrskaya (2018) & M. Komarova (2018) express the opinion that the provisions of the CPC of Ukraine regulating the grounds and procedure for the seizure of property in the execution of a decision on the search of a person's home or other property clearly require the specification of things, documents, or persons for the pursuit of which it is planned to conduct a search. Therewith, the considered feature of the seizure of property in executing such a resolution is that the legislator, providing for the procedural possibility of seizure, uses the term "things that are relevant for criminal proceedings"¹. This definition creates an opportunity for procedural abuse because other provisions of the Criminal Procedure Code of Ukraine do not give a clear understanding of what should be attributed to such things. Cases when investigators temporarily seize property when executing a decision are systematic, although, in the future, the investigating judge refuses to seize it since it does not establish its importance for criminal proceedings. Investigators in such a situation are guided solely by their subjectivism, which violates the balance of interests that the legislator should guarantee in this case. It will be more appropriate to use² the term "things relevant for establishing circumstances to be proved in criminal proceedings" part 7 of Article 236 of the CPC of Ukraine, and its direct connection with the meaning of Article 91 of the CPC of Ukraine³, it will make it impossible to take a subjective approach to the issue of temporary seizure of property in such cases.

Ye. Povzyk (2021) determines the proper recording of its individual features not only when obtaining permission from the investigating judge to conduct a search but also when directly conducting this investigative (search) action as another essential component of

the implementation of the principle of proportionality in the seizure of property, in particular in the relevant protocol. I. Osypenko & K. Myshasta (2021) draw attention to the fact that it is the investigator, the prosecutor who executes the decision that should examine the evidentiary value of the property that is planned to be seized and check the ownership of the actions of the persons involved in conducting this investigative (search) activity since they, not having information about the pre-trial investigation as a whole, can allow procedural abuses in the context of property seizure.

The need to record not only individual signs of the found objects during the search but also their exact location is indicated by P. Antoniuk & N. Kononenko (2022). If, after the execution of the decision on permission to search a person's home or other property and seize property, it is not recognised as material evidence in criminal proceedings, it is subject to an immediate return to the person from whom it was seized. This also applies to cases when the seizure of property occurred in violation of the requirements of the CPC of Ukraine (Zhudinsky, 2020). This study can agree with these comments and add that the legislator's wording of the content of Part 7 of Article 236 of the CPC of Ukraine regarding the division of property into "seized" and "temporarily seized" is also ambiguous. In practice, investigators and prosecutors mistakenly believe that if the property is specified in the decision of the investigating judge on permission to search a person's home or other property, then it is seized, and not temporarily seized, and therefore it should not be arrested. This approach creates procedural problems, the consequence of which is an unjustified restriction of a person's rights to the inviolability of housing or other property. For the unification of criminal procedural legislation in this aspect, part 7 of Article 236 of the CPC of Ukraine⁴, it is more appropriate to highlight in such a way that all property, except that which is seized from circulation by law, is considered temporarily seized.

Conclusions

The implementation of the principle of proportionality in the execution of a decision on permission to search a person's home or other property is insufficiently ensured from the point of view of legislative regulation, which makes it difficult to ensure the legitimacy of such a procedure on the part of an investigator or prosecutor. All possibilities of abuse of procedural powers by these entities can be resolved by making appropriate amendments to Article 236 of the CPC of Ukraine. This concerns the insufficient settlement of issues related to the seizure of property and the possibility of prompt appeal against the decision on the search permit and

¹ Criminal Procedure Code of Ukraine. (2012, April). Retrieved from <https://zakon.rada.gov.ua/laws/show/4651-17#Text>.

² Ibidem, 2012.

³ Ibidem, 2012.

⁴ Ibidem, 2012.

its execution at the stage of pre-trial investigation by a person whose rights were restricted. However, imperfect legislative regulation of the procedure violates the balance of interests not only in connection with the existing opportunities for abuse by the investigator, prosecutor but also on the part of a person, the right to inviolability of housing or other property was restricted in this way, in particular due to the lack of procedural powers to conduct this investigative (search) action by the Inquirer or operational units on the basis of the investigator's order. This violates the mutual coordination of the inquirer's institutions, operational units, and investigative (search) actions when executing a decision on permission to search a person's home or other property and, therefore, requires a legislative decision. In the context of the Russian-Ukrainian war, the implementation of the principle of proportionality should be conducted by the subjects of the implementation of the resolution. If the legal regulation of this investigative (search) action under the conditions of the legal regime of martial law does not raise additional questions, then cases of procedural abuses may depend on an individual investigator or prosecutor, and, therefore, such actions necessarily require further legal assessment in criminal proceedings. Improvement of legislation and criminal procedural law enforcement regarding the implementation of the principle of proportionality in the

implementation of a decision on permission to search a person's home or other property should be conducted considering the needs of modern practice and national and foreign legal doctrine.

Therewith, additional attention should be paid to issues related to the implementation of the principle of proportionality when restricting a person's right to inviolability of housing or other property in connection with the conduct of secret investigative (search) actions, which includes the procedure for granting permission for their implementation by the relevant investigating judge, and the direct implementation of such measures in criminal proceedings. Despite the fact that the restriction of a person's right to inviolability of housing or other property during secret investigative (search) actions is the most substantial measure of restrictions in its content, the study examination of problems of legislative regulation and modern law enforcement of this issue continues to be quite relevant.

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Conflict of Interest

None.

References

- [1] Akhtyrska, N. (2018). [Search: Procedural and tactical aspects through the prism practices of the European Court](#). *Scientific Bulletin of Kherson State University*, 2(1), 112-118.
- [2] Antoniuk, P., & Kononenko, N. (2022). Organizational and tactical aspects of conducting search of the office. *Law and Society*, 2, 208-214. [doi: 10.32842/2078-3736/2022.2.31](#).
- [3] Barabash, O., Dobkina, K., Senyk, S., Klyuyeva, Y., & Martiuk, A. (2022). [European human rights standards: The practice of applying ecthr decisions](#). *Informatologia*, 55(1-2), 27-41.
- [4] Basysta, I. (2021). Regarding the legality of conducting a search and/or inspection of a person's home or other property on behalf of an investigator, inquirer, or prosecutor. *Social and Legal Studios*, 3(13), 115-122. [doi: 10.32518/2617-4162-2021-3-115-122](#).
- [5] Blikhar, V., Dufeniuk, O., & Blikhar, M. (2021). Balance of "goal-means" in the system of criminal procedure or can a good goal justify evil means? *Beytulhikme An International Journal of Philosophy*, 11(4), 1801-1817. [doi: 10.18491/beytulhikme.1804](#).
- [6] Bolger, C.P., & Walters, G.D. (2019). The relationship between police procedural justice, police legitimacy, and people's willingness to cooperate with law enforcement: A meta-analysis. *Journal of Criminal Justice*, 60, 93-99. [doi: 10.1016/j.jcrimjus.2019.01.001](#).
- [7] Braaten, C.N., & Vaughn, M.S. (2023). Police officers' qualified immunity in excessive force claims, warrant execution, and warrantless searches and arrests: Tracing the evolution of, and stagnation in, U.S. Supreme Court precedents. *American Journal of Criminal Justice*, 48, 65-95. [doi: 10.1007/s12103-021-09617-w](#).
- [8] Chasnyk, D. (2022). Ensuring human rights in the field of national security in the face of military aggression of the Russian Federation. *Scientific notes of the Lviv University of Business and Law*, 34, 61-67. [doi: 10.5281/zenodo.7105142](#).
- [9] Davydenko, S., & Mavdryk, D. (2021). Problems of legal improvement regulation of the search procedure by the investigator, inquirer, and prosecutor. *Current Problems of the State and Law*, 90, 51-63. [doi: 10.32837/apdp.v0i90.3207](#).
- [10] Kaplina, O., & Fomin, S. (2020). Proportionality of Interference with the right to peaceful enjoyment of property during the seizure of property in criminal proceedings in Ukraine. *Access to Justice in Eastern Europe*, 3(4), 246-264. [doi: 10.33327/AJEE-18-3.4-a000038](#).

- [11] Kelbia, S., Zakharchyn, N., Samilo, A., Koveino, Yu., Pundor, Yu., & Shyshko, V. (2021). [The rule of law as a fundamental principle of the functioning of the legal system of democratic countries](#). *AD ALTA: Journal of Interdisciplinary Research*, 11(2), 113-117.
- [12] Komarova, M. (2018). [Powers of the investigator during a search in criminal proceedings](#). *Scientific Bulletin of Kherson State University*, 2(1), 125-128.
- [13] Moeller, U. (2020). Pre-trial procedure in Germany. *Istanbul University Press*, 5274, 87-107. [doi: 10.26650/B/SS26.2020.014.05](#).
- [14] Mohyla, V. (2021). The decision of the investigating judge on permission to search a person's home or other property: Some theoretical and practical issues. *Legal Scientific Electronic Journal*, 4, 532-535. [doi: 10.32782/2524-0374/2021-4/131](#)
- [15] Osyenko, I., & Myshasta, K. (2021). General provisions of search tactics. *Analytical and Comparative Jurisprudence*, 3, 196-200. [doi: 10.24144/2788-6018.2021.03.36](#).
- [16] Pavlova, N. (2021). The importance of observing the rights and freedoms of a person during conducting a search during the investigation of criminal offenses, committed by fraud. *Scientific Bulletin of Dnipropetrovsk State University of Internal Affairs*, 1, 285-291. [doi: 10.31733/2078-3566-2021-1-285-291](#).
- [17] Pochtovyi, M. (2020). On the completeness of the list of criminal principles proceedings. *Legal Science*, 9(111), 157-163. [doi: 10.32844/10.32844/2222-5374-2020-111-9.19](#).
- [18] Povzyk, Ye. (2021). Current issues of conducting a search of a person's home or other possessions. *Law and Innovative Society*, 2(17), 100-105. [doi: 10.37772/2309-9275-2021-2\(17\)-13](#).
- [19] Rossler, M.T., & Suttmoeller, M.J. (2022). Conservation officer perceptions of search authority. *An International Journal, Police Practice and Research*, 23, 61-79. [doi: 10.1080/15614263.2021.1925553](#).
- [20] Shybiko, V. (2021). The evolution of criminal procedure in Ukraine over 30 years of independence. *Access to Justice in Eastern Europe*, 3(11), 23-51. [doi: 10.33327/AJEE-18-4.3-a000069](#).
- [21] Tataryn, I., Komissarchuk, Yu., Dmytryk, Yu., Maistrenko, M., & Rymarchuk, O. (2021). [Features of detection and obtaining evidence of war crimes committed in the context of international armed conflict](#). *Cuestiones Politicas*, 69(39), 74-93.
- [22] Tishchenko, V., Tsekhan, D., Tesliuk, I., Chumak, S., & Yatskevych, R. (2022). Peculiarities of conducting investigative actions during the investigation of criminal activity of leaders of criminal groups. *Amazonia Investiga*, 11(51), 210-219. [doi: 10.34069/AI/2022.51.03.20](#).
- [23] Tsyhanii, S., & Kuzmichiva-Kyslenko, Ye. (2022). Modern approaches to the basics of criminal proceedings. *Scientific Innovations and Advanced Technologies*, 7(9), 278-287. [doi: 10.52058/2786-5274-2022-7\(9\)-278-287](#).
- [24] Voloshyna, V., & Shylin, D. (2021). Compliance with the principle of legality during the search. *Legal Scientific Electronic Journal*, 10, 485-489. [doi: 10.32782/2524-0374/2021-10/127](#).
- [25] Zhmudynskyi, V. (2020). Peculiarities of returning property not recognized as material evidence. *Academic Notes of TNU Named After V.I. Vernadskyi*, 31(4), 229-234. [doi: 10.32838/1606-3716/2020.4/37](#).

Аспекти реалізації принципу пропорційності під час виконання ухвали про дозвіл на обшук житла чи іншого володіння особи

Дмитро Зайцев

Ад'юнкт

Національна академія внутрішніх справ

03035, пл. Солом'янська, 1, м. Київ, Україна

<https://orcid.org/0009-0009-1383-1085>

Анотація

Довіра до держави є нагальною проблемою країн Центрально-Східної та Східної Європи. Позаяк побудова між державою і суспільством партнерських стосунків можлива лише за умови дотримання принципу процесуальної справедливості, обмеження права особи на недоторканність житла чи іншого володіння в кримінальному провадженні є однією з нагальних проблем сучасного українського законодавства. Метою роботи є висвітлення окремих законодавчих і правозастосовних аспектів процедури виконання ухвали про дозвіл на обшук житла чи іншого володіння особи, що не узгоджуються з вимогами принципу пропорційності та створюють проблеми для забезпечення розумного балансу приватних і публічних інтересів. Для досягнення мети дослідження використано емпіричні, загальнологічні, евристичні та спеціально-юридичні методи наукового пізнання. Встановлено, що недостатньо врегульовані законодавцем питання, які стосуються визначення суб'єктів, уповноважених на виконання ухвали про дозвіл на обшук житла чи іншого володіння особи, вилучення майна, неможливості оперативного оскарження такого судового рішення, створюють дисбаланс між приватними та публічними інтересами в кримінальному процесі. Узагальнено, що обмеження прав під час виконання ухвали про дозвіл на обшук житла чи іншого володіння особи не може бути здійснено у випадку, якщо засоби обмеження не є співмірними з метою, яку слідчий, прокурор прагне досягти. Змодельовано процесуальну ситуацію, у якій принцип пропорційності може бути порушено на користь не тільки публічного інтересу, а й приватного, що дало змогу окреслити можливості для потенційних зловживань особою, право якої обмежили. Проаналізовано особливості виконання такої ухвали в умовах воєнного стану та висвітлено критерії, дотримання яких сприятиме реалізації принципу пропорційності. Запропоновано рекомендації щодо розв'язання окреслених вище проблем. Результати дослідження стануть у нагоді не тільки для вдосконалення відповідних положень КПК України та слідчої практики, вони засвідчили можливість розроблення додаткових гарантій легітимного обмеження низки інших, гарантованих Конституцією України прав під час виконання ухвали про дозвіл на обшук житла чи іншого володіння особи в кримінальному провадженні

Ключові слова:

баланс інтересів; дізнавач; досудове розслідування; права особи; правозастосування; прокурор; слідчий