

Restrictions on Property Rights in Criminal Proceedings



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As prescribed by the current *Criminal Code of Ukraine*, any criminal proceeding is aimed at keeping citizens and the state safe from criminal offenses, protecting rights, freedoms and lawful interests of all parties to a criminal proceeding, ensuring prompt, complete, unbiased investigation and trial so that everyone who has committed a criminal offense could be held liable to the extent of his or her guilt.

However, given specifics of the criminal process, authorized bodies often find it rather difficult to perform their duty of respecting rights and freedoms of parties to a criminal proceeding. As a matter of fact, there is always a temptation "to tighten screws" on those who, as alleged by representatives of pre-trial investigation bodies or a prosecutor, might be linked to a committed crime.

It is worth noting that it is during criminal proceedings when it is of primary importance to ensure steadfast observation of individual rights and freedoms under the requirements of the *Constitution of Ukraine* and international agreements, in particular in regard to procedural coercion measures.

As usual, measures of procedural coercion in criminal proceedings are associated with certain limitations of non-property rights of an individual which are mostly related to personal "inconveniences" such as prohibition of free movement, restrictions on communication, etc. However, along with the non-property "burden" imposed on a defendant in a criminal proceeding, pre-trial investigation bodies or prosecutors quite often use additional limitations related to restrictions on property rights and freedoms of an individual.

Undoubtedly, inviolability of the right to property, envisaged in the current legislation of Ukraine, is one of the fundamental principles of the democratic society and law-bound state. For example, Art. 41 of the *Constitution of Ukraine* imperatively prescribes that "No one shall be unlawfully deprived of his or her ownership right. The right to private property is indefeasible."

At the same time, the aforementioned norm of the Main Law has been implemented into the criminal procedural legislation of Ukraine. Thus, Article 16 of the *Criminal Procedure Code of Ukraine* describes conceptual approaches to inviolability of the ownership right, which are specified in a number of other norms of the *Criminal Code of Ukraine* regulating provisional restriction or deprivation of the ownership right of an individual. In particular, it relates to search, examination, investigative experiment, seizure of property, attachment of property, transfer of the seized property to ARMA (Asset Recovery and Management Agency), etc.

Thus, given a larger number of cases when the property right is restricted, such right does

not seem anymore to be as stable and absolute as the *Constitution of Ukraine* establishes.

Moreover, in the present-day Ukraine restriction or even deprivation of the ownership right of an individual before the court judgment becomes effective is, unfortunately, practiced on the daily basis.

Consequently, unsubstantiated attachment of assets, limitation of flow of funds in banking accounts have become an acute problem businesses are currently facing. Apart from it, of special concern also is the legal ambiguity which has arisen in connection with formation and operation of the Asset Recovery and Management Agency (ARMA).

It is worth noting that existence in the system of public bodies of institutions like ARMA is not a novation. Almost every European state has a public body authorized to keep and manage property referred to as an exhibit, used as a tool to commit a criminal offence or acquired as result of the latter.

However, adopting a specialized law, members of the Ukrainian parliament made a number of mistakes due to which the aforementioned body became a hostage of the current situation. Thus, in accordance with prescriptions of Article 100 of the *Criminal Procedure Code of Ukraine* ARMA is authorized not only to manage property, but also alienate it. At the same time, cases in which alienation of property is admissible and permissible have not been outlined. In turn, representatives of the law-enforcement bodies make use of these legislative loopholes and, in fact, force ARMA to alienate attached assets.

Thus, representatives of pre-trial investigation bodies and prosecutors, enjoying a sufficient scope of powers, evidently abuse their rights to restrict property rights. Consequently, it ends up with absolutely unreasonable restriction of the right to property of individuals who have nothing to do with a criminal offense.

To illustrate the aforementioned, we will consider a particular case: having learned that property of our client who had not been interrogated within a criminal proceeding even as a witness (not to mention the status of a suspect) has been attached, we sought to have the respective ruling of an investigative judge reversed. After considering the lawyers' complaint, the panel of judges concluded that the property had been attached ahead of time. As a result, the attachment was withdrawn. However, the triumph of justice and supremacy of law did not last long. On the next day, the prosecutor filed a motion for attachment of property with a court of first instance. Miraculously enough, but the investigative judge granted the motion on the same day warranting a new attachment.

Criminal practitioners know from their experience how much effort it takes to have an investigative judge consider an ordinary motion or complaint of the defense within a reasonable period

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of time (at least two or three weeks). At the same time, motions filed by prosecutors or detectives (including those relating to attachment of property) are considered, as usual, within a short period time. Even more surprising is the fact that if a lawyer happens to know about consideration of such motions filed by a prosecutor and intends to attend the hearings, the desire to promptly consider them evaporates for some reason.

The aforementioned facts lead to quite pessimistic conclusion that in the present-day system of criminal justice of Ukraine the norms of the *Criminal Procedure Code of Ukraine* which introduce the principle of equality of parties to a criminal process are absolutely inoperative. This is just a small illustration of the gap which has arisen in the relations between "court-prosecutor" and "court-lawyer."

As to the problem of uncontrollable attachment within criminal proceedings of property owned by individuals who have not gained the status of suspects or defendants, it can be solved by introducing simple changes into the *Criminal Procedure Code of Ukraine*. To do this, it is enough only: a) to limit a number of motions for attachment of property prosecutors and detectives can file with the investigative judge; b) obligate investigative judges to notify property owners of consideration of motions for attachment of their property (only notices excluding compulsory participation). Such simple chang-

es will immediately liquidate numerous abuses on the part of pre-trial investigation bodies and prosecutors.

Another but no less acute problem for property owners who have encountered the law enforcement system is return of the property which is no longer attached. What problem would it seemingly be if there is a court decision to return the property to its owner? In practice, however, the lawyer and the owner of the attached property have to pass seven circles of hell to return the acquired property.

We would like to draw attention to a number of ready-to-use answers detectives or prosecutors give to the lawyer's request to execute the court judgment and return the property:

- We have not received the original of the ruling of the investigative judge to withdraw the attachment and obligation to return the property.
- Let the owner come in person and take it back. Besides, we have something to discuss with him.
- The property of your client has been transferred for examination which will last for certain number of months. It means that there is nothing to return at the moment.
- The ruling of the investigative judge does not state a period of its execution and, for this reason, there are no grounds for its immediate execution.

- The ruling of the investigative judge is not a court decision in the understanding of the *Criminal Procedure Code of Ukraine* and, therefore, there is no point to refer to its immediate execution and threaten with a criminal proceeding for non-compliance with it (art. 382 of the *Criminal Code of Ukraine*).

- Your property has been lost during move/transfer to another division/another body of pre-trial investigation.

- Your property has been sold in auction/tender in connection with impossibility to manage it properly.

This gives rise to the logical question "Is it possible to break the vicious circle?" The answer we can confidently give is "Yes!"

In the course of years long practice in the area of criminal law and process lawyers of our firm have elaborated a clear mechanism to solve the problem of groundless attachments and liens of their clients' assets. Apart from it, while solving this problem, we are not limited to solely judicial mechanisms of protecting rights of our clients. Combination of several actions at the same time, for example, challenging actions of prosecutors or representatives of law enforcement bodies in court, making the process which involves media public, taking measures to hold law enforcement officers responsible for abusing their authority, is quite effective.