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# Substantiating the legality of human rights restrictions in Ukraine in pre-trial investigation

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**Abstract.** The relevance of the subject lies in the formation of a scientifically based concept of proving the legality of restrictions on rights and freedoms during pre-trial investigation, which is based on a three-stage test of the justification of interference formulated in the jurisprudence of the European Court of Human Rights. The purpose of the study was to establish general criteria for the legality of restriction of rights and freedoms during pre-trial investigation with their explication of specific procedural actions and decisions characterised by a high degree of intrusiveness. The main research methods were anthropological, axiological, dialectical, systemic, formal, legal, and the method of expert assessments. Was is proved that algorithmisation of the decision on the restriction of human rights in a pre-trial investigation should be conducted according to the methodology of a three-part test: foresight in the law; the purpose of interference, which should be legitimate; whether such interference was required in a democratic society. This test is applicable to all intrusive measures in criminal proceedings but has its own characteristics depending on the measure and the nature of the intensity of restriction of rights. It is argued that the elements of the three-part test when applying measures to ensure criminal proceedings are objectified in the local subject of proof, which has three levels: 1) General (Article 132 of the Criminal Procedure Code of Ukraine); 2) Group, for preventive measures; 3) Special, for certain measures to ensure criminal proceedings, including preventive measures. On the example of regulatory regulation of individual investigative (search) actions, it is established that ensuring the proportionality of their application is conducted by determining by the investigating judge the limits of restriction of rights and freedoms during such a procedural action and preventing arbitrariness to a person. The most detailed proof of the legality of restricting rights in measures to ensure criminal proceedings has specifics depending on the measure and the person to whom it is applied. The practical importance of the work lies in the possibility of using the algorithms given in it when establishing elements of the local subject of proof by investigating judges

**Keywords:** rule of law; proportionality; European Court of Human Rights; evidence; judicial control; investigative (search) actions; measures to ensure criminal proceedings

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## Introduction

In a state governed by the rule of law that respects legal values and where the rule of law really exists, the limits of its interference in people's lives are determined by human rights. In any state, there may be legitimate restrictions on human rights due to the values of security and freedom, but such restrictions must be conducted on the basis of a law formulated in such a way that its content correlates with the rule of law and legal certainty. There are other conditions for legitimate restriction of human rights that must be met. Of particular importance is the legality of restricting human rights in criminal proceedings since this is the most intrusive of all legal processes in the state, and the result of this process is judicial criminal sanctions. An investigating judge who has relevant powers regulated by the Criminal Procedure Code of Ukraine (2012) (hereinafter referred to as the CPC) to assess the legality of such restrictions in criminal proceedings. This issue is currently relevant in both theoretical and practical contexts. In the theoretical context, it is important to form the concept of criminal procedural proof of the legality of human rights restrictions. In the practical context, the relevance is due to the fact that there are often cases of improper establishment of circumstances that restrict human rights, leading to disproportionate restrictions on such rights.

The most important theoretical and methodological issues of restricting human rights in Ukraine are considered in sources on the theory and philosophy of law, constitutional law. In particular, the influence of the European Court of Human Rights (ECHR) practice on assessing the legality of human rights restrictions is examined. M. Blikhar *et al.* (2020) considered the general axiological paradigm of the ECHR's activities, which also concerns the assessment of the legality of interference with rights. The authors' conclusions emphasise the values of the ECHR (including procedural ones) in the aspect of defending rights. S. Romantsova *et al.* (2020) investigated these issues in the aspect of preventive measures in the context of the practice of the ECHR. The authors concluded that the practice of the ECHR is mandatory for the prosecution side, which is authorised to initiate the application of preventive measures. O. Kaplina and S. Fomin (2020) investigated considering the practice of the ECHR in the aspect of restricting the right to peaceful possession of property. They review the characteristics of means of restricting the right to peaceful possession of property and, based on the results of the study, formulated a model of the list of consecutive issues that the investigating judge should solve when considering a request for the seizure of property. V. Rohalska and I. Shapovalova (2020) reviewed the application of the practice of the European Court of Human Rights by an investigating judge, including the disclosure of the tree-component test. The authors stressed its importance in determining the legal basis for the proportionality of the interference.

The issues of proving these measures in the activities of the investigator are considered by I. Zinkovskyy (2019). The author highlighted the shortcomings of the legal regulation of such measures for all groups of these measures, including those where the decision is made by the investigating judge. Features of proof during the application of preventive measures are examined by M. Kalinovska (2021). The author highlights the specifics of the activities of an investigator, Inquirer, prosecutor, and investigating judge, and highlights the subject of proof and its characteristics. The issue of proof in the application of preventive measures in proceedings for the use of compulsory medical measures was considered by O. Tyshchenko and I. Titko (2020) drew attention to. The authors note that it is inappropriate to classify the measures provided for in Article 508 of the Criminal Procedure Code of Ukraine CPC of Ukraine (2012) as preventive measures.

A separate block of research is devoted to the issues of proving the legality of restrictions on rights and freedoms during investigative (search) and secret investigative (search) actions. Authors O. Kaplina *et al.* (2023) highlighted the standards for ensuring the legality of secret activities in criminal proceedings. Within the framework of this problem, questions of the legality of interference in private communication (Teremetsky *et al.*, 2021) and bank account monitoring are also considered (Kantsir *et al.*, 2021). The authors focus their attention mainly on certain issues of regulatory regulation of these aspects in Ukrainian national legislation and relevant international standards in this area.

However, comprehensive proof of the restriction of human rights in criminal proceedings under modern legislation in the systematic unity of those procedural actions, the decision on permission to conduct, which is made by the investigating judge, using a three-part test, was not conducted. Thus, the purpose of the study is to highlight the features of proving the restriction of human rights in Ukraine in a pre-trial investigation based on the methodology for assessing the legality of the restriction of human rights highlighted by the ECHR.

## Materials and methods

In the criminal procedure doctrine of Ukraine, there are no systematic concepts of the specifics of proving human rights restrictions in Ukraine in pre-trial investigations based on the methodology for assessing the legality of human rights restrictions identified by the ECHR. Accordingly, a set of scientific approaches and methods was used to achieve the purpose of the study. The fundamental approach of the study is the anthropological methodological approach because the focus of the study is on human rights and their limitations. Through the prism of this approach, despite the fact that the basis of human rights is dignity and freedom, the general possibility, grounds and limits of restricting human rights were considered. The axiological approach applied is based on the interpretation of human rights as values and those values for which human rights can be restricted: security (in a broad sense) and ensuring the rights of other people. This approach allowed developing an understanding the criteria for the legality of interference with rights in pre-trial investigations, demonstrating the correctness and necessity of using the three-part test, and identifying its manifestations in the text of the Criminal Procedure Code of Ukraine based on the correlation of values. The hermeneutical approach allowed identifying the implicit three-part test in the Criminal Procedure Code of Ukraine. Consequently, norms that indicate that this test should be considered, including the need to assess the proportionality of human rights restrictions. The same approach allowed demonstrating the limits of the legality of interference with rights when deciding on the application of measures to ensure criminal proceedings. Its application allowed interpreting the specific features of the proportionality of the seizure of property due to the intrusive nature of the measure. The use of the historiographic

method allowed examining the development of scientific approaches to the subject under study. The logical-legal method allowed arguing for algorithmising the use of a three-part test in proof.

The levels of proof of the legality of human rights restrictions in the aspect of measures to ensure criminal proceedings were identified using the classification method: 1) General; 2) Group for preventive measures; 3) Special for individual measures, including preventive measures. Using a systematic method, the relationship between scientific ideas, approaches, and legal norms related to issues of interference with rights in pre-trial investigations was determined. The same method allowed considering restrictions on rights in criminal proceedings within the framework of a more general concept of restrictions on rights (interference with rights), in particular, constitutional and conventional ones. It also allowed considering evidence of restriction of rights in the application of preventive measures within the more general category of restrictive measures to ensure criminal proceedings. Using this method, a logical relationship between the elements of a three-part test and the local subject of proof was demonstrated.

Methods of analysis and synthesis allowed interpreting the norms of current legislation and judicial practice. The content of the provision of legislation and judicial practice was considered using the formal-legal method for this purpose. All methods were applied in a relationship, ensuring the formulated conclusions' validity and correctness. The normative basis of the study is the Constitution of Ukraine (1996), Law of Ukraine No. 2939–VI (2011), Criminal Procedure Code of Ukraine (2012) (CPC of Ukraine), and empirical-systematised legal positions on the decisions of the European Court of Human Rights..., 2015; 2019). The study was conducted according to the following methodological scheme: 1) review of general issues of interference with constitutional, conventional, and procedural rights in the pre-trial investigation; 2) consideration of issues of interference with rights in the context of measures to ensure criminal proceedings; 3) analysis of the issue of interference with rights in the context of conducting investigative (search) actions.

## Results and discussion

**General provisions of the legality of interference with rights in pre-trial investigation.** The key provisions of proving the validity of human rights restrictions in Ukraine in pre-trial investigation are related to the disclosure of fundamental issues: rights that may be restricted in criminal proceedings; regulatory conditions for their restriction of various sources; proportionality of restrictions. Therewith, when interpreting restrictions on human rights, it is necessary to proceed from the definition of I. Dakhova (2018) of the impossibility of a person to exercise a certain subjective right in order to protect public values, which is necessary in a democratic society. Notably, the element of setting limits on the exercise of law is emphasised as a content component of this category (Great Ukrainian legal encyclopedia, 2017) and an element of balancing interests (Savchyn, 2018; Doroshenko, 2023). However, it is difficult to agree with the position that the restriction of fundamental rights and freedoms of a person is a detraction of possible patterns of behaviour on the part of other persons (Strekalov, 2010) since, when it comes to lawful restriction of rights, the subject of such restriction, through appropriate rule-making activities, is the state, and the legal capabilities of other persons to influence other people's behaviour are derived from state restriction.

Regarding human rights in criminal proceedings, a complex system of rights that have different sources, although they are the same in nature. This concerns the following rights: constitutional, convention, and procedural (although they overlap in certain aspects). Constitutional rights that are directly exercised in criminal proceedings, according to Article 64 of the Constitution of Ukraine (1996), may not be restricted except in cases provided for by the Constitution. Restrictions for some of them (according to the list of Article 64 of the Constitution) are possible in a state of war or emergency. However, the current legislation stipulates that constitutional rights are restricted not only in such cases. In particular, the CPC of Ukraine (2012) provides for restrictions on the free choice of a defender of their rights if the number of defenders in court proceedings exceeds five and in cases of defence – by appointment with the participation of a defender from the system of free legal assistance, including for conducting a separate procedural action. Therewith, the European Court of Human Rights stressed that the right to choose one's own defender cannot be considered absolute, and the provision of legal assistance in certain cases is limited (Decision of the European Court of Human Rights..., 2015).

Article 64 of the Constitution of Ukraine (1996) does not contain any grounds and conditions for general restrictions, despite the fact that the conditions for restrictions are prescribed, for example, the right to secrecy of correspondence, telephone conversations, telegraph, and other correspondence, to the inviolability of the home, to freedom, and personal inviolability. However, the doctrine highlights the general principles of restriction of rights (Nazarov, 2009; Great Ukrainian legal encyclopedia, 2017; Savchyn, 2018), so that such restriction is not arbitrary. However, the general concept of restriction of constitutional human rights in the Constitution of Ukraine is very lapidary, in contrast, for example, to the Convention for the Protection of Human Rights and Fundamental Freedoms and the practice of the ECHR, within which a three-part test of the legality of restriction of rights (interference in rights) is formed.

Conventional human rights in criminal proceedings are set out in Articles 3, 5, 6, 8, 13 of the Convention for the Protection of Human Rights and Fundamental Freedoms (1950) (hereinafter referred to as the Convention), Article 1 of the Additional Protocol, Article 2 of Protocol No. 4, Articles 2, 4 of Protocol No. 7. Notably, the conditions of restriction are set out only in Articles 5, 8, and Article 2 of Protocol No. 4, Articles 2, 4 of Protocol No. 7. However, when it comes to restricting certain components of the right to a fair trial, the ECHR case law mentions restrictions on the right of access to a court, the right to defence, early access to a defender, and the right to survey witnesses (European Court of Human Rights, 2023a). The ECHR interprets the rule of law through the "living instrument" doctrine (Reminska, 2023), which also affects the interpretation of the possibilities of interference in rights.

The three-part test is most clearly manifested in the provisions of Article 8 of the convention because it provides for the implementation of interference in accordance with the law, a legitimate goal, and the need for interference in a democratic society. This test is used as a methodological basis for assessing the legality of interference in law

in the legal system of Ukraine (Law of Ukraine No. 2939-VI, 2011). Scientific research uses it as a methodological basis for assessing the legality of human rights restrictions (Savchyn, 2018; Dakhova, 2018). This is due to the fact that the practice of the ECHR is aimed at humanising national criminal proceedings (Romantsova *et al.*, 2020), and the core of the ECHR philosophy is humanistic anthropological values (Blikhar *et al.*, 2020).

The CPC of Ukraine (2012), considering the publicly coercive nature of criminal procedure activities, provides for both the procedural rights of participants in criminal proceedings and their restrictions. Therewith, restrictions are formulated as certain exceptions at the level of the principles of criminal proceedings and, in more detail, in the regulation of specific procedural actions. It should be recognised that not all restrictions on procedural rights, which are simultaneously constitutional, are equally meaningfully formulated. In particular, this concerns the right to freedom and personal inviolability, which, according to Article 29 of the Constitution of Ukraine (1996), is allowed for the purpose of urgent necessity to prevent or stop a crime. Therewith, Articles 207 and 208 of the CPC of Ukraine (2012) provide for a large number of grounds for detention that are broader than the constitutional norm (Part 1 – paragraphs 3-4; Part 2 of Article 208).

The three-part test, which is well-known in the practice of the ECHR, is not directly fixed in the CPC of Ukraine (2012). However, the analysis of the text of the CPC of Ukraine (2012) allows asserting the implicitness of this test. This interim conclusion follows, firstly, from the consolidation in the CPC of Ukraine (2012) of the principles of the rule of law and legality and the regulation of restriction of Rights (which indicates interference under the law if the quality of the norms is such as to meet the requirements of the "quality of the law", also formulated in the practice of the ECHR). Secondly, this is evidenced by the wording of a legitimate goal in a number of norms, although without such a name, for example, Part 2 of Article 14, Part 3 of Article 15, Part 2 of Article 23, Part 2 of Article 27, Article 206-1, Article 207, Article 208 of the CPC of Ukraine (2012). Thirdly, there are also formulations that indicate the need and the proportionality of interference in a democratic society: Part 3 of Article 132, Part 2 of Article 246 of the CPC of Ukraine (2012).

Researchers, in particular, V.V. Nazarov (2009) expressed approaches to the standards of permissible restriction of human rights in criminal proceedings. The principles of such restrictions include: legality; legitimacy; clarity, clarity and certainty; goal-conditionality; correlation of goal and result; exclusive and temporary nature. A more advanced approach is to highlight standards (requirements) and signs of restriction of individual rights. In particular, such requirements include: the legality of restriction without changing the essence of the right; the existence of a legal procedure; the legal mechanism for implementing the right and the guarantee (Mirkovets, 2021). However, the latter standard is more a standard for ensuring the rights rather than limiting them. Such features have common features of measures to ensure criminal proceedings (Poberezhnyk, 2017) (this is important but does not reflect the standards of restriction of rights) and a provision that is really a standard: application in cases where it is otherwise impossible to achieve the goals of criminal proceedings (Poberezhnyk, 2017). The most relevant approach is to determine the legality of a restriction using the three-part test methodology (Tarasyuk, 2019). Notably, the following elements of this test are added in the research: equality; judicial character; temporality and the possibility of appeal (Muzychenko, 2016; 2018), the presence of a real possibility of causing harm to various interests.

Algorithmisation of the solution to the issue of human rights restrictions in pre-trial investigations should be conducted according to the methodology of a three-part test. This question is solved by proof, which for this purpose is understood both as proof-knowledge and as proof-justification (Arkusha *et al.,* 2021). In the first stage, it should be discussed whether the interference is provided for by law. Proof of this aspect is usually limited because the CPC of Ukraine (2012) clearly provides for an exclusive list of procedural actions that restrict human rights in criminal proceedings. As for a resolution, ruling, or petition, they contain references to the relevant articles of the CPC of Ukraine (2012). In the second stage, a legitimate goal is determined. It varies depending on the nature of the procedural action and may consist in: ensuring the effectiveness of criminal proceedings; ensuring the collection and verification of evidence; ensuring the safety of a person's life (in case of forced feeding), etc. During the third stage, the need for a democratic society is justified. This regards the possibility of achieving a legitimate goal and the appropriateness of such a means of achieving it. In criminal proceedings, this is proved in each specific case, considering the specifics of the local subject of proof and the procedural situation, for example: determining whether the bail is sufficient and its size to ensure the proper behaviour of the suspect, whether it is necessary to apply detention; in the case of bail, determining its size; in the case of applying additional obligations provided for in Article CPC of Ukraine (2012), determining which one.

Given that the concept of "necessity", in particular, within the meaning of Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms (1950), means conformity to a pressing public need and proportionality to a legitimate purpose (European Court of Human Rights, 2023b), the question of proportionality of interference is decided in the same stage. The proportionality requirement is most clearly reflected in Part 5 of Article 132 and Article 178 of the CPC of Ukraine (2012), and the algorithmisation of proof of proportionality is proposed in the doctrine (Hloviuk, 2018). Moreover, the doctrine rightly suggests that proportionality should be recognised as the basis of criminal proceedings (Loskutov, 2023). Failure to prove the previous element excludes the possibility of further proof of the legality of the restriction. The last element has the greatest discretion for law enforcement officers.

Thus, proof of the legality of a potential restriction of human rights should be conducted precisely according to the algorithm of the three-part test developed in the practice of the ECHR. In this case, the following conditions should be considered: 1) the movement of proof is conducted according to the sequence of elements, the transition to the next one without the previous one being proved is excluded; 2) the widest discretion is characteristic of the element of necessity in a democratic society, including proportionality. The legality of human rights restrictions should be enshrined as the basis of criminal proceedings in the CPC of Ukraine. This article, based on a three-part test, should set out the criteria for the legality of the restriction, including the proportionality of the restriction of human rights in a separate

part. It is this article that law enforcement officers will refer to as a general principle in case of doubts about the legality of restricting the right.

**Proof of the validity of restrictions on human rights during investigative (search) actions.** Conducting investigative (search) actions in the vast majority of cases is associated with restrictions on the fundamental rights and freedoms of a person. Although they differ in the level of their intrusiveness, the possibility of conducting them, in any case, is ensured by the permissibility of applying coercion to a person. That is why the legislator establishes in Part 2 of Article 223 of the CPC of Ukraine (2012) a general rule, according to which the grounds for conducting an investigative (search) action are the availability of sufficient information indicating the possibility of achieving its goal. Accordingly, the legislator directs the subjects conducting a pre-trial investigation to make an initial decision on conducting an investigative (search) action based on the strict need for such a procedural action. I. Voytovych (2023) rightly emphasises the impossibility of strict formalisation in the law of the information that can serve as grounds for conducting investigative (search) actions. That is why the legislator formulates only approximate conditions for investigative situations in which it is advisable to conduct them. Accordingly, although the standard of "necessity" for conducting an investigative (search) action is available in the legislation, its implementation is exclusively at the discretion of the subjects conducting a pre-trial investigation *ex officio*; it cannot be formalised at the regulatory level.

An effective guarantee of ensuring the validity of human rights restrictions is judicial control, which, in the context of the institution of investigative (search) actions, provides for the granting of permission by the investigating judge to conduct them by issuing a court decision in the form of a ruling. According to the provisions of the CPC of Ukraine (2012), the preliminary permission of the investigating judge is a necessary condition for conducting a number of the most intrusive investigative (search) actions. By the decision of the investigating judge, the vast majority of implicit investigative (search) actions are also conducted.

The doctrine expresses different opinions about the criteria for assigning to the competence of an investigating judge the authority to grant permission to conduct a particular investigative (search) action. The Ukrainian criminal procedure legislation is also quite dynamic in this regard because this list has been both expanded and narrowed. However, the indisputable idea of judicial control in this segment of Criminal Procedural relations is the level of intrusiveness of a particular investigative (search) action. In other words, judicial control applies to those investigative (search) actions that most substantially restrict the rights and freedoms of persons during a pre-trial investigation. V. Nastyuk *et al.* (2020) believe that judicial control during investigative (search) actions is a safeguard against incompetence, bad faith, and bias of professional participants in criminal proceedings. It is worth agreeing with the author, however, the key advantage of this criminal procedural guarantee is the arbitrariness of resolving such petitions, in which the burden of proving the exceptional need for investigative (search) actions is assigned to the prosecution. The task of the investigating judge as an impartial subject when making a decision on granting permission to conduct an investigative (search) action is to determine the limits of restriction of rights and freedoms during such a procedural action and prevent arbitrariness to the person. These boundaries may have different expressions depending on the specific investigative (search) action being considered. In the case of a search, such restrictions may consist in determining the place of its conduct and the list of things that it is aimed at finding. However, if the investigating judge decides to apply for permission to obtain biological samples for examination, they will consist in determining specific samples and the expert examination that is planned to be conducted. In fact, in this context, the proportionality of restrictions on rights and freedoms when granting permission to conduct investigative (search) actions is manifested.

The assessment of the proportionality of the restriction of rights and freedoms in the context of granting an investigating judge permission to conduct investigative (search) actions is mainly of a promising nature because it consists in determining the potential need for such procedural actions. However, in some cases, it is also retrospective in nature. Such a case, in particular, occurs when the investigating judge considers a request for a search, which was initiated in urgent cases: Part 3 of Article 233 of the CPC of Ukraine (2012). In such a case, the investigating judge will have to make a retrospective assessment of the existence of grounds for entering the person's home or other property without the decision of the investigating judge. A similar situation develops when an investigating judge decides to grant permission to conduct certain secret investigative (search) actions that were initiated in urgent cases defined in Article 250 of the CPC of Ukraine (2012).

The range of circumstances to be established by the investigating judge when deciding requests for investigative (search) actions is differentiated depending on their specific type. Unlike measures to ensure criminal proceedings, the CPC of Ukraine (2012) does not establish circumstances that are universal for all investigative (search) actions but only establishes the above-mentioned general provision that the grounds for conducting an investigative (search) action are the availability of sufficient information indicating the possibility of achieving its goal (Part 2 of Article 223).

The presence of a specific list of circumstances that must be considered by the investigating judge when considering the application is legally defined for the search. Such circumstances, based on the systematic interpretation of Articles 234-235 of the CPC of Ukraine, are: 1) circumstances that indicate that a criminal offence has been committed; 2) things and documents to be found may be evidence in criminal proceedings and are important for establishing its real circumstances; 3) things and documents to be found may actually be in a certain residence or other possession of a person; 4) a search in this particular situation is the most effective, appropriate, and proportional measure (Criminal Procedural Code of Ukraine, 2012).

Special attention in the context of ensuring proportional restriction of rights and freedoms during a search should be paid to the latter circumstance. The fact is that the CPC of Ukraine establishes other, alternative, and less intrusive ways to achieve certain search goals. For example, the instrument of a criminal offence or property that was obtained as a result of its commission can also be obtained by requesting it in accordance with Article 93 of the CPC of Ukraine and applying temporary access to things and documents (Criminal Procedural Code of Ukraine, 2012). According to

V. Mohyla (2021), establishing this circumstance is possible if a reasonable suspicion of committing a criminal offence is identified, which justifies the adoption of such a strict measure and the inability to obtain information by other means. Accordingly, the restriction of a person's right to privacy and the conduct of a search in their home or other possession would be lawful and proportionate in two cases: (1) if the prosecution had taken other, less intrusive measures to achieve the purpose of the search but they had proved ineffective; (2) if the application of less intrusive measures was evidently inappropriate in certain circumstances or would damage the achievement of the purpose of the search.

In some cases, criminal procedure legislation establishes the obligation of judicial control only in cases where a person does not voluntarily consent to certain investigative (search) actions in relation to them or their property. In particular, the absence of voluntary consent is a key condition for granting an investigating judge permission to conduct such investigative (search) actions as an investigative experiment in a person's home or other possession (Part 5 of Article 240), involving a person to conduct a medical or psychiatric examination (Part 3 of Article 242), obtaining biological samples for examination (part 3 of Article 245) (Criminal Procedural Code of Ukraine, 2012).

When considering such petitions, the investigating judge should make sure that the person's will to conduct an investigative (search) action has been established. Only in the absence of such consent may the investigating judge decide whether to grant permission to conduct such investigative (search) actions, concluding that the interest in conducting a full and rapid pre-trial investigation prevails over the private interest of a person, which consists in the inviolability of their rights and freedoms. This model of restriction of rights and freedoms is based on the idea of the primacy of persuasion as a method of regulating criminal procedural relations.

Thus, for example, regarding forced biological sampling, Part 3 of Article 245 of the CPC of Ukraine (2012) is a reference and provides for the consideration of relevant applications in accordance with the procedure provided for temporary access to things and documents. Although these provisions of the Criminal Procedure Code of Ukraine (2012) can be considered related in terms of implementing the function of judicial control, the essence of these procedural actions is quite different. Accordingly, the circumstances to be established when examining applications for temporary access to things and documents are not entirely relevant in the context of granting permission to forcibly take biological samples for examination. When considering and resolving the latter, circumstances such as the absence of a person's voluntary consent to the collection of biological samples, the list of biological samples to be forcibly selected, the type of expert research that is planned to be conducted, and the importance of the circumstances to be established in the course of such research for criminal proceedings are important.

The criminal procedure legislation does not specify the list of substances covered by the concept of biological samples. V. Rohalska *et al.* (2021), analysing related legislation in this aspect, concluded that biological samples should be considered all samples related to human life as a biological being and all samples of biological origin in their classical sense (saliva, blood, semen, sweat, hair, nails, etc.).

The most intrusive type of investigative (search) actions are implicit investigative (search) actions that are conducted in conditions of secrecy when information about the fact and methods of their conduct is not subject to disclosure. The secret restriction of rights and freedoms in the course of conducting implicit (investigative) search actions requires a greater range of guarantees for their protection at the legislative level. From the provisions of Article 246 of the CPC of Ukraine (2012), two key conditions for the legality of conducting secret investigative (search) actions follow: conducting in cases where information about a criminal offence and the person who committed it cannot be obtained in any other way; the condition for the severity of a criminal offence in respect of which criminal proceedings are being conducted (the law establishes only certain exceptions to this rule). Actually, these two conditions must necessarily be established by the investigating judge when considering a request to conduct secret investigative (search) actions of any kind. They generally satisfy the standard of the exceptional need to restrict the right to privacy in a democratic society, formed in the case-law of the ECHR.

O. Kaplina *et al.* (2023), based on the analysis of the case-law of the ECHR, determine the following conditions for the legality of conducting secret investigative (search) actions: 1) predictability; 2) availability of guarantees against abuse; 3) verifiability; 4) exceptional necessity; 5) proportionality of interference and its expediency; 6) inadmissibility of interference in communication of certain subjects. In general, it can be argued that these conditions are reflected at the regulatory level in the CPC of Ukraine (2012). Consequently, circumstances indicating the need for secret investigative (search) actions should exist when the relevant issue is initiated before the investigating judge. In this regard, the ECHR developed the doctrine of prohibiting retrospective justification, formed in the case "Liblik and Others v. Estonia" (Decision of the European Court of Human Rights…, 2019). Its essence lies in the critical attitude to the prosecution's efforts to prove the legality of conducting secret events at the late stages of criminal proceedings when the evidence quite naturally becomes much larger.

The most effective mechanism for ensuring the validity of restrictions on rights and freedoms during investigative (search) actions is judicial control. According to the regulatory model established in the CPC of Ukraine (2012), it applies to those investigative (search) actions that most substantially restrict the rights and freedoms of persons during pre-trial investigation. The main task of judicial control during investigative (search) actions is to determine the limits of restriction of rights and freedoms during such a procedural action and prevent arbitrariness to a person. The main advantage is the arbitral method of resolving such petitions, in which the burden of proving the exceptional need for investigative (search) actions is assigned to the prosecution. Such a mechanism for exercising judicial control over the conduct of investigative (search) actions allows ensuring proportional restriction of rights and freedoms on the part of an impartial subject.

**Legality of human rights restrictions and measures to ensure criminal proceedings.** The Criminal Procedure Code of Ukraine (2012) pays quite a lot of attention to establishing the range of circumstances that must be proved for such a restriction. This is done at several levels: 1) general (Article 132); 2) Group for preventive measures; 3) special for individual measures, including individual preventive measures. The general level of proof applicable as the basis

for all measures to ensure criminal proceedings is related to the establishment of the circumstances specified in Part 3 of Article 132. Its wording indicates the need to prove, firstly, a legitimate goal (although it is formulated not in these provisions but in the very definition of measures to ensure criminal proceedings). More specifically, the legitimate goal is spelt out in Article 177 of the CPC of Ukraine (2012) for preventive measures. In the absence of reasonable suspicion, it does not appear that the interference is prescribed by law because the law provides for such interference to ensure the effectiveness of criminal proceedings. Such proceedings are initiated only if there are circumstances that may indicate the commission of a criminal offence, and there must be sufficient grounds for such notification to report the suspicion. As for necessity in a democratic society and proportionality, they are evidenced by paragraphs 2 and 3 of Part 3 of Article 132 of the CPC of Ukraine (2012), considering the determination of the degree of restriction of rights by the needs of pre-trial investigation and the possibility of achieving the effectiveness of criminal proceedings.

These elements of the three-part test are objectified in the local proof subject. According to M.O. Kalinovska (2021), it should also be understood in terms of the circumstances of the inner conviction about the need to apply the measure. This study does not agree with this because such an understanding concerns the individual psychological activities of law enforcement officers, which cannot be regulated by law. Even more specifically, the elements of the three-part test are spelt out in Article 176 of the CPC of Ukraine (2012) regarding preventive measures because it clarifies the impossibility of preventing risk or risks by other measures. This reflects the balancing of interests in criminal proceedings. I. Bespalko (2020) writes precisely in the context of preventive measures about the specifics of the restriction's ownership, necessity, and reasonableness (the ratio of the restriction of rights to the one that will take place when a person is brought to justice. However, I. Hloviuk (2018) considers that reasonableness is manifested in the fact that the investigating judge should assess the appropriateness of more lenient preventive measures and consider the circumstances provided for in paragraphs 2-11 of Article 178 of the CPC of Ukraine (2012). The second position should be agreed upon with only one clarification: not only the use of milder preventive measures but also the need for any coercive measure, in general, should be considered.

At a special level of evidence, the provisions of the CPC of Ukraine (2012) regarding certain measures to ensure criminal proceedings should be reviewed. In particular, the legitimate purpose is detailed for temporary restriction of the use of a special right in Part 1 of Article 148; for removal from office in Article 157; for temporary access to things and documents in Article 163, seizure of property in Article 170. Notably, under the Article of CPC of Ukraine (2012), which is used in proceedings for the use of compulsory medical measures, the legitimate purpose of these measures differs from the legitimate goal under Article 177 of CPC of Ukraine (2012), which O.I. Tyshchenko and I.A. Titko (2020) drew attention to.

Regarding the assessment by the investigating judge of the proportionality of restrictions on the right to work and non-interference in private life, it can be concluded from the provisions on the consideration by the investigating judge of the consequences of temporary restrictions in the use of special rights, the consequences of removal from office for other persons, and the justification for the need to seize things and originals or copies of documents. Algorithmisation is proposed to assess the legality of restricting the inviolability of property rights during the seizure of property, which is based on a three-part test, to resolve the issue of property seizure (Kaplina & Fomin, 2020). As for proportionality, it is indicated in the norms regarding the consideration by the investigating judge of the reasonableness and proportionality of the restriction of the right (Article 173) (Criminal Procedural Code of Ukraine, 2012). Such detailing is precisely for the seizure of property due to its intrusive nature, namely, the possibility of restricting or even depriving a person of the opportunity to exercise the rights of the owner.

## Conclusions

The study considers the features of proving the restriction of human rights in Ukraine in a pre-trial investigation based on the methodology for assessing the legality of the restriction of human rights, highlighted by the ECHR. In particular, general issues of interference with constitutional, conventional and procedural rights in the pre-trial investigation; interference with rights in the context of measures to ensure criminal proceedings, interference with rights in the context of conducting investigative (search) actions are disclosed. Arguments are given that the three-part test is implicitly fixed in the CPC of Ukraine, because: the existence of the principles of the rule of law and legality with a call to the practice of the ECHR indicates interference under the law; the provisions of the CPC of Ukraine provide for legitimate goals of restriction of rights, although they are not called that; the wording regarding the assessment of opportunities to achieve the goal by other, less intrusive means, indicates an element of necessity in a democratic society and the proportionality of interference.

It is indicated that the CPC of Ukraine considers the elements of the three-part test and measures to ensure criminal proceedings. Its elements in the activities of an investigating judge should be considered at three levels: General; Group; Special. The final assessment of proportionality is provided by the investigating judge, which is reflected in some provisions of the Criminal Procedure Code of Ukraine. Objectification of the elements of the three-part test is conducted in the circle of circumstances that must be established to make a decision on the application to the investigating judge. For a more complete consideration of proportionality for the application of preventive measures, it should be interpreted more broadly than it is written in Article 176 of the Criminal Procedure Code of Ukraine, and it should be assessed whether the effectiveness of proceedings is possible in the context of behaviour without any preventive measure The assessment of the proportionality of the restriction of rights and freedoms in the context of granting an investigating judge permission to conduct investigative (search) actions can be both prospective and retrospective, depending on whether it is a question of allowing them to be conducted, or whether it is a question of authorising an investigative (search) action that has already been immediately initiated.

The Criminal Procedure Code of Ukraine does not establish the range of circumstances that should be considered when granting permission to conduct all investigative (search) actions. Thus, the range of circumstances to be

established by the investigating judge when deciding requests for investigative (search) actions is differentiated depending on their specific type. A property search is one of the most intrusive investigative (search) actions provided for by the Criminal Procedure Code of Ukraine. Ensuring proportionate restriction of rights and freedoms during the conduct of a search requires the establishment by the investigating judge of circumstances indicating that: other, less intrusive measures were taken by the prosecution party to achieve the purpose of the search but were ineffective; the use of less intrusive measures is evidently inappropriate in certain circumstances or will damage the achievement of the purpose of the search. When considering and resolving requests for compulsory selection of biological samples for examination, such circumstances as: the absence of a person's voluntary consent to the collection of biological samples; the list of biological samples to be forcibly collected; the type of expert examination that is planned to be conducted and the importance of the circumstances to be established in the course of such investigation for criminal proceedings are important.

Secret investigative (search) actions are the most intrusive type of investigative (search) actions. CPC of Ukraine puts forward two key conditions for the legality of conducting implicit investigative (search) actions: conducting in cases where information about a criminal offence and the person who committed it cannot be obtained in any other way; conducting exclusively in criminal proceedings for serious or especially serious crimes. They must necessarily be established by the investigating judge when considering a request to conduct secret investigative (search) actions of any kind. These provisions reflect the standard of the exceptional need to restrict the right to privacy in a democratic society, formed in the case-law of the ECHR.

Further areas of research may include an analysis of the effectiveness of investigative judges' activities regarding the inadmissibility of prospective illegal restrictions on human rights, which is possible on the basis of an analysis of statistics and a content survey.

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## Conflict of interest

None.

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# Доказування правомірності обмеження прав людини в Україні у досудовому розслідуванні

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**Анотація**. Актуальність теми дослідження полягає у формуванні науково обґрунтованої концепції доказування правомірності обмеження прав та свобод під час досудового розслідування, що ґрунтується на триетапному тесті виправданості втручання, сформульованому у юриспруденції Європейського суду з прав людини. Метою дослідження було встановлення загальних критеріїв правомірності обмеження прав та свобод під час досудового розслідування з їх експлікацією на конкретні процесуальні дії та рішення, що характеризуються високим ступенем інтрузивності. Основні методи дослідження – антропологічний, аксіологічний, діалектичний, системний, формально-юридичний, а також метод експертних оцінок. Доведено, що алгоритмізація вирішення питання про обмеження прав людини у досудовому розслідуванні має здійснюватися за методологією трискладового тесту: передбачення у законі; мети втручання, що має бути легітимною; чи вимагається таке втручання у демократичному суспільстві. Цей тест застосовний до усіх інтрузивних заходів у кримінальному провадженні, однак, має особливості залежно від заходу та характеру інтенсивності обмеження прав. Аргументовано, що елементи трискладового тесту при застосуванні заходів забезпечення кримінального провадження об'єктивуються у локальному предметі доказування, який має три рівні: 1) загальний (ст. 132 Кримінального процесуального кодексу України); 2) групових для запобіжних заходів; 3) спеціальний для окремих заходів забезпечення кримінального провадження, у тому числі запобіжних заходів. На прикладі нормативної регламентації окремих слідчих (розшукових) дій встановлено, що забезпечення пропорційності їх застосування здійснюється шляхом визначення слідчим суддею меж обмеження прав та свобод при проведенні такої процесуальної дії та недопущення свавілля до особи. Доказування правомірності обмеження прав при заходах забезпечення кримінального провадження є найбільш деталізованим, має специфіку залежно від заходу, який застосовується, та стосовно кого застосовується. Практичне значення роботи полягає у можливості використання наведених у ній алгоритмів при встановленні елементів локального предмету доказування слідчими суддями

**Ключові слова**: верховенство права; пропорційність; Європейський суд з прав людини; докази; судовий контроль; слідчі (розшукові) дії; заходи забезпечення кримінального провадження