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THE PRACTICE OF THE EUROPEAN COURT OF HUMAN RIGHTS REGARDING THE CRITERIA FOR THE LAWFULNESS OF INTERFERENCE WITH LAND OWNERSHIP

Abstract. ***Purpose.*** The study aims to analyze and systematize the criteria used by the European Court of Human Rights to assess the lawfulness of interference with a human right to peaceful enjoyment of their land. ***Research methods.*** The study was conducted using general scientific and specialized methods of scientific inquiry. ***Results.*** The main doctrinal and judicial approaches to the criteria for the lawfulness of interference with land ownership rights have been analyzed. The components of all three criteria, namely, lawfulness, pursuit of a legitimate aim, and proportionality, were examined. Requirements for the quality of the law, predictability, and accessibility were explored. The legal positions of the European Court of Human Rights on the aforementioned issues were arranged, involving the definition of the category of public interests, which national authorities tailor to the specific needs of a particular society. Considering the broad discretion of national authorities in determining the content of public interests, the main components assessed by the Court when evaluating the satisfaction of the "proportionality" criterion were also indicated, including the provision of adequate compensation and the maintenance of a fair balance between potentially broad public interests and the interests of an individual, who cannot bear an excessive burden. The procedural factors which the European Court of Human Rights regards when deciding on violation of the proportionality criterion were analyzed. ***Conclusions.*** The criteria for lawfulness constitute an effective mechanism for protecting land ownership rights in Ukraine. The criteria developed by the European Court of Human Rights guarantee a wide range of rights and mechanisms for their protection, which need to be further studied and implemented in practice. Ukrainian courts and public administration should undertake systematic efforts to implement and adhere to the aforementioned criteria and standards when resolving land disputes or regulating land legal relations in order to minimize potential complaints against Ukraine to the European Court of Human Rights and raise the standards of land rights protection in Ukraine.

Key words: practice of European Court of Human Rights, criteria of lawfulness, deprivation of land, public interests, proportionality, source of land law.

1. Introduction

An individual's right to own property is fundamental, and its proper regulation and protection are critical for the development of both the individual and society and the state as a whole. Ukrainian legislation provides for a set of criteria for the legitimacy of interference with the right to own land.

However, given that under Art. 17 of the Law of Ukraine "On Execution of Judgments and Application of Practice of the European Court of Human Rights", the practice of the European Court of Human Rights (hereinafter referred to as the "ECtHR", the "Court") and the European Commission of Human Rights is a source of law in Ukraine, a detailed study of the legal positions of the Court on the criteria for the lawfulness of interference with land ownership is crucial (The Law of Ukraine "On Execution of Judgments and Application of Practice of the European Court of Human Rights"). Courts and public administration are obliged to follow these legal positions when resolving land disputes or regulating land legal relations. The topic's relevance is also acute due to the lack of proper systematization of knowl-

edge and analysis of specific legal decisions of the ECtHR.

A scientific study of the ECtHR practice as a source of land law of Ukraine as a whole or criteria for the lawfulness of interference with land ownership was carried out by such scientists as Antoniuk O.I., Blazhivska N., Kovalenko T.O., Miroshnichenko A.M., Sannikov D.V., Falkovskyi A.O., and Yurchyshyn V.D.

The purpose of the article is to study the main criteria used by the Court, examine specific judgments, and formulate practical advice on the application of the relevant legal positions in resolving court disputes.

2. The ECtHR criteria for the lawfulness of interference with property rights

In order to properly determine the criteria for the lawfulness of interference with the individual's right of land ownership used by the ECtHR, it is necessary, first of all, to refer to the primary source followed by the Court in resolving disputes, namely, the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter referred to as the "Convention", "ECHR"). According to Art. 1 of Protocol No. 1 to the Convention, a person may be deprived of his possessions except:

– in the public interest;

– subject to the conditions provided for by law and by the general principles of international law.

The same Article of Protocol No. 1 to the Convention also stipulates that a State may enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties (Convention for the Protection of Human Rights and Fundamental Freedoms). From the above, it can be concluded that the Convention distinguishes two criteria for the lawfulness of interference with the right to peaceful possession of one's property: legality and the implementation of such interference in the public interests.

At the same time, the European Court of Human Rights, in the process of interpreting the Convention when resolving disputes, sometimes goes beyond the original provisions of the Convention and creates additional rules that the contracting states are actually obliged to comply with. Sabodash R. B. drew such a conclusion noting: "the content of the Court's judgments indicates that although its interpretation of the Convention does not establish new norms of the Convention, new conduct rules for the States Parties are often created" (Sabodash, 2013, p. 141). The alike was mentioned by the scientist Ivanytskyi A. "the Court's practice defines and explains the provisions of the Convention and its protocols in practice" (Ivanytskyi, 2020, p. 26).

A similar situation arose during the interpretation of the criteria for the legitimacy of interference with the right to peaceful possession of property since the Court, in its judgments, specified these criteria and expanded their content. Thus, there are usually three criteria for the legitimacy of an interference:

– complies with the principle of lawfulness;

– pursues a legitimate aim;

– meets the criterion of proportionality.

Scientists Kaletnik H. M. and Opolska N. M. also came to a similar "three-stage test" in their work (Kaletnik, Opolska, 2021). At the same time, it should be noted that in many cases before the ECtHR, it was sufficient for the Court to identify a violation of the criterion of lawfulness or to establish that the interference did not pursue a legitimate goal in order to recognize such interference as a violation of the right guaranteed by the Convention (Guide on Article 1 of Protocol No. 1 – Protection of property, p. 20). Therefore, the Court does not necessarily analyze the criterion of proportionality, as, for example, happened in the case of Simonyan v. Armenia (Case of Simonyan v. Armenia, 2016).

3. Interference under the law (the principle of lawfulness)

Although the rule of law is one of the fundamental principles of the legal system and a democratic state, the ECtHR has repeatedly emphasized in its practice that interference with the peaceful possession of a person's land should be legal.

However, when resolving disputes, the Court was not limited to just mention of the principle. Thus, for example, following the judgment as of June 2, 2014, in the case of East/West Alliance Limited v. Ukraine, the Court interpreted the principle of lawfulness within the meaning of the Convention. According to the Court's position, only interference that is carried out in "compliance with the relevant provisions of domestic law and compatibility with the rule of law, which includes freedom from arbitrariness", can be lawful (Case of East/West Alliance Limited v. Ukraine, 2014).

The Court reached a similar conclusion in the judgment as of October 25, 2012, in the case of Vistiņš and Perepjolkins v. Latvia., which concerned the expropriation of land: the Court noted that the existence in national law of a legal basis for interference with property rights is not yet a guarantee that such interference does not violate the provisions of the Convention. It stressed that the law should be of high quality, namely "it should be compatible with the rule of law and should provide guarantees against arbitrariness." Moreover, in the same case,

the ECtHR established that such a law should not always apply exclusively to any subject of legal relations. Some laws related to interference with the right of peaceful possession may provide for special conditions for one or more persons (Case of Vistiņš and Perepjolkins v. Latvia, 2012).

In other cases, the Court also held that the legal rules interference is based on must be "reasonably accessible, precise, and foreseeable in their application". In particular, the Court reached that conclusion in the case of Guiso-Gallisay v. Italy (Case of Guiso-Gallisay v. Italy, 2009).

On top of that, the "foreseeability" of legislation can be attained even if a person needs legal aid to comply with certain rules and procedures or predict the consequences of his actions. In the judgment as of February 14, 2017, in the case of Lekic v. Slovenia, the ECtHR stated that the law can be recognized as foreseeable even if legal assistance is required for the analysis. Legal aid can be crucial for persons involved in some professional or commercial activity since "they carefully assess the risks that such activity entails" (Case of Lekic v. Slovenia, 2017). In fact, this provision complicates the situation for farmers or other persons who use their land plots for commercial rather than personal purposes, as the threshold for compliance with the foreseeability of legislation when interfering with a person's right to land is lower.

The case of Nesic v. Montenegro is an example an example of legislation that the ECtHR may consider unforeseeable. In a judgment as of 9 September 2020, the Court found that the State had deprived the applicant of ownership of several of his land plots in the coastal zone. The lawful owner lost the right to such plots due to the entry into force of laws under which the concerned land had become state property. However, no formal expropriation was carried out, and no compensation was established for the owner. The legislation did not enshrine the obligation of formal expropriation of the land plot and hence jeopardized the applicant's opportunity to obtain compensation. Accordingly, the Court concluded that such a state of legislation violates the principle of foreseeability of law and thus a violation of Art. 1 of Protocol No. to the Convention (Case of Nesic v. Montenegro, 2020).

It is worth paying meticulous attention to the Court's position that judicial practice must also comply with the law in order to establish that the principle of lawfulness is observed when interfering with the right to peaceful enjoyment of one's property. Divergences in the case-law may create legal uncertainty which is incompatible with the requirements the rule of law (Guide on Article 1 of Protocol No. 1 – Protection of property, p. 25).

A component of the lawfulness principle in the ECtHR practice is the availability of legal remedies for legal protection against arbitrary interference by public authorities or other entities with the right to peaceful enjoyment of land. Thus, in the judgment as of February 14, 2017, in the case of Lekic v. Slovenia, the Court pointed out that although the absence of judicial control during interference with a person's right does not automatically constitute a violation of such a right, any interference with the right to use property must entail procedural guarantees that allow the person to express his position before the authorities for the efficient protection of his right. To this end, the Court shall examine existing judicial and administrative procedures in national law to ensure that the principle of lawfulness is not infringed (Case of Lekic v. Slovenia, 2017).

Such legal principles as lawfulness are basic and fundamental; they are probably impossible to specify without using abstract categories. Although the components of the lawfulness criterion are often quite abstract, they are actionable and consideration since they provide extra space for the protection of individual land rights.

4. Interference in pursuit of a legitimate aim

As noted above, the second criterion of the Convention, as well as the Court, in assessing the lawfulness of interference with an individual's right to peaceful enjoyment of his land is a legitimate goal.

Protocol No. 1 to the Convention outlines that a person may be deprived of his possession only in the public interest, which is a rather abstract category, that was further specified in the ECtHR practice. The Law of Ukraine "On Alienation of Private Land Plots and Other Real Estate Objects Located on Them for Public Needs or on the Grounds of Public Necessity" involves a mechanism for deprivation of possessions for public needs/public necessity in some cases. The ECtHR, in its practice, actually recognized a set of situations as a legitimate goal for interfering with the property rights of a person, as follows:

– elimination of social injustice in the housing sector;

– nationalization of specific industries;

– adoption of land and city development plans;

– securing land in connection with the implementation of the local development plan;

– prevention of tax evasion;

– protection of morals;

– confiscation of monies acquired unlawfully;

– transition from a socialist to a free-market economy;

– protection of the environment; etc. (Guide on Article 1 of Protocol No. 1 – Protection of property, pp. 28–30).

At the same time, it is worth highlighting that the list is not exhaustive. In its practice, the Court holds the opinion that international judges are not able to properly analyze public needs in each country that is a member of the Council of Europe, and therefore leaves a significant space for the discretion of national state bodies since they understand the specifics of their state and public needs that allow interference with the property right of a person. On top of that, even such a wide discretion should be justified and somehow limited.

In the judgment as of 13 December 2016, in the case of Béláné Nagy v. Hungary, the Court indicated that the category of "public interest" is broad. The ECtHR stressed: "it considers it natural that the margin of appreciation available to the legislature for the implementation of social and economic policy should be broad and it will respect the legislature's decision as to what is in the "public interest", unless that decision is manifestly unreasonable" (Case of Belane nagy v. Hungary, 2016).

Moreover, in some cases, even the transfer of land from the property of one person to the property of another private person can be regarded as committed in accordance with the public interest. Thus, in the decision as of February 21, 1986, in the case of James and Others v. the United Kingdom, the ECtHR noted that the expression "in the public interest" does not always mean that the property should be transferred to the use of the general public or that the community as a whole or even a significant part of it should directly benefit from interference with the property rights of another person. Interference with the right to peaceful enjoyment of property in order to implement social justice policy in society can be correctly described as "public interest" (Case of James and Others v. the United Kingdom, 1986).

Summing up, it must be admitted that the Court rarely recognizes the public interest that justifies interference with the property right as unreasonable. Although this may carry some risks because states can abuse their discretion in determining the public interest, in this case, there are some safeguards against the arbitrariness of the public administration, namely, the presence of other criteria for the lawfulness of interference with property rights and the reaction of a democratic society interested in legislation's correspondence to its values and desires. Moreover, the ECtHR always reserves the right to recognize certain public interests as unjustified if the above occurs.

5. Interference given the criterion of proportionality

One of the limitations of the category of "public necessity" and the last important element of the right to peaceful enjoyment of one's land or other property is also the requirement of proportionality of interference with the relevant right. If interference with the property right occurs via means that are unduly burdensome and inconsistent with the purpose, it may be considered unlawful.

In the case of East/West Alliance Limited v. Ukraine, the ECtHR stressed that interference should strike a fair balance between the interests of society and the individual applicant and a balance could not be achieved if "...a disproportionate and excessive burden was imposed on the person concerned. In other words, there must be a reasonable proportion between the means employed and the end sought" (Case of East/West Alliance Limited v. Ukraine, 2014).

When hearing the case, the Court not only establishes the existence of public interests but also examines the extent to which these public interests correlate with individual's private interests. An essential element of proportionality under interference is proper compensation to the owner for it. In the case of Svitlana Ilchenko v. Ukraine, the ECtHR stated that "the conditions for granting compensation under the relevant legislation are crucial for assessing whether the contested measure maintains the necessary fair balance, and, in particular, whether it imposes a disproportionate burden on the applicant". In this case, the Court examined the lawfulness of the demolition of the applicant's garage on the land she had used for 20 years in order to build the territory. The ECtHR also drew attention to the fact that the interference with the applicant's rights was carried to develop housing, that is, for private commercial gain. Although the issue of public interest in the process of housing building was also considered, namely, the renewal and increase in the housing stock for the population, the interference proportionality was still violated due to the lack of adequate compensation that would correspond to the market value of the alienated property. As a result of the case's consideration, the Court, taking into account the above factors, concluded that the applicant's rights guaranteed by Protocol No. 1 to the Convention were violated (Case of Svitlana Ilchenko v. Ukraine, 2019).

At the same time, the Court recognizes that in some exceptional situations, interference with property rights may be regarded proportionate

even in the absence of compensation. In the judgment as of December 9, 1994, in the case "The Holy Monasteries v. Greece", it holds that full compensation is not guaranteed since the public interest may require less compensation than the market value of the property (Case of The Holy Monasteries v. Greece, 1994).

The availability of compensation is not the only factor the Court regards when examining the issue of fair balance. There are an unlimited number of other factors that are taken into account when making a final decision. It refers to the so-called procedural factors, namely, the availability to the applicant of procedures that would allow challenging the interference. In cases where the applicants do not have the possibility of effectively challenging the measure, the Court has found that an excessive burden was borne by them (Hentrich v France, 1994).

It is also important that the ECtHR has examined the components of this procedure, noting that the procedures should include an assessment of the consequences of the expropriation, determination of the rights to be compensated and how, cost, etc. It is also regarded whether legislation has provided for other ways to solve the problem, except for interference with the individual's property rights (Guide on Article 1 of Protocol No. 1 – Protection of property, pp. 32-33).

6. Conclusions

Summing up all the above, it is worth emphasizing that the ECtHR practice is a source of land law in Ukraine, and therefore the legal positions of the Court should be further analyzed, and the acquired knowledge should be systematized for practical application. The ECtHR practice regarding the protection of land ownership is multifaceted and specified.

The main criteria for the legitimacy of interference with the right to peaceful possession of one's property are lawfulness, the implementation of such interference for the public interest, as well as compliance with the criterion of proportionality. The components of the lawfulness criterion are described in detail in the ECtHR practice and should be taken into account by the legislator and judges when deciding on interference with an individual's rights to property. Legislative norms should be sufficiently accessible, precise, and foreseeable in their application. Although the category of "public interest" is interpreted by the Court broadly and given the significant discretion of the national authorities, the ECtHR uses the principle of proportionality as a safeguard, which considers the presence in the national legislation of other, less stringent, measures of interference, compensation for interference with the individual's property right to land, as well as other factors that may indicate a violation of the rights provided for by the Convention.

The ECtHR practice and the Convention are effective tools for protecting rights. Thus, further systematic work on translating more judgments into Ukrainian, systemizing legal positions, and applying the Court's criteria during legislative work is crucial.

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ПРАКТИКА ЄВРОПЕЙСЬКОГО СУДУ З ПРАВ ЛЮДИНИ ЩОДО КРИТЕРІЇВ ПРАВОМІРНОСТІ ВТРУЧАННЯ В ПРАВО ВЛАСНОСТІ НА ЗЕМЛЮ

Анотація. ***Мета.*** Метою статті є дослідження, аналіз та систематизація критеріїв, які Європейський суд з прав людини використовує задля оцінювання правомірності втручання в право особи на мирне володіння своєю землею. ***Методи дослідження.*** Роботу виконано з використанням загальнонаукових та спеціальних методів наукового пізнання. ***Результати.*** Проаналізовано основні доктринальні та Судові підходи щодо критеріїв правомірності втручання в право власності на землю, досліджено складники всіх трьох критеріїв, а саме законності, переслідування легітимної мети та пропорційності. Досліджено вимоги щодо якості закону, передбачуваності та доступності. Систематизовано правові позиції Європейського суду з прав людини з вищезазначеного питання, а також щодо визначення категорії суспільних інтересів, яку національні державні органи наповнюють своїм змістом залежно від потреб конкретного суспільства. Зважаючи на широку дискрецію національних органів щодо визначення змісту суспільних інтересів, також установлено основні складники, які перевіряються Європейським судом з прав людини під час оцінювання задоволення критерію пропорційності, а саме наявність належної компенсації, дотримання справедливого балансу між потенційно вкрай широкою категорією суспільних інтересів та інтересами приватної особи, на яку не можна покласти надмірний тягар. Також досліджено процедурні фактори, які беруться до уваги Європейським судом з прав людини під час прийняття рішення щодо порушення критерію пропорційності. ***Висновки.*** Критерії правомірності є цілком дієвим механізмом захисту права власності на землю в Україні. Розроблені Європейський судом з прав людини критерії гарантують широкий обсяг прав та механізми їх захисту, які й надалі потрібно вивчати, систематизувати та впроваджувати на практиці. Українські суди та публічна адміністрація повинні здійснювати системну роботу із впровадження та дотримання вищезазначених критеріїв та стандартів під час вирішення земельних спорів або регулювання земельних правовідносин з метою мінімізації потенційних скарг проти України до Європейського суду з прав людини, а також підвищення стандартів захисту прав на землю в Україні.

Ключові слова: Практика Європейського суду з прав людини, критерії правомірності, позбавлення землі, публічні інтереси, пропорційність, джерело земельного права.

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