

PROTECTION OF OWNERSHIP RIGHT IN THE COURT: THE ESSENCE AND PARTICULARITIES

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Abstract. *Today, ownership right is not only one of the main categories of legal and economic science but also the basis for the existence of the state and the private sector. The development of market relations, formation of the economy and industry of developed countries, as well as human rights theory and the concepts of modern legal relations within the society are related to the development of understanding of ownership right. The right to inviolability of private property is an inalienable right, the recognition of which indicates the level of democracy and the development of human and civil rights in the territory of a certain state. The particularities of this right and its essence taken together are recognised in the realities of today as a broad, multifaceted and complex problem that requires its actualised development from both theoretical and practical law enforcement positions. In the context of European integration, qualitative restoration of the domestic legal system, as well as at the stage of initial reformation of Ukraine, for representatives of the doctrine and practitioners, the following issue appears to be more relevant: proper ensuring and improvement of the mechanism of ownership right protection. Besides, law enforcement practice, the variability of which is still not generalised, is considered*

to be an important factor in the modern updated perception of the essence of the ownership right protection. However, the introduction of so-called "model decisions" of the Supreme Court, use of the case law practice of the European Court of Human Rights by national courts and the particularities of modern legal relations in the field of ownership correct the legislative basis and the mechanism of enforcement of this right, given globalisation processes and the challenges of our time.

According to the results of the analysis of doctrinal approaches, legal regulation and law enforcement practice in the field under research in the publication: 1) modern essential content of the concepts "ownership right" and "ownership right protection" is revealed; 2) the tendencies of ownership right protection are analysed; 3) particularities, admissibility and expediency of the civil claim in criminal proceeding are defined; 4) debating scientific positions on the justified restriction on the ownership right are investigated; 5) it is proposed to define the ways of protection of ownership right by the court as the statutory measures by which the court implements the protection of the violated, contested, subjective and unrecognised ownership right, freedom or interest by implementing the function of civil law in the sphere of protection; 6) it is substantiated that with the appeal of the owner for the protection of his right, the main functions of civil law became more active (restoration, compensation, prevention) which are the key to the effective implementation of protection.

Keywords. Ownership right, ownership right protection, restriction on ownership right, civil claim in criminal proceeding, functions of ownership right protection.

Introduction. Today, we can observe how under the impact of different factors in the legal order, which we used to consider the model for the domestic civil law, the concept of ownership right falls under the qualitative transformations. For example, modern civil law successfully masters the concept of trust, which used to be faced with critical negation, revives fuchao property, supports the intensive development of the concept of "the Internet of things" and the like. Since the Ukrainian civil law is traditionally in the wake of the leading continental legal orders, there is no doubt that the changes in the understanding and interpretation of ownership right will directly affect our law. It can be stated that ownership is a complex phenomenon in the society life, and its impact on all spheres of public life is obvious and unconditional. Today, ownership right is not only one of the main categories of legal and economic sciences but also the basis for economic activity of the state and private sector. It is the understanding of ownership right that the development of market relations, formation of economy and industry of the developed countries and human rights theory because the right to the inviolability of private property is inalienable, and its recognition indicates the level of democracy, development of the Institute of Human and Civil Rights on the territory of a certain state are related to ¹.

The category of ownership has been and remains the subject of philosophical and sociological research. Since ancient times, human thought has tried to determine the content of property, its importance for the society and state. The essence of ownership in the history of mankind was explained by various theories, the most significant of which were reflected in national legal acts. In the science of civil law, there has always been a significant interest in the study of its problematic issues. As noted in scientific literature, without ownership there is no economy², and the latter, if to continue a logical row, defines the economic system of Ukraine

1 Abliazov D. Ye. Social, Legal State and Human and Civil Rights. *Forum prava*. 2012. No. 1. P. 10–14.

2Mozolin V.P. Modernisation of Ownership Right in the Economic Dimension. *Journal of Russian Law*. No. 1. 2011. P. 26-30.

which, in turn, defines the political system of any socio-economic formation. Thus, of ownership right is a broad, multifaceted and complex problem that can be developed from both theoretical and practical, law enforcement positions in the vast expanses of our state.

At the same time, at the stage of initial reformation, for representatives of the doctrine and practitioners, the following issue appears to be more relevant: proper ensuring and improvement of the mechanism of ownership right protection. It is known that the possibility of enforcement of any subjective right depends directly on the extent to which it is guaranteed by the state³. The solution of this problem is achieved through various guarantees: economic, social, political and legal. Among the latter, a special place is taken by the ways of protection, the very existence of which is able to produce an undoubted protective impact on the participants of legal relations. According to Part 4, Art. 41 of the Constitution of Ukraine⁴, no one can be unlawfully deprived of the ownership right because this right is inviolable. The the above constitutional norm is in systemic connection with Art. 16 of the Civil Code of Ukraine⁵, according to which, every person has the right to apply to the court for protection of his property right and interest, and the norm of Part 1, Art. 317 of the same codified act, which enshrines the rights of ownership, use and disposal of the owner of his property. Thus, the very existence of means of civil rights protection, including real rights, is a necessary prerequisite for their unhindered implementation.

Today, in the civil law of Ukraine, the need to renew and develop mechanisms for the ownership right protection and improve the legislation on the rights protection is recognised⁶. In addition, the state of scientific development of problems related to the protection of ownership and real rights in modern Ukrainian law can not be considered satisfactory. The modern doctrine demonstrates the fragmentary nature of the research of the problems of ownership right protection in the civil process which is manifested primarily in the absence of large-scale monographic papers. Modern eurointegration aspirations of our state gave a new impetus to domestic legal research by adjusting the latest vector of development of the national legal system in the context of international legal obligations of Ukraine to the world community. It is obvious that the development and improvement of legislation and scientific provisions on ownership and its protection cannot and should not take place in conditions of isolation that exclude the impact of international experience. Besides, the use of blind copying of foreign scientific and legislative decisions is devoid of any reasonable grounds. A domestic balanced approach to the study of this problem should be based on the latest developments of national and foreign scientists, approbated common experience of developed democratic states, taking into account the particularities of the national legal system and compliance with domestic legal traditions.

Also, it is expedient to recognise the law enforcement practice as an important factor of the renewed understanding of the essence of the protection of ownership rights in civil proceeding. Thus, the introduction of so-called "model decisions" of the Supreme Court, use of the case law practice of the European Court of

3 Bogdanova Ye. Ye. Forms and Ways of Protection of Civil Rights and Interests. *Journal of Russian Law*. 2003. No. 6. P. 39-45.

4 Constitution of Ukraine: Law of 28.06.1996. No. 254k/96-VR. Vidomosti Verkhovnoi Radu Ukrainu. 1996. No. 30. Art. 141.

5 Civil Code of Ukraine of 16.01.2003. *Offitsiynyi Visnyk Ukrainy* 2003. No. 11. Art. 461.

6 Maidanyk R. A. *Civil Law: General Part. Introduction to Civil Law*. Kyiv: Alerta, 2012. 472 p.

Human Rights by national courts and the particularities of modern legal relations in the field of ownership correct the legislative basis and the mechanism of enforcement of this right, given globalisation processes and the challenges of our time.

Given the above said, the aim of the article is to study essential particularities of the protection of ownership right in the realities of present time. Considering the outlined vector of research paper, the following tasks are developed: 1) to reveal the modern essential meaning of the concept of "ownership right"; 2) to analyse the tendencies in ownership right protection in civil proceeding; 3) to determine the particularities of a civil claim in criminal proceeding; 4) to study the disputable positions of the representatives of the doctrine on the justified restriction on ownership right.

Literature Review. The topic of protection of ownership right and other real rights is not among those undeveloped in the science of civil law. It was investigated in lots of research papers of pre-revolutionary civilists such as Yu. S. Gambarov, D. I. Meier, I. A. Pokrovskiy, V. I. Sinaiskiy, G. F. Shershenevich and the others, as well as Soviet jurists such as A. N. Arzamastsev, G. N. Amfiteatrov, A. V. Venediktov, D. M. Genkin, O. S. Ioffe, Yu. K. Tolstoy, B. B. Cherepakhin and the others. The conclusions made by the authors to a greater extent keep their relevance and scientific value due to the traditional nature of the ways used to protect ownership rights, most of which are taken by modern legal systems in connection with the reception of Roman law (it is manifested, in particular in the preservation of proper Roman symbols of real claims – rei vindicatio and negatory). As a result, the legislative regulation of issues on protection of ownership right and other real rights, taking into account their particularities is formed and does not undergo fundamental changes.

However, representatives of the modern civil doctrine make attempts to develop new approaches to the identified problems, especially in the light of globalisation and europeanisation. Also, one should pay attention to the research of such scientists as O. V. Dzera, V.Y. Kisel, O. M. Klymenko, N. S. Kuznetsova, R. A. Maidanyk, L. M. Mandryka, K. I. Sklovskiy, Ye. O. Sukhanov, Yu. K. Tolstoy, Ye. O. Kharytonov, O. I. Kharytonova, L.V. Shala, Ya. M. Shevchenko and the others.

The problem of ownership right in the practice of the European Court of justice was given attention in the scientific developments of V. H. Butkevych, T. I. Dudash, M. Carss-Frisk, V. I. Manukian, V. Ye. Marmazov, A. M. Miroshnichenko, V. P. Paliuk, Kh.Yu. Papir, P. M. Rabinovych, S. P. Rabinovych, R. Risdal, R. B. Sabodash, M. de Salvia, S. V. Shevchuk and other scientists.

However, despite the multidimensionality and development of doctrinal approaches to the ownership right protection in civil proceedings, the reformation of national legislation and its applying requires the latest comprehensive developments in the outlined domaine.

Materials and Methods. The versatility, variability and diversity of manifestations of the ownership right protection led to applying a set of general scientific and special scientific methods of knowledge of state and legal phenomena and processes which provided an objective analysis of the issue and the reliability of the results and conclusions. The research conducted in the article is based on the materialistic understanding of ownership right as a natural result of the historical development of the society. Among the methods applied one should note the following: dialectical, historical, formal and logical, analysis and synthesis, abstraction and generalisation, system and structural, comparative and legal and the others. Thus, the methodological basis of the research is, first of all, the dialectical method of studying legal phenomena, with the help of which the

scientific analysis of the legal regulation of ownership relations in the Ukrainian legislation is conducted. With the help of historical method the genesis of national legislation which regulates ownership relations, as well as changes in approaches to understanding the category of "ownership right" is investigated. Formal and logical method and method of analysis and synthesis were applied in the formulation of the concepts of "ownership", "enforcement of the right to protection" and the like. Abstraction and generalisation methods were also applied to carry out these tasks, especially in the context of judicial practice in the national and international judicial institutions. Due to the system and structural method of cognition, the structure of ownership relations in the national legislation and the structure of relations of the ownership right protection in the European Convention and the practice of the European court are investigated. Comparative and legal method is applied when comparing the procedural aspects of the ownership right protection in civil and criminal proceedings.

Results. The systematic study of ideas about the essence of the protection of property rights is impossible without identifying its origins as a legal category. In 1868, K. P. Pobedonostsev in *Civil Law Course defined ownership right as "the most complete and simplest of all civil rights"* ⁷, however, at the beginning of the XX century G. F. Shershenevich in his *Textbook on Russian Civil Law* says that the simplicity and clarity of our ideas of ownership is nothing but an illusion: "It is difficult to give a definition to such a concept as ownership, despite its apparent simplicity and clarity. There is still no clear definition of ownership in science" ⁸. Over time, since the very origins of the state formation up to present time the debate on this issue has not subsided.

Thus, in a quite substantiated way scientists note that the origin of the Institute of Ownership Right must be attributed to the classical Roman law despite the fact that special terminology for marking this phenomenon has not been developed. Gradually, the question of the essence of ownership rights acquired the signs of discussion and at the end of the XVIII century led to the actualisation of scientific research. However, only since the beginning of the XIX century in the science of civil law there has emerged a scientific discussion about the genesis and essential content of ownership right. Significant changes in the doctrinal understanding of ownership right are related to the Soviet period which is characterised by deep social upheavals. Turning to the more modern and generally recognised in the science of civil law content of ownership right, it is expedient to note that it is revealed with the help of the set of powers, so-called "triad of powers of the owner" – possession, use and disposal. The vast majority of scientists believe that this triad originates from Roman private law⁹. However, these powers are not always exhaustively able to characterise the ownership right. According to some lawyers, in the context of the transformational tendencies of our time, it is possible

7 Pobedonostsev K. P. *Civil Law Course. Part I: Patrimonial Rights*. Moscow: Statute, 2002. 622 p.

8 Shershenevich G. F. *Textbook on Russian Civil Law. Vol. 1*. Moscow: Statute, 2005. 556 p.

9

to single out about fifteen hundred possible powers of the owner¹⁰. In modern science of civil law, the criticism of the classic "triad" can be heard, for example, from I.V. Spasybo-Fateieva¹¹. Some scientists try to combine traditional views with the idea of the fullest by content property right and define the ownership right as unrestricted subjective property right, which is legally ensured by the owner's possibility to make any kind of actions regarding his property at his will and regardless of the will of other persons, the restriction of which is allowed in the cases and in the manner prescribed by law¹². At the same time, the interpretation of ownership right through the comprehensive triad of powers, the object of which is nothing but things, today becomes the most acceptable for the Ukrainian civil law and approbated in practice.

As for the definition of ownership right, it should be noted that despite its fundamental nature and diversity there can be no single approach to the definition of the relevant legal category. According to V. P. Kamushanskiy, today, in the science of civil law there is no definition of ownership right that fully reflects the essence and content of this institution¹³. Also, one should pay attention to the definition of ownership right formulated by O. V. Dzera who proposes to consider the ownership right as the right recognised by the law that enshrines the fact of absolute property's belonging to the person (owner) and determines his rights and obligations in respect of such property¹⁴. In definition of the ownership right given in Part 1, Art. 316 of the Civil Code of Ukraine¹⁵, attention is focused on the main feature of this right: it is enforced by a person (owner) of his own will in accordance with the law, regardless of the will of the others. Taking into account the analysis of modern doctrinal approaches to the definition of the concept of "ownership" it can be stated that the current legalised definition of this category through the powers of ownership, use and disposal requires the improvement of the content. Modern tendencies of economic development and reformation and eurointegration realities make it necessary to abandon the classical "triad" of the owner's powers, as they go beyond the appropriate understanding of the ownership right and give specific participants of absolute relations such powers that cannot be covered by the categories of "possession", "use" and "disposal". Thus, it can be concluded that the ownership right is a fundamental, absolute right that gives a person the highest power regarding the property belonging to him as well as it goes beyond the real legal relations and needs special protection. This conception is followed by judicial practice, in particular the Supreme Court and the European Court of Human Rights.

10 Lazar Ya. Ownership in Bourgeois Legal Theory: Translation from German. Moscow: Yuridicheskaya Literatura, 1985. 182 p.

11 Spasybo-Fateieva I. V. The Concept of Property, Property and Corporate Rights as Objects of Ownership Right. Ukrainian commercial law. 2004. No. 5. P. 9-18.

12 Acquisition and Termination of Ownership Right in Ukraine (Problems of Theory and Practice): Monograph / Under General Editorship of V.V. Luts, academician of National Academy of Legal Sciences of Ukraine. Kyiv: Research Institute for Private Law and Entrepreneurship named after Academician F. G. Burchak at the National Academy of Legal Sciences of Ukraine. 2013. 358 p.

13 Kamushanskiy V. P. Ownership Right: Limits and Restrictions. Moscow: UNITY, 2000. 224 p.

14 Dzera O.V. Principle of Inviolability of Ownership Right Requires Additional Legislative Guarantees. Civil Doctrine and Formation of Civil Society. Proceedings of the International Scientific-Practical Conference, Kyiv, October 3, 2014. Kyiv: Bilotserkivdruk LLC, 2015. p. 32-33.

15 Civil Code of Ukraine of 16.01.2003. Offitsiynyi Visnyk Ukrainy 2003. No. 11. Art. 461.

It is important to study this category not only from the point of view of the essential content but also from the standpoint of the legal impact on the participants of legal relations within which they are endowed with special rights and possibilities. Moreover, the problems and tendencies in the ownership right protection are due to objective grounds. However, there are certain "spirit" (meaning) collisions of the new, reformed legal acts with some historically formed different traditions of law enforcement practice, with previous experience of establishing the appropriate relations with previously formed sense of justice. Inconsistencies between modern legal structures and business turnover customs established over many decades of administrative and planned economic activity remain unresolved. To create and implement an effective mechanism of civil regulation of the protection of ownership right, it becomes necessary to analyse the existing regulatory acts of various levels, as well as judicial practice which from time to time ambiguously interprets the provisions of the legislation, as well as states a number of gaps in the outlined domain which adversely affects the situation of owners. Taking into account the above, it can be stated that the protection of ownership right from the point of view of civil law is a possibility provided within the framework of subjective powers independently or by taking measures of state coercion to ensure the removal of obstacles in the enforcement of the powers of possession, disposal and use, or to prevent them. The particularity of the ownership right protection, as well as other real right, is that it is possible both in the presence of the ownership right violation, and for preventive purposes in cases directly stipulated by law or other legal acts. Besides, effective protection of ownership right implies the inseparable unity of the following basic legal principles of protection: the principle of equal protection of all forms of property and the principle of inviolability of property.

In recent years, the problems of the ownership right protection have become more acute, as judicial practice on property disputes is increasing. At the same time, in the civil doctrine, there can be found a large number of definitions of the legal phenomenon. Thus, O. V. Ivanov understood the ownership right protection as taking the special measures aimed at ensuring the authorised person of the real possibility of enforcement of his right by the jurisdictional authorities endowed with state powers¹⁶. E.P. Boush¹⁷ defines this term almost analogically. Special attention should be given to the definition of E.V. Avanesov who understands the ownership right protection as the a of mutually interdependent ways that exist in the composition of the subjective right of ownership¹⁸. According to A. I. Bazilevich, the ownership right protection should be understood as the way of its enforcement with the aim of restoration, that is, comprehensive measures that can be approbated after the violation of property rights for its restoration. The need for protection arises in connection with the violation or abuse of these rights, failure to perform a legal duty, emergence of a dispute between the parties about the existence of rights and

16Ivanov V. Issues of the Soviet State and Law. Proceedings of Irkutsk State University. 1967. Vol. XIV. Issue 8.Law Series. Part 3. Irkutsk, 1967. P. 48-59.

17 Boush E. P. Civil Protection of Property and Participation of the Law Enforcement Agencies in it. Tashkent, 1977.1977. 48 p.

18 Avanesov E. V. Problems of Property Protection in Civil Law and Criminal Proceeding. Thesis Abstract of... PhD Holder in Legal Science. Moscow, 1993. 20 p.

obligations, etc.¹⁹ More detailed and complete is the following definition formulated by A. Sukhanov: "Civil law protection of ownership right and other real rights is a narrower concept that should be applied only to cases of violation. It is a set of civil law methods (measures) that are applied to violators of relations formed with the help of real rights"²⁰. However, it should be noted that a similar definition could be found in the research papers of O. S. Ioffe²¹.

The ways of such protection require analysis to determine the particularities of the ownership right protection by the court. Taking into account the opinions of scientists, it is expedient to single out the signs of ways to protect ownership right by the court. First, it is the focus on the restoration of the violated ownership rights if the violation occurred or can occur. Second, this is the reality of the possibility of implementing the ways of protection with certain freedom of use of available protection possibilities, taking into account the restrictions established by law. These restrictions can be defined as the norms of civil and other legislation, and also be related to processual (procedural) particularities. Thanks to these two signs, the ways to protect the ownership right by the court can be defined as the statutory measures by which the court implements the protection of the violated, contested, subjective and unrecognised ownership right, freedom or interest, performing the functions of civil law in the sphere of protection. In civil law, there is no unity of views on the proper functions of civil law, but the reference to the restorative and compensatory functions is the most common. The restoration of the legal situation, namely, the violated subjective right, is not always possible and depends on the essence of the violated right and the nature of such a violation. Unfortunately, the restoration of a person's property status is not always followed by the restoration in the legal, "intangible" sphere. Moreover, compensation of property losses, as a rule, indicates the impossibility to restore the violated right. In this regard, there is an objective basis for the distinction between the restorative and compensatory effects of law and singling out both restorative and compensatory functions. Unlike the latter, which ensures the restoration of the property sphere of the victim, the restorative function ensures the impact of law in the field of protection of civil relations by eliminating the negotiable consequences of the offence. In addition, one should single out a preventive function which ensures the prevention of violations of ownership right or its consequences. Since the aims of restoration, compensation for property losses and warning of possible violations are characteristic of not only civil rights but also other branches of law, which also govern the property relations, these functions can be fairly attributed to cross-sectoral, but should be specific to their manifestations at the level of specific branch of law. The particularities of the restorative impact of civil law are related to a broader scope of its enforcement: it is carried out not only at the level of regulatory acts by enshrining certain methods of protection but also with the help of their choice and applying by participants of civil legal relations.

In scientific literature, they traditionally single out jurisdictional and non-jurisdictional forms of rights protection²². The main difference between them lies in the fact that the protection of rights and interests in

19 Bazilevich A.I. Forms of Protection of Subjective Civil Rights. Thesis Abstract of... PhD Holder in Legal Science. Moscow, 2002. 21 p.

20 Civil Law. Vol. I / Eds. by Ye. A. Sukhanov. Moscow, 2004. 544 p.

21 Ioffe O. S. Soviet Civil Law. Moscow, 1967. 494 p.

22 Sverdlyuk G. A. Ways of Protection of Civil Rights and Their Classification. "State and Law". 1999. No. 1. P. 16-26.

jurisdictional form is carried out by different competent agencies specially authorised for this activity by the state, with a specific procedural order of operations which are characteristic of each of them while protection of rights and interests in the non-jurisdictional form takes place within the framework of real legal relations and is usually carried out by the participants of the legal relationship (self-defence). The jurisdictional form of the ownership right protection is carried out by the competent agencies, that is, courts. In practice, it is possible to be faced with self-defence more rarely. Despite the fact that the term "self-defence" has recently emerged in civil law, the doctrine of civil law has used this concept before²³. Thus, for example, V. P. Gribanov understood as self-defence as "committing by authorised person permitted by law actions of the actual order aimed at protecting his personal or property rights and interests"²⁴. In turn, according to Yu. G. Basin, self-defence is not only the actual actions of the authorised person to protect the rights, but also any legally permissible unilateral actions of the interested person with the aim of ensuring the inviolability of the right, that is, actions of a legal nature²⁵. But in this interpretation, the concept of self-defence also includes operational measures, which, as previously mentioned, are of a legal nature. At the same time, classifications of ways of protection, which exist in the science of civil law do not allow to take into account the manifestation of the functions of civil law, including restorative. In this regard, scientists propose the classification of civil protection ways according to the functional target criterion consisting of three groups: (1) ways in which restorative impact manifests itself and which are aimed at restoring subjective civil rights; (2) methods that ensure the restoration of the property sphere of the victim and embody the compensatory function; (3) ways aimed at preventing possible offences or their consequences²⁶.

The ownership right protection is regulated by different branches of law. Thus, Art.16 of the Civil Code of Ukraine²⁷ contains the list of ways to protect violated civil rights and interests that can be applied, in particular in the ownership right protection. However, the need and possibility of applying one or another way of protection of property rights is determined primarily by the nature of the violation (threat of violation) of this right. Thus, this factor can be the basis for choosing the appropriate way of protection²⁸. On the basis of the traditional approach, the ways of protection related to the methods of protection of ownership right by the modern doctrine were investigated. Undoubtedly, among these ways there are property claims of the owner on returning the things from illegal possession by other person (*rei vindicatio*) and on removing the barriers not related to property deprivation (*negatory*). The identification of ways to protect ownership right aimed at restoring ownership is possible with the help of vindication, that is, the owner's demands on returning the

23 Antoniuk O. I. The Right of Participants of Civil Legal Relations to Self-Defence: Thesis Abstract of... PhD Holder in Legal Science. Kharkiv, 2004. 20 p.

24 Gribanov V. P. Limits on the Enforcement and Protection of Civil Rights. Moscow, 1972. 411 p.

25 Basin Yu. G. Basics of Civil Legislation On Protection of Subjective Civil Rights. Problems of Applying the Basics of the Civil Legislation and the Basics of Civil Legal Proceeding of the USSR and Union Republics. Saratov, 1971. 607 p.

26 Rumiantseva V. Protection of Property of Individuals and Legal Entities in the European Court of Human Rights. Kyiv, 2004. No. 5. P. 38-40.

27 Civil Code of Ukraine of 16.01.2003. *Offitsiynyi Visnyk Ukrainy* 2003. No. 11. Art. 461.

28 Fursa S. Ya. Evidence and Proof in Civil Proceeding. Kyiv, KNT, 2005. 256 p.

thing from illegal possession and similar ones with vindication of demands of owners of other real rights. A claim for recognition of ownership right provides the person with protection of subjective rights but legally protected interest in certainty of legal status of the person, and not always implies the existence of a dispute with a certain person about the thing's belonging. A claim to invalidate a juristic act has a similar object of protection whereas on a claim to invalidate a disputed juristic act, the court makes a decision of real and legal importance. However, even in this case, there is no direct protection of subjective real right. At the same time, the demand by the party on the invalidity of the transaction on returning the value of things is not a means of the subjective right protection as it is of a compensatory nature, and is applied in case of impossibility of returning the individually specified things transferred under an invalid transaction²⁹. The ways of the ownership right protection should include the requirements for returning the things transferred for temporary use under the contract as in the result of combination of different legal roles (owner and contractor under the contract) in one person in respect of the same object, the contractual obligations to return things are violated and it produces an indirect impact on subjective real right, making in most cases impossible to enforce the right of possession and use as well as complicating the disposal of the property. The performance of contractual obligations on returning property, including forced returning, leads to restoration of the violated subjective property right.

The ambit of the negatory claim is traditionally determined by the "residual" principle: it is provided if the violation of the ownership right does not lead to deprivation of ownership. In this regard, the demand on the elimination of non-dispossession obstacles is not a way of protection that ensures the restoration of possession. At the same time, common in civil law idea of negatory action, as a means that applies in case of violation of the powers of use and disposal, is not quite exact. The ground for applying this method of protection are violations that do not lead to loss of possession of the thing, so the plaintiff should not prove that the violation affects the eligibility of use and disposal, he should provide evidence that his real right is violated, but possession is not lost.

Given the above, we can say that from all means recognised by both doctrine and practice as means of ownership right protection, by essential content they include only methods that provide restoration of the violated ownership right or limited real right by eliminating the reversible consequences of the violation: real claims for returning the things and the removal of obstacles that are related to deprivation of possession; claims for returning the things transferred for temporary use under the contract; demand on damage compensation in case of damage of a thing.

At the same time, in recent years, new ways of the ownership right protection have emerged in the legislation. This, in turn, requires improving the legal regulation of civil law ways of the ownership right protection, further theoretical development of various institutions for both civil law and other branches of law. An important place in the ownership right protection is given to all law enforcement agencies, including courts, intended to contribute to the rule of law and protect the interests of society and the rights of citizens. Any encroachment on the enforcement of ownership right causes great damage to the normal functioning of organisations and the interests of citizens. Ensuring the compensation of property damage caused by theft and other crimes and the restoration of the violated rights of the owner are the most important tasks of all law enforcement

29 Spasybo I. A. Acquisition of Ownership Right: Monograph. Kyiv: Research Institute for Private Law and Entrepreneurship named after Academician F. G. Burchak, 2009. 171 p.

agencies³⁰. It should be noted that the infliction of property damage to organisations or citizens is often accompanied by a crime against property, that is why the courts in criminal proceedings, along with the norms of criminal and criminal procedural law, use the norms of civil law. The ownership right protection can be implemented in criminal proceeding by both the victim and the prosecutor. The specified provision is provided by cl. 12, Part 2, Art. 36 of the Criminal Procedure code of Ukraine³¹ in which it is enshrined that the prosecutor is authorised to bring the civil claim in interests of the state and citizens, taking into account the full list of the circumstances stipulated by this codified act, have no possibility to enforce independently the right to protection. Besides, in which it is enshrined that the prosecutor is authorised to bring the civil claim in interests of the state and citizens, taking into account the full list of the circumstances stipulated by this codified act, have no possibility to enforce independently the right to protection. In this regard, in the specified clause of the code it is expedient to replace the term "citizen" with the term "person". It is worth noting that it is a civil claim that is the main and important condition for the ownership right protection and harm compensation in criminal proceeding³². As practice shows, the legal mechanism for the enforcement of the Institution for Civil Claim, which existed in the Criminal Procedure Code of 1960, did not justify itself because it had no effective and well-regulated procedural order³³. However, the previous regulatory act stipulated that a civil claim could be presented only in the cases on crimes and the current Criminal Procedure Code of Ukraine enshrined the possibility of bringing a civil suit in criminal proceeding not only on criminal offences but also in the proceedings on taking coercive measures of medical or educational nature. Another rather significant gap was that under the code of 1960 (in the original version), a civil claim could be presented only for material harm caused by a crime, but the current code of Ukraine of 2012 clearly enshrines the provision on the possibility of compensation for both material and moral harm³⁴ and that is undoubtedly, it is a positive innovation. The Criminal Procedure Code of 2012 in Art.129 also provided some other provision than that which was contained in Art. 328 of the Criminal Procedure Code of 1960) on the possibility of seeking protection of one's rights in the civil proceeding order in case the court's acquittal. According to Parts 2 and 3, Art. 129 of the Criminal Procedure Code, the court refuses the claim only in passing an acquittal in case of ascertaining the fact of the absence of the event of the criminal offence; in case of justification of the accused due to the absence of the elements of criminal offence in his actions or his non-participation in committing a

30 Ablamskyi S.Ye. Protection of the Rights and Legitimate Interests of the Victim in the Criminal Proceeding: Monograph / Under the General Editorship of Doctor of Law O. O. Yukhno. Kharkiv: Panov, 2015. 240 p.

31 Criminal Procedure Code of Ukraine: Code of Ukraine; Law, Code of 13.04.2012 No. 4651-VI. URL: <https://zakon.rada.gov.ua/laws/show/4651-17> (Date Accessed:26.07.2019). 26.07.2019).

32 Herasymchyk O. P. Theoretical and Practical Aspects of Professional Protection of the Victim. Chronicle of the National University of Ostroh Academy. Law Series. 2011. No. 1 (3). P. 1-10.

33 Andreiev R. On Damage Compensation to the Victim and Arrest of Property in Criminal Proceeding Investigated by Security Authorities and Law Enforcemeny Agencies. *Visnyk Prokuratury*. 2013. No. 6. P. 59-62.

34 Criminal Procedure Code of Ukraine: Code of Ukraine; Law, Code of 13.04.2012 No. 4651-VI. URL: <https://zakon.rada.gov.ua/laws/show/4651-17> (Date Accessed: 26.07.2019).

criminal offence, the court leaves the claim without consideration and that does not deprive of possibility to appeal with such a claim in the order of civil proceeding. From our point of view, such a decision of the legislator, although it caused lots of objections in scientific literature³⁵, is positive as it enables to implement various standards of proof in domestic legislation³⁶.

At the moment, simultaneous consideration by the court of materials of criminal proceeding and the civil claim contributes to strengthening the protection of the rights and legitimate interests of the victim, as well as faster and more complete compensation and ownership right protection. As for the content and form of the civil claim for the ownership right protection filed in the framework of the criminal proceeding, in this case, it is necessary to be guided by the rules of the Civil Procedure Code since the Criminal Procedure Code of Ukraine does not regulate in detail the particularities of the appeal with such demands and contains a reference rule to the provisions of other legislation. However, direct consideration of such a claim takes place under the rules of criminal proceeding, taking into account the rules of civil law. It can be stated that, despite the variability of ways of the ownership right protection, the current legislation, which regulates the grounds for seeking protection and procedural elements of its implementation, requires significant improvement, taking into account the reformed national rules of law, the particularities of law enforcement practice and the realities of judicial proceeding.

Discussion. When giving a legal assessment of the proper enforcement and the ownership right protection, the judicial authorities are usually faced with the conflict of interests of the person-owner and the public interests of the society in which the owner is located. The consequence of this problem is the restriction on ownership right in the context of its protection, the appropriateness of which causes quite lively discussions today.

The restriction in the enforcement of ownership right is rooted in the German civil doctrine, whose representatives argued that property had certain social functions which are not limited to meeting the needs of owners and other people who directly use the property, but indicated the existence of a common interest in the proper use of property³⁷. The outlined ideas were positively taken not only by legal doctrine but also by practice. The restriction on ownership right in the state with the rule of law provides stability and statics of civil rights. Scientists emphasise that the development of civil legal relations and their regulation using the basic private law criteria and principles, need for contextual of the ownership right protection of individuals in the aggregate require the development and approbation of relevant limits given the specificity of certain civil law institutions³⁸. V. P. Kamushanskiy in his research papers reveals the problem of the absence of a comprehensive scientific and theoretical approach to the nature and content of restrictions on ownership

35 Nor V. Institute for Harm Compensation in Criminal Proceeding under the Current Criminal Procedure Code of Ukraine: Achievements and Potential for Improvement. "Law of Ukraine". 2013. No. 11. P. 37; Titko I. Regulatory Support and Practice of Implementation of Private Interest in the Criminal Process of Ukraine: Monograph. Kharkiv: Pravo, 2015. P. 207.

36 Vapniarchuk V.V. Theoretical Basics of Criminal Procedural Proof: Doctoral Dissertation... of Legum Doctor. Kharkiv, 2018. P. 151-164.

37 Cherniak Yu. On Some General Theoretical Aspects of the Concept of Judicial Practice. *Naukovi Zapysky*. Vol. 21. Legal Sciences. 2003. P. 187-203.

rights and this certainly has a sustainable impact on the quality of law-making activity, causes inconsistencies during the consideration of court cases directly related to restrictions on ownership right³⁹.

According to Ye. O. Michurin, restrictions on ownership right, as an element of legal regulation, requires a balanced approach and should be applied in exceptional cases⁴⁰. Successful is the standpoint of V. S. Ponomariov on the fact that any legal restrictions should be specific, qualitatively justified and developed by the need to ensure the rights and legitimate interests of participants in civil turnover and society at large⁴¹. This approach is fully correlated with Art. 3 of the Constitution of Ukraine, and is a consequence of the need to ensure the rights of individuals by the state. According to scientists, the unrestricted interference of state power in ownership relations leads to the loss of personal individuality and increases the degree of dependence of the latter on power. The restriction of state power, in turn, creates conditions for the expansion of individual freedom. Thus, the degree of individual freedom, including property relations of ownership, is interdependent with the degree of state interference in these relations. In the state with the rule of law, such interference must be exceptional, justified and conditioned by the legitimate rights of other people or by the public interests which can compete with the rights of the authorised subject.

However, R. Maidanyk notes that subjective law is opposed by restrictions on its enforcement⁴². Thus, the subjective rights of a person and their restrictions complement one other in order to achieve a balance between the rights of different people. Ownership on the one hand, and its restrictions on the other hand, in the state with the rule of law must be balanced and statically dynamic. According to Ye. O. Michurin, the imbalance in favour of the ruling class, a group of people or one person indicates an undemocratic state system⁴³.

Thus, a person can be deprived of his property by the court only in the interests of the society, under the conditions prescribed by law and general principles of international law, and when passing the judgement on the possibility of depriving a person of property, a fair balance between the interests of the society and the rights of the owner and their protection should be observed.

Conclusion. The ownership right is a fundamental absolute right which endows a person with the highest authority over the property belonging to him and goes beyond the real legal relations. The analysis of variable approaches to the content of the concept of "ownership" provided an opportunity to state that the current

38 Spasybo-Fateieva I.V. Forms of Ownership Right. *Bulletin of the Academy of Legal Sciences of Ukraine*. 2009. No. 3. P. 145-154.

39 Kamushanskiy V. P. Restrictions on Ownership Right: Civil Law Analysis: Doctoral Thesis... of Legum Doctor. Moscow: the Russian State Library, 2003. 403 p.

40 Michurin Ye. O. Restrictions on Property Rights of Individuals (General Provisions). Monograph. Kharkiv: Yursvit, 2007. 220 p.

41 Ponomariov V.S. Ownership Right of Citizens for Living Accommodation: Issues of Limitations: Thesis Abstract of... PhD Holder in Legal Science. Moscow: the Russian State Library, 2005. 187 p.

42 Maidanyk R. A. Problems of Regulation of Trust Relations in Civil Law. Doctoral Dissertation Abstract... of Legum Doctor. Kyiv: Taras Shevchenko National University, 2003.

43 Michurin Ye. O. Restrictions on Property Rights of Individuals (General Provisions). Monograph. Kharkiv: Yursvit, 2007. 220 p.

legalised definition of this category through the powers of ownership, use and disposal requires significant improvement. Modern tendencies in economic development and reformation and eurointegration realities necessitate the refusal of the classical "triad" of the powers of the owner as they go beyond the relevant understanding of ownership right and give specific participants in absolute relations such powers that cannot be covered by these categories. At the same, the interpretation of ownership right for the exhaustive triad of powers, the object of which are exclusively things, remains for today the most acceptable for Ukrainian civil law and approbated in practice.

The development of civil turnover in the context of the ongoing formation of globalised market economy, the reform of the judicial system, changes in maintaining business activity, European integration social and legal tendencies determine the need for operational measures to protect subjective civil rights. Any delay in this case can lead to irretrievable loss of property. For the effective protection of civil rights, it is very important to stop the negative activity of an unscrupulous participant in civil legal relations at the initial stage or even to prevent it. Thus, the ownership right protection, which forms the basis for civil turnover and stability of the society, is becoming of particular importance.

Issues and tendencies of the ownership right protection is due to objective grounds. In particular, there are certain conflicts of meaning of the new, reformed legal acts with some historically fundamentally different traditions of law enforcement practice, with previous experience of establishing relevant relations with previously formed sense of legal consciousness. Inconsistencies between modern legal structures and business turnover customs established over many decades of administrative and planned economic activity remain unresolved. Some civil law institutions are new and require being studied by specialists in the context of approbation of successful foreign experience in law enforcement activity.

The ways of the ownership right protection were defined as legally enshrined measures, with help of which the court implements the protection of the violated, contested, subjective and unrecognised ownership right, freedom or interest by implementing the function of civil law in the sphere of protection. It is substantiated that with the request of the owner for the protection of their rights at the same time the main functions of civil rules activated (restorative, compensatory and preventive) which are the key to effective implementation of protection. At the same time, The classifications of ways of protection that exist in the science of civil law do not allow to take into account the manifestation of the civil law functions, including restorative. It is stated that of all the means recognised by both doctrine and practice as means of the ownership right protection, by their essential content they include only the ways that ensure the restoration of the violated ownership right or restricted ownership right by eliminating the reversible consequences of the violation: legal action for restitution of property and for removal of obstacles related to deprivation of possession; claims for returning the things transferred for temporary use under the contract; claim for compensation in case of damage to the thing. It is noted that the infliction of property damage to organisations or citizens is often accompanied by a crime against property, that is why the courts in criminal proceedings, along with the norms of criminal and criminal procedural law, use the norms of civil law. The direct ownership right protection can be implemented in criminal proceeding by both the victim and the prosecutor. Besides, in recent years, new ways of the ownership right protection emerge in the legislation, and this requires, in turn, improvement of legal regulation of civil ways of the ownership right protection, further theoretical development of different institutions, both civil law and other branches of law.

References

1. Ablamskyi S.Ye. Protection of the Rights and Legitimate Interests of the Victim in the Criminal Proceeding: Monograph / Under the General Editorship of Doctor of Law O. O. Yukhno. Kharkiv: Panov, 2015. 240 p.
2. Abliazov D. Ye. Social, Legal State and Human and Civil Rights. *Forum prava*. 2012. No. 1. P. 10–14.
3. Avanesov E. V. Problems of Property Protection in Civil Law and Criminal Proceeding. Thesis Abstract of... PhD Holder in Legal Science. Moscow, 1993. 20 p.
4. Andreiev R. On Damage Compensation to the Victim and Arrest of Property in Criminal Proceeding Investigated by Security Authorities and Law Enforcement Agencies. *Visnyk Prokuratury*. 2013. No. 6. P. 59-62.
5. Antoniuk O. I. The Right of Participants of Civil Legal Relations to Self-Defence: Thesis Abstract of... PhD Holder in Legal Science. Kharkiv, 2004. 20 p.
6. Bazilevich A.I. Forms of Protection of Subjective Civil Rights. Thesis Abstract of... PhD Holder in Legal Science. Moscow, 2002. 21 p.
7. Basin Yu. G. Basics of Civil Legislation On Protection of Subjective Civil Rights. Problems of Applying the Basics of the Civil Legislation and the Basics of Civil Legal Proceeding of the USSR and Union Republics. Saratov, 1971. 607 p.
8. Bogdanova Ye. Ye. Forms and Ways of Protection of Civil Rights and Interests. *Journal of Russian Law* 2003. No. 6. P. 39-45.
9. Boush E. P. Civil Protection of Property and Participation of the Law Enforcement Agencies in it. Tashkent, 1977. 48 p.
10. Vapniarchuk V.V. Theoretical Basics of Criminal Procedural Proof: Doctoral Dissertation... of Legum Doctor. Kharkiv, 2018. 509 p.
11. Herasymchyk O. P. Theoretical and Practical Aspects of Professional Protection of the Victim. *Chronicle of the National University of Ostroh Academy*. Law Series. 2011. No. 1 (3). P. 1–10.
12. Civil Law. Vol. I / Eds. by Ye. A. Sukhanov. Moscow, 2004. 544 p.
13. Gribanov V. P. Limits on the Enforcement and Protection of Civil Rights. Moscow, 1972. 411 p.
14. Dzera O. V. Principle of Inviolability of Ownership Right Requires Additional Legislative Guarantees. Civil Doctrine and Formation of Civil Society. Proceedings of the International Scientific-Practical Conference, Kyiv, October 3, 2014. Kyiv: Bilotserkivdruk LLC, 2015. p. 32-33.
15. Ivanov V. Issues of the Soviet State and Law. Proceedings of Irkutsk State University. 1967. Vol. XIV. Issue 8. Law Series. Part 3. Irkutsk, 1967. P. 48-59.
16. Ioffe O. S. Soviet Civil Law. Moscow, 1967. 494 p.
17. Kamushanskiy V. P. Ownership Right: Limits and Restrictions. Moscow: UNITY, 2000. 224 p.
18. Kamushanskiy V. P. Restrictions on Ownership Right: Civil Law Analysis: Doctoral Thesis... of Legum Doctor. Moscow: the Russian State Library, 2003. 403 p.
19. Constitution of Ukraine: Law of 28.06.1996. No. 254k/96-VR. *Vidomosti Verkhovnoi Radu Ukrainu*. 1996. No. 30. Art. 141.

20. Criminal Procedure Code of Ukraine: Code of Ukraine; Law, Code of 13.04.2012 No. 4651-VI. URL: <https://zakon.rada.gov.ua/laws/show/4651-17> (Date Accessed: 26.07.2019).
21. Lazar Ya. Ownership in Bourgeois Legal Theory: Translation from German. Moscow: Yuridicheskaya Literatura, 1985. 182 p.
22. Maidanyk R. A. Problems of Regulation of Trust Relations in Civil Law. Doctoral Dissertation Abstract... of Legum Doctor. Kyiv: Taras Shevchenko National University of Kyiv, 2003. 387 p.
23. Maidanyk R. A. Civil Law: General Part. Introduction to Civil Law. Kyiv: Alerta, 2012. 472 p.
24. Michurin Ye. O. Restrictions on Property Rights of Individuals (General Provisions). Monograph. Kharkiv: Yursvit, 2007. 220 p.
25. Mozolin V.P. Modernisation of Ownership Right in the Economic Dimension. *Journal of Russian Law*. No. 1. 2011. P. 26-30.
26. Acquisition and Termination of Ownership Right in Ukraine (Problems of Theory and Practice): Monograph / Under General Editorship of V.V. Luts, academician of National Academy of Legal Sciences of Ukraine. Kyiv: Research Institute for Private Law and Entrepreneurship named after Academician F. G. Burchak at the National Academy of Legal Sciences of Ukraine. 2013. 358 p.
27. Nor V. Institute for Harm Compensation in Criminal Proceeding under the Current Criminal Procedure Code of Ukraine: Achievements and Potential for Improvement. "Law of Ukraine". 2013. No.11. P. 32-41.
28. Pobedonostsev K. P. Civil Law Course. Part I: Patrimonial Rights. Moscow: Statute, 2002. 622 p.
29. Ponomariov V.S. Ownership Right of Citizens for Living Accomodation: Issues of Limitations: Thesis Abstract of... PhD Holder in Legal Science. Moscow: the Russian State Library, 2005. 187 p.
30. Ownership Right inUkraine: Teaching Aid / O. V. Dzera, N. S. Kuznetsova, O. A. Pidoprygora; Under General Editorship of O. V. Dzera, N. S. Kuznetsova. Kyiv: Yurincom Inter, 2000. 816 p.
31. Rumiantseva V. Protection of Property of Individuals and Legal Entities in the European Court of Human Rights. Kyiv, 2004. No. 5. P. 38-40.
32. Sverdlyuk G. A. Ways of Protection of Civil Rights and Their Classification. "State and Law". 1999. No. 1. P. 16-26.
33. Sklovskiy K. I. Protection of Property from Seizure in the Administrative Order. «Business and Law» 1998. No. 7. P. 116-119.
34. Spasybo I. A. Acquisition of Ownership Right: Monograph. Kyiv: Research Institute for Private Law and Entrepreneurship named after Academician F. G. Burchak, 2009. 171 p.
35. Spasybo-Fateieva I. V. The Concept of Property, Property and Corporate Rights as Objects of Ownership Right. *Ukrainian commercial law*. 2004. No. 5. P. 9-18.
36. Spasybo-Fateieva I. V. Forms of Ownership Right. Bulletin of the Academy of Legal Sciences of Ukraine. 2009. No. 3. P. 145-154.
37. Titko I. A. Regulatory Support and Practice of Implementation of Private Interest in the Criminal Process of Ukraine: Monograph. Kharkiv: Pravo, 2015. 448 p.
38. Fursa S. Ya. Evidence and Proof in Civil Proceeding. Kyiv, KNT, 2005. 256 p.
39. Civil Code of Ukraine of 16.01.2003. Offitsiynyi Visnyk Ukrainy 2003. No. 11. Art. 461.

40. Cherniak Yu. V. On Some General Theoretical Aspects of the Concept of Judicial Practice. *Naukovi Zapysky*. Vol. 21. Legal Sciences. 2003. P. 187-203.
41. Shershenevich G. F. Textbook on Russian Civil Law. Vol. 1. Moscow: Statute, 2005. 556 p.