UDC 343.74

Osipov O. – Postgraduate Student of the Scientific Laboratory on the Problems of Pre-Trial Investigation of the Educational and Research Institute No. 1 of the National Academy of Internal Affairs, Kyiv, Ukraine

TEMPORARY SEIZURE OF PROPERTY IN THE SYSTEM OF MEASURES TO ENSURE CRIMINAL PROCEEDINGS

The concept and legal basis of the current system of measures for criminal proceedings ensuring are defined. The features of temporary property seizure, its implementation mechanism and legal nuances are analyzed. Its place in relevant Ukrainian legislation is determined along with correlation with other existing measures.

Keywords: criminal proceedings, measures to ensure criminal proceedings, temporary seizure of property.

The provisions of the Constitution of Ukraine stipulate that person's life and health, honor and dignity, inviolability and security are the highest social values [1] and primary objectives to be ensured by the state. Therefore, human rights and freedoms are inviolable dogmas, which cannot even be violated with by the state represented by government. At the same time, the law provides for a number of cases, in which human power can be limited or completely deprived. The widest range of such cases is contained in the Criminal Procedure Law, as this branch is connected with the legal relationships of coercion arising from committal of the most socially dangerous acts – crimes. Moreover, the legislator considers the issue of human rights and freedoms limiting with the utmost conscientiousness, ensuring transparency and democratization of their emergence and use.

Current Criminal Procedural Code of Ukraine (hereinafter – CPC) contains norms regulating measures to ensure criminal proceedings – aimed to restrict the rights of certain subjects of criminal process. The application of such measures is clearly regulated by the provisions of the act that to some extent complicates their «non-targeted» use. Moreover, the system of such

measures is ramified and contains a large number of regulations which differ in content. Author pays special attention to the temporary seizure of property because this measure limits one of the most significant rights of a person – ownership. In addition, temporary seizure of property is characterized by procedural and legal specificity, which proves the relevance of determining the place of this norm in the system of criminal proceedings in general.

At different times, criminal and procedural coercion had been studied by such well-known scholars as V. Halahan, A. Dubynsky, V. Drozd, Z. Zinnatullin, F. Kudin, V. Maliarenko, V. Nazarov, V. Chystiakov, I. Petrukhin, V. Savytskyi, V. Shepitko, M. Yakuba. These scholars have conveyed the general issues of criminal and procedural law and practical aspects of implementing its norms. Moreover, the CPC of Ukraine contains a separate section devoted to criminal proceedings, studied by S. Smokov, O. Humin, V. Nazarov in details. Problematic issues such as the temporary seizure of property have not been reflected properly in scientific studies. Therefore, the author argues that this important aspect of criminal and procedural law requires thorough analysis and study.

The aim of the article is elaboration and determination of specific features of temporary property seizure and determination of its place in the current system of measures for criminal proceedings ensuring.

Criminal procedure establishes procedure for cases in which the rights and freedoms are limited due to the obligation to fulfill the key law enforcement tasks, such as protection of a person, society and the state from criminal offenses, protection of rights, freedoms and legitimate interests of participants in criminal proceedings, as well as ensuring a prompt, complete and impartial investigation and trial so that anyone, who has committed a criminal offense, is held liable to the extent of his guilt, no innocent is accused or convicted, no person is subjected to unjustified procedural coercion while the proper legal procedure is applied to each participant of criminal proceedings [2]. For that purpose, a specific system of measures to ensure criminal proceedings is taken. Of course, such a definition of the set of measures is extremely narrow and needs to be further interpreted. In the current CPC, Chapter II contains the key information, rules of application, the list of systemic elements etc. However, without deep analysis of relevant legal provisions a rather logical question arises – what is the nature of abovementioned institution? Former CPC of Ukraine (1960) does not provide any measures to ensure criminal

proceedings, but regulates the use of precautionary measures, which currently are only an element of relevant legal institution.

The issue of criminal procedural law, analyzed in the article, has been studied by scholars at different times. Due to the heterogeneity of scientific views on measures to ensure criminal proceedings, their definition varies considerably. For example, V. Makhov and M. Pieshkov identify the notion of measures for criminal proceedings ensuring and measures of criminal procedural coercion (defining the latter as provided for by the criminal procedure law) as procedural means of coercive nature, which are applicable in criminal justice to those officials and public authorities in case if sufficient grounds are present and fully compliant with the law relating to the accused, the suspects and other persons to prevent and terminate their unlawful actions for successful investigation and execution of criminal justice cases [3; 4]. T. Osoianu presents a wider definition underlining that measures of criminal procedural coercion are coercive procedural means, provided for by the criminal procedural law, that are used in the criminal process by authorized officials and state bodies given sufficient grounds and in accordance with the procedure provided for by law to suspects and other persons for successful investigation and consideration of a criminal case [5; 6]. On the contrary, such scholars as M. Korniienko, T. Korniakova and Yu. Shemshuchenko argue that measures to ensure criminal proceedings are legal mechanisms for deterrence, countervailing and coercive measures used in criminal proceedings to achieve the purpose and fulfill tasks of criminal proceedings [7].

The authors of the article argue that the most creative and complete definition of measures to ensure criminal proceedings is in the textbook of V. Kovalenko, L. Udalova and D. Pysmennyi. The scientists emphasize that the measures for ensuring criminal proceedings are the procedural means of state and legal coercion, provided for by the criminal procedure law, applied by the authorized bodies (officials) that carry out criminal proceedings, clearly defined by law, concerning persons involved in criminal proceedings in order to achieve the effectiveness of criminal proceedings (for the prevention and termination of unlawful actions, ensuring the detection and securing of evidence, etc.) [8, p. 164]. In addition, scientists also identify such features of measures to ensure criminal proceedings as:

– state and power character;

– functioning of criminal procedural form of application;
– purposefulness;
– coercive nature;
– ignorance of the addressee will [8, p. 164].

Therefore, measures to ensure criminal proceedings present a coherent institution of coercion that violates the rights of citizens in cases provided for by the CPC of Ukraine and is applied with strict adherence to the criminal procedure. In addition, it must be mentioned that the abovementioned norms can be applied only by law enforcement bodies.

In legislation, the notion of measures to ensure criminal proceedings is enshrined in the synthesis of jurisprudence regarding the consideration of petitions on the application of these measures by an investigating judge issued by the Higher Specialized Court of Ukraine for the consideration of civil and criminal cases. This document states that criminal measures are coercive means, provided by the CPC, applied if given sufficient grounds and in accordance with the procedure established by law, in order to prevent and overcome negative circumstances that interfere or may interfere with criminal proceedings tasks, ensuring its effectiveness [9]. Moreover, an exhaustive list of these measures is provided in Art. 131 of the CPC of Ukraine, defining each of them:

1) citation by the investigator, prosecutor, judicial citation and arrest;
2) imposition of pecuniary charge;
3) temporary restrictions on the use of special right;
4) removal from office (temporary removal of a judge from the administration of justice);
5) temporary access to things and documents;
6) temporary seizure of property;
7) seizure of property;
8) detention of a person;
9) precautionary measures [2].

Therefore, as far as our study is concerned, the temporary seizure of property is defined by law as an independent measure to ensure criminal proceedings that is as a measure of criminal-procedural coercion. This indicates that it has a separate area and purpose of application. Clarifying the measure under investigation, Chapter 16 of Section II of the CPC of Ukraine proves this statement. In Art. 167, the temporary deprivation of property is put as actual

depriving the suspect or persons possessing the property specified by the law of the ability to possess, use and dispose of it until the decision on the issue of arrest or its return [2]. In addition, procedural law states that temporarily seized property may be in the form of objects, documents, money, etc. with given sufficient reasons that they are:

1) found, manufactured, adapted or used as a means or tool for committing a criminal offense and (or) retained its vestiges;

2) intended (used) to persuade a person to commit a criminal offense, to finance and/or provide with financial support for a criminal offense or compensation for its commission;

3) the subject of a criminal offense, including those associated with their illicit traffic;

4) obtained due to a criminal offense and/or relevant proceeds, as well as the property, in which they have been wholly or partially converted [2].

It should be emphasized that the temporary seizure of property occupies a special position in the system of measures for ensuring criminal proceedings that is connected with the specifics of its application. Generally, such measures are applied on the grounds of the investigating judge or court decision. The petition for the application of measures to ensure criminal proceedings, grounded on the decision of the investigating judge, is submitted to the local court, within which territorial jurisdiction the pre-trial investigation body is situated [2]. However, in some cases, their application is not allowed due to the lack of appropriate reasons.

Analysis of Art. 168 of the CPC of Ukraine demonstrates that another procedure is stipulated under the set of norms concerning temporarily seized property. Based on the provisions of this norm, temporary seizure may be carried out during the lawful detention of a person (Art. 207, 208 of the CPC of Ukraine) or during a search or examination (Art. 234, 237 of the CPC of Ukraine). According to legislation, during the detention or search and temporary seizure of property or immediately after its implementation, an investigator, prosecutor or another authorized officer is obliged to draw up a corresponding protocol, a copy of which is given to the person, whose property has been seized or to his/her representative [2]. Nevertheless, the issue of follow-up with these things remains unresolved. The matter is that Chapter 16 of Section II of the CPC of Ukraine does not directly state what in particular the investigator must do with the property, removed in accordance with the

procedure established by law. Considering that such a precautionary measure does not require a special sanction of the court, as it is carried out within the framework of detention, search or examination, performed on the basis of the decision of the investigating judge, such violation of the right of property must be «legalized» in a certain way. The clarification of this issue is presented in the provision of part 5 Art. 171 of the CPC of Ukraine, stating that the petition of the investigator, the prosecutor for the arrest of the temporarily seized property must be filed not later than the next business day after the seizure of property, otherwise the property should be returned immediately to the person, from whom it has been seized [2]. Moreover, the first part of this article defines the procedure of seized property legalization in the course of person's detention procedure, since similar actions during the inspection and search have certain features. Therefore, in the case if property was temporarily seized in the course of search and examination, carried out on the basis of a decision of the investigating judge, provided for in Art. 235 of this Code, the petition for the seizure of such property must be filed by the investigator, the prosecutor within 48 hours after the seizure of the property, otherwise the property should be returned immediately to the person, from whom it has been seized [2].

The last feature is caused by the specifics of the search and examination. Art. 236–237 stipulates that in the course of investigating the investigator or the prosecutor has the right to temporarily remove things that are relevant for the criminal proceedings. Items extracted from circulation according to law are subjects to seizure regardless of its relation to criminal proceedings. Seized items and documents that are not included in the list, for which explicit permission to search is given in the decision on the permission to conduct a search, and which are not related to items seized from circulation according to law, are considered as temporarily seized property [2]. To conclude, the 48-hour time-limit provided for resolving of the issue of arrest imposed on temporarily seized property in the course of search or examination (fully justified). It is conditioned by the need to determine the fact of relevant property inclusion in the list of items subjected to seizure. This aspect was confirmed in Art. 19 of the Letter of the High Specialized Court of Ukraine on the Examination of Civil and Criminal Cases from April 5, 2013, which states that the investigator or the prosecutor in his petition for the seizure of property should

refer to documents confirming the right to ownership of the property subjected to arrest. Nevertheless, while considering the relevant petitions, the investigating judges should take into account that such documents cannot be indicated in the petition and provided for property, the ownership of which cannot be documented (for example, property seized from circulation, movable property not subject to state registration and documents for which are absent, etc.), as well as property that is subject to state registration, however, contrary to the requirements of the law has not been registered. Nevertheless, a corresponding inability should be substantiated in the petition, it should also be mentioned in the decision [10].

Mentioned issues are not the only ones characterizing the temporary seizure of property. In the law enforcement practice, exact interpretation of aforesaid norms, which regulate this measure, have created a false idea that property which meets the specified criteria may be seized only from a suspect, in a place or from a person, to which/whom he/she has personal or indirect access and a real possibility to dispose of certain things in order to prevent criminal proceedings, since in the part I, the mentioned article provides the deprivation of suspect's ability to possess, use and dispose of: firstly, «certain» property that is a certain part of the part II Art. 167 of the CPC of Ukraine, and secondly, «his/per» property, which belongs to the suspect [11, p. 311]. However, in practice, situations often arise when the property described above is owned by persons, who are not informed of its origin or area of application at all. Therefore, the enforcement of the provisions of Art. 167 is complicated by inconsistency of legal definition with actual content of the legal norm, which is a significant challenge. However, as previously stated, a temporary seizure of property is inextricably linked with such measure of criminal proceedings as an arrest of property. Actually, temporary seizure is carried out precisely in order to achieve a long-term restriction of the rights of a particular person in his/her further property rights. At the same time, in the Generalized Judicial Practice regarding the investigating judge's consideration of petitions on the application of measures to ensure criminal proceedings issued by the High Specialized Court of Ukraine for consideration of civil and criminal cases, it is stated that persons, who are not suspects (who are informed of the suspect or detained on suspicion of a criminal offense according to Art. 276–279 of the CPC of

Ukraine) or the accused (a person whose indictment has been transferred to court according to Art. 291 of the CPC of Ukraine) or persons who bear civil liability by law for damage caused by acts of a suspect, accused or mentally disturbed person, who committed a socially dangerous act, cannot be subjected to decision on the property seizure.

Therefore, even if the investigating judge considers due to sufficient reasons that a person has committed a criminal offense, he has no authority to seize the property of a person who is not a suspect [9]. Accordingly, temporary seizure of property from such persons cannot be carried out as well, as the implementation of such measure does not have the proper legal basis. In case of temporarily seizing property from persons, who are not suspects or accused, contrary to the provisions of the law, such measure would not make any sense, as in the future, these items will have to be returned, since imposing a petition for arrest will be impossible.

In conclusion, temporal seizure of property as a specific measure for enforcement of criminal proceedings, as well as its place in the system of similar institutions possess essential attributes.

Firstly, temporary seizure of property has a special mechanism of application, which is manifested in enforcing exclusively within lawful detention of a person or in the course of search or examination. Therefore, based on the provisions of the law, it is not practically possible to apply a temporary seizure on its own.

Secondly, a measure to ensure criminal proceedings under consideration is inextricably linked with another similar institution that is the seizure of property. Temporarily seized property must be arrested necessarily, otherwise it have to be returned to a legal owner.

Third, the legislation has incorrectly defined a list of persons, whose property can be seized. This leads to a whole range of challenges at the moment of property seizure from inappropriate entities and imposing an arrest on it in the future. Actually, an error in defining the entity when applying a measure to ensure criminal proceedings prevents achieving the purpose of its enforcement.

Therefore, temporarily seized property as a measure of criminal proceedings possesses all the features and characteristics of an investigative action. Nowadays, in the system of measures for ensuring criminal proceedings, temporary seizure of property is superfluous, since its application is simplified, because it is an

«additional means» enforced in the course of other measures to ensure criminal proceedings or investigative actions. The inaccuracy of legislative mechanism leads to challenges within law enforcement activities performed by investigators and prosecutors. Hope is left that in the future the legislator will take this issue into account and improve its legal regulation.

REFERENCES

1. Konstytutsiia Ukrainy: vid 28 cherv. 1996 r. No. 254k/96-VR [The Constitution of Ukraine from June 28, 1996, No. 254k/96-VR]. *Ofitsiinyi Biuleten Verkhovnoi Rady Ukrainy, Official Bulletin of the Verkhovna Rada of Ukraine, 30* [in Ukrainian].

2. Kryminalno-protsesualnyi kodeks Ukrainy: vid 13 kvit. 2012 r. No. 4651-VI [The Criminal Procedural Code of Ukraine from April 13, 2012, No. 4651-VI]. *Ofitsiinyi Biuleten Verkhovnoi Rady Ukrainy, Official Bulletin of the Verkhovna Rada of Ukraine, 9-10, 11-12, 13* [in Ukrainian].

3. Humin, O.M. (2013). Systema zakhodiv shchodo zabezpechennia kryminalnoho provadzhennia za novym Kryminalno-protsesualnym kodeksom Ukrainy [The system of measures for ensuring criminal proceedings under the new Criminal Procedure Code of Ukraine]. *Naukovyi visnyk Natsionalnoi akademii vnutrishnikh sprav, Scientific Bulletin of the National Academy of Internal Affairs, 1,* 226-231 [in Ukrainian].

4. Smokov, S.M. (2012). Vydy obmezhen na konstytutsiini prava hromadian u novomu Kryminalno-protsesualnomu kodeksi Ukrainy [Types of restrictions on the constitutional rights of citizens in the new Criminal Procedural Code of Ukraine]. *Forum zakonu, Forum of Law, 2,* 628-632 [in Ukrainian].

5. Osoianu, T. (2003). Ugolovno-processualnyi zakon Respubliki Moldova: obscaia chast [The Criminal Procedure Law of the Republic of Moldova: Common Part]. *Mezhdunarodnyi Nezavisimyi Universitet Moldovy, International Independent University of Moldova* [in Russian].

6. Firman, O.V. (2014). Zakhody shchodo zabezpechennia kryminalnoho provadzhennia ta ikh klasyfikatsiia [Measures for ensuring criminal proceedings and their classification]. *Yurydychnyi*

naukovyi elektronnyi zhurnal, Legal Scientific Electronic Journal, 6, 234-237 [in Ukrainian].

7. Shemshuchenko, Yu.S., Korniienko, M.V., & Korniakova, T.V. (2017). *Naukovo-praktychnyi komentar Kryminalno-protsesualnoho kodeksu Ukrainy [Scientific and Practical Commentary of the Criminal Procedural Code of Ukraine].* Kyiv, Yurydychna iednist, Legal Unity [in Ukrainian].

8. Kovalenko, V.V., Udalova, L.D., & Pysmennyi, D.P. (2013). *Kryminalne provadzhennia [Criminal proceedings].* Kyiv, Tsentr vykhovnoi lit. [in Ukrainian].

9. Uzahalnennia sudovoi praktyky shchodo rozhliadu suddeiu-slidchym zaiav pro zastosuvannia kryminalnoi spravy: vytiah vid 7 liut. 2014 r. [Summarizing the court practice regarding the consideration by the investigating judge of applications for the application of criminal proceedings: an extract from February 7, 2014]. (n.d.). *zakon3.rada.gov.ua.* Retrieved from http://zakon3.rada.gov.ua/laws/show/n0001740-14/page [in Ukrainian].

10. Z okremykh pytan suddia-slidchyi sudu pershoi instantsii zdiisniuie sudovyi kontrol za dotrymanniam prav, svobod ta interesiv fizychnykh osib pry zastosuvanni zakhodiv shchodo zabezpechennia kryminalnoho provadzhennia [On certain issues of the investigating judge of the court of first instance implementation judicial control over the observance of the rights, freedoms and interests of individuals during the application of measures to ensure criminal proceedings]. Zakon I biznes, Law and Business, 17 [in Ukrainian].

11. Miroshnichenko, Yu.M. (2013). Pro problemni pytannia tymchasovoho vyluchennia ta areshtu majna za novym kryminalno-protsesual'nym zakonom [Problematic issues of temporary seizure and arrest of property under the new criminal-procedural law]. *Porivnialno-analitychne pravo, Comparative and Analytical Law, 3-2,* 310-312 [in Ukrainian].

Стаття надійшла до редколегії 20.07.2017

Осіпов О. О. *– аспірант наукової лабораторії з питань досудового розслідування навчально-наукового інституту № 1 Національної академії внутрішніх справ, м. Київ*

Тимчасове захоплення майна в системі заходів забезпечення кримінальної процедури

Визначено поняття та правове підґрунтя чинної системи заходів щодо забезпечення кримінального судочинства. Проаналізовано особливості тимчасового захоплення майна, механізм його реалізації та правові нюанси.

Ключові слова: кримінальне провадження, заходи щодо забезпечення кримінальної справи і тимчасового вилучення майна.