COLLECTION
"SCIENTIFIC BULLETIN OF THE RESEARCH INVESTIGATION
PROBLEMS OF PRE-COURT INVESTIGATION"2025-1
ISSN 2786-7900
https://doi.org/10.61417/2786-7900.2025.1.5

JUDICIAL CONTROL: TODAY'S CHALLENGES

Olena Babikova,
Director of the Research Institute of problems
of pre-trial investigation,
DS (Law), Professor
ORCID – 0000-0001-6578-9979

Igor Fedorenko,
Ph.D in law,
lawyer of DEFENSORES Law Firm
ORCID – 0000-0002-1512-7835

UDC 343.2

Abstract. The article is devoted to the study of the issue of clarifying the main content and significance of judicial control at the stage of pre-trial investigation and in other spheres of society's life in the present conditions. The principles of legality, the rule of law, ensuring the right to freedom and personal integrity, and observing human rights and freedoms, enshrined in Art. 7 of the Code of Criminal Procedure of Ukraine, recognize that in the process of conducting a pre-trial investigation and trial in criminal proceedings, violations of the rights and freedoms of both individuals and legal entities are not allowed. The central place in ensuring compliance with the law is assigned to

the court, because clear and strict compliance with the established regulatory provisions regarding the legal status of an individual is one of the fundamental requirements of legality and an important guarantee of its observance in the administration of justice. The presence of judicial control in various spheres of society acts as a guarantee of restoring the population's trust in its individual institutions and in the state as a whole. The author has studied the main aspects related to the conditions for exercising judicial control. After all, its significance lies primarily in the fact that, thanks to the activities of the investigating judge and the court, urgent judicial protection of the rights, freedoms and interests of participants in criminal proceedings is ensured, as well as the creation of appropriate conditions for the implementation of the principle of adversarial proceedings during the pre-trial investigation, and the creation of prerequisites for the reconstruction of the rule of law and civil society. Thus, judicial control is one of the processes that ensures the achievement of the goals set by the system. One of the main goals should be compliance with the basic principles of criminal proceedings defined by the Code of Criminal Procedure of Ukraine. The most important component of control is feedback. Effective control in itself excludes a formal approach. That is why such an approach, despite the workload of the judicial system, should include an individual and full-fledged approach to resolving disputes, issues, and cases that have come to court for resolution.

Keywords: *judicial control, pre-trial investigation, participants in criminal proceedings, court, exclusive competence.*

Introduction. The principles of legality, the rule of law, ensuring the right to liberty and security of person, and respect for human rights and freedoms enshrined in Article 7 of the CPC of Ukraine recognise that in the course of pre-trial investigation and court proceedings in criminal proceedings, no violation of the rights and freedoms

of both individuals and legal entities is allowed. The central place in ensuring compliance with the law is assigned to the court, since clear and strict compliance with the established normative provisions on the legal status of an individual is one of the fundamental requirements of the rule of law and an important guarantee of its observance in the administration of justice. The availability of judicial control in various spheres of society is a guarantee of restoring public confidence in its individual institutions and in the state as a whole.

Analysis of recent research results. The theoretical aspects of judicial control in criminal proceedings have been the subject of research by the following national scholars, such as: A. F. Bondiuk, A. A. Donchenko, D. P. Kislenko, Y. V. Kuzmichev, O. P. Kuchynska, M. A. Makarov, V. Y. Marchak, O. H. Rusanova, Y. V. Skrypina, O. H. Yanovska and others. At the same time, the issue of the definition and significance of judicial control remains relevant due to the existence of different approaches in the doctrine of criminal and administrative procedure and the need to improve the quality of criminal and administrative procedural legislation, as well as due to the availability of many proposals relating to amendments to procedural legislation in this aspect.

The purpose of the article is to analyse the concept and significance of judicial control at the pre-trial investigation stage and in the course of resolution of cases arising out of administrative and criminal law relations, based on criminal and administrative procedural legislation, court practice and scientific doctrine.Виклад основного матеріалу.

The theory of criminal procedure law is rich in a variety of scientific views on the concept of ‘judicial control’. This is due to the versatility and ambiguity of the legal phenomenon under consideration. The current scientific views reflect the main features of judicial control and characterise its activity side (as a direction of the investigating

judge's activity) and functional side (through ensuring the rights and interests of the participants to criminal proceedings). Judicial control in criminal proceedings is a separate area of court activity which is carried out during the pre-trial investigation by an investigating judge, and the essence of which is to control the observance of rights, freedoms and interests of persons during investigative (detective) and covert investigative (detective) actions, application of measures to ensure criminal proceedings, other procedural actions and making procedural decisions.

With regard to administrative proceedings, Articles 382-383 of the Code of Administrative Procedure of Ukraine provide for several types of judicial control over the enforcement of court decisions in administrative cases: obligation of the public authority to submit a report on the enforcement of the court decision and, based on the results of consideration of this report, as a possible option - imposition of a fine (in the amount of twenty to forty times the minimum subsistence level for able-bodied persons (part 2 of Art. 382 of the Code of Administrative Procedure of Ukraine); declaring unlawful decisions, actions or omissions committed by the defendant authority to enforce a court decision; declaring unlawful decisions, actions or omissions of the executive service body, private executor [9].

The exercise of judicial control differs in different types of legal proceedings, while at the same time, when restoring human rights and freedoms in court, similarities can be found in this process.

The significance of judicial control lies in the fact that the activities of the court and the investigating judge ensure immediate judicial protection of the rights, freedoms and interests of participants in criminal proceedings, as well as create appropriate conditions for the implementation of the principle of adversarial proceedings during the pre-trial investigation.

The human rights nature of judicial control led to the enshrining in Article 206 of the CPC of the general duties of the investigating judge to protect human rights.

According to the current CPC, judicial control has several separate areas, which, based on specific tasks, differ in procedural form, subjective composition of participants in the proceedings, means of proof, and decisions of the investigating judge.

These areas include the following:

1) consideration by the investigating judge of a motion to apply measures to ensure criminal proceedings (Article 132 of the CPC);

2) consideration by an investigating judge of a motion to conduct certain investigative (detective) actions (inspection and search of a person's home or other property, conducting an investigative experiment in a person's home or other property) and covert investigative (detective) actions (Article 246(3) of the CPC);

3) consideration by the investigating judge of complaints against decisions, actions and inaction of the investigator and prosecutor (Articles 303-306 of the CPC);

4) consideration by the investigating judge of motions for recusal (Article 81 of the CPC)

5) consideration by the investigating judge of a motion for the transfer or destruction of material evidence (Article 100(7) of the CPC);

6) consideration by the investigating judge of the motion for special confiscation and the fate of material evidence and documents in case of closure of criminal proceedings by the investigator or prosecutor (Article 100(9) of the CPC);

7) interrogation of witnesses and victims by the investigating judge during the pre-trial investigation (Article 225 of the CPC);

8) consideration by the investigating judge of a motion to set a time limit for familiarisation with the criminal proceedings in accordance with Article 290 of the CPC;

9) consideration by the investigating judge of motions for temporary and extradition arrest when deciding on the extradition of persons who have committed a criminal offence (extradition) (Chapter 44 of the CPC);

10) consideration of the investigator's or prosecutor's request for a special pre-trial investigation (Article 297-1 of the CPC) [3].

Based on the results of consideration of these issues, the investigating judge issues a ruling. During the pre-trial investigation, the investigating judge's rulings are subject to appeal, as specified in Article 309 of the CPC [3].

Despite the legislative consolidation of judicial control, its mechanisms and its limits, in practice, especially during the pre-trial investigation, at the stage of filing and consideration by the investigating judge of the defence's complaints against the actions or inaction of the prosecution, it seems that judicial control is still formal. This impression is created, for example, because interim measures in criminal proceedings, which have become widespread in society through the media, are excessive in such cases.

In such criminal proceedings, an extremely high bail amount is imposed, which is absolutely incompatible with the amount of damage caused by the criminal offence, or, conversely, a person accused of committing a particularly serious crime is imposed a too lenient preventive measure that does not meet the objectives of the criminal process as defined by the Criminal Procedure Code of Ukraine, which, accordingly, causes justified public indignation and criticism of justice, which cannot but affect the credibility of the entire law enforcement block of the state.

It should also be noted that there are cases that persistently bring to the attention of the population that in fact the court, when deciding on complaints, for example, of individuals on certain issues, including in criminal proceedings, administrative and civil proceedings, refuses to make a decision on the merits, which reduces the function of judicial control to nothing. This is clearly evidenced by the court practice. This is particularly painful for the population on the issues that are of most interest to society today. This concerns, first and foremost, the granting of deferments to men who have the grounds for this, as defined by the Law of Ukraine 'On Mobilisation Preparation and Mobilisation' and the Cabinet of Ministers' Resolution No. 560 "On Approval of the Procedure for Conscription of Citizens for Military Service during Mobilisation, for a Special Period". In order to comply with the provisions of these regulations, men apply to local CCCs with relevant applications, which must be considered within the time limit established by law. Instead, in response to such applications for deferment, men usually receive a response that they need to come to the MCC in person and submit documents again in person, although, as the court practice has already determined, a person does not have to appear in person.

The TCC, as an authority with exclusive competence, must make decisions in accordance with the requirements of the applicable law. Logically, if the TCC refuses to make a decision within its competence at the request of a person, the latter has the right to apply to the court for the latter to make a decision on the merits. At the same time, as judicial practice shows, the court, when making decisions in this category of cases, states that the authority (TCC) has failed to act. An example is the decision of 29 July 2024 in case No. 380/9669/24 of the Lviv District Administrative Court. Among other things, in its decision, the court noted that: '...Procedure No. 1487 does not specify specific ways of providing documents confirming the right to deferment of military service during mobilisation (in person, by mail, etc.), nor does it contain

provisions according to which a person liable for military service must personally come to the MCC to submit the relevant documents, as stated by the MCC in its letter of 4 March 2024.

In accordance with the Regulation on CMCs approved by the Resolution of the Cabinet of Ministers of Ukraine No. 154 dated 23 February 2022, district CMCs issue deferrals from conscription during mobilisation for persons liable for military service and reservists, and keep special records of them.

In view of the above, the TCC, as an authority competent to decide on the issue of postponement of military service during mobilisation, after receiving by mail from the plaintiff an application for postponement of military service during mobilisation and relevant documents, had to consider such an application... The defendant did not provide evidence of consideration of the plaintiff's application on the merits. The absence of a duly executed decision to grant a postponement of military service during mobilization or a reasoned refusal to grant a postponement of military service during mobilization indicates an unlawful inaction of the subject of authority.'

In these circumstances, the court concluded that the proper way to protect the plaintiff's violated right in a disputed situation is to oblige the defendant to consider the application and make a reasoned decision to grant or refuse to grant an extension based on the results of its consideration.

In its rulings, the Supreme Court has concluded that it is possible to establish judicial control after the judgement has been delivered, since the grounds are the failure to enforce the judgement delivered in favour of the plaintiff (resolutions of the Administrative Court of Cassation: in case No. 806/2143/15 of 20 February 2019 in case No. 820/4261/18 of 03.04.2019; in case No. 580/988/19 of 27.12.2019 (in which the court noted that in case of non-enforcement of a court decision, the plaintiff has the right to demand special measures of influence against the defendant - a subject

of authority, and non-enforcement of a court decision cannot be an independent subject of separate court proceedings, which indicates the active role of the court in the exercise by the parties of the rights and legitimate interests for the protection of which it made a court decision).

The following situation. Article 303 of the CPC of Ukraine provides for the right of participants in criminal proceedings to appeal against actions or omissions of pre-trial investigation bodies or the prosecutor during the pre-trial investigation. In short, this means that the participants in criminal proceedings, the list of which is set out in Art. 3 of the CPC of Ukraine, have the right, if they believe that their right has been violated or the investigator, in their opinion, has not clarified all the circumstances of the case, to file a relevant motion or appeal against certain statutory actions of the investigator or prosecutor relating to inaction of the investigator, detective, prosecutor, which consists in failure to enter information about a criminal offence into the Unified Register of Pre-trial Investigations after receiving a statement or notification of a criminal offence, failure to return temporarily seized property in accordance with the requirements of Article 169 of this Code, as well as failure to perform other procedural actions, which he/she is obliged to perform within the timeframe specified by this Code - by the applicant, victim, his/her representative or legal representative, suspect, his/her defence counsel or legal representative, representative of the legal entity in respect of which the proceedings are being conducted, owner of the temporarily seized property, other person whose rights or legal interests are restricted during the pre-trial investigation;

2) decision of the investigator, detective, prosecutor to suspend the pre-trial investigation - by the victim, his/her representative or legal representative, suspect, his/her defence counsel or legal representative, representative of the legal entity in respect of which the proceedings are being conducted;

3) the decision of the investigator or coroner to close the criminal proceedings - by the applicant, the victim, his/her representative or legal representative;

4) the decision of the prosecutor to close criminal proceedings and/or proceedings against a legal entity - by the applicant, one of the close relatives or family members, whose circle is defined by this Code, and/or the defence counsel of the deceased, the victim, his/her representative or legal representative, the suspect, his/her defence counsel or legal representative, the representative of the legal entity in respect of which the proceedings are conducted;

5) a decision of the prosecutor, investigator, or coroner to refuse to recognise a victim - by a person who has been refused recognition as a victim;

6) decisions, actions or omissions of the investigator, coroner or prosecutor in the application of security measures - by persons to whom security measures may be applied as provided by law;

7) decision of the investigator, detective, or prosecutor to refuse to satisfy a petition for investigative (detective) actions, covert investigative (detective) actions - by the person who was refused the petition, his/her representative, legal representative or defence counsel;

8) decision of the investigator, coroner, public prosecutor to change the pre-trial investigation procedure and to continue it in accordance with the rules stipulated by Chapter 39 of this Code - by the suspect, his/her defence counsel or legal representative, victim, his/her representative or legal representative;

9 - 1) a decision of the prosecutor to dismiss a complaint about failure to comply with reasonable time limits by an investigator, coroner, or prosecutor during a pre-trial investigation - by the person whose complaint was dismissed, his/her representative, legal representative or defence counsel;

10) notification of suspicion by the investigator, detective, or prosecutor after one month from the date of notification of suspicion of committing a criminal offence or two months from the date of notification of suspicion of committing a crime, but not later than the prosecutor closes the criminal proceedings or files an indictment with the court - by the suspect, his/her defence counsel or legal representative;

11) refusal of the investigator, detective, or prosecutor to satisfy the motion to close the criminal proceedings on the grounds provided for in paragraph 9-1 of part one of Article 284 of this Code - by the defence, another person whose rights or legitimate interests are restricted during the pre-trial investigation, or his/her representative [3].

As a rule, when ruling on a motion, for example, of the defence to examine witnesses, where there is a refusal of the investigator to satisfy the latter, the court does not rule on the obligation of the investigator to examine the witness, but on the obligation of the investigator to re-examine the motion of the defence. The question arises: why? After all, the investigator has already considered this motion and denied the defence.

From the above examples, for which there is more than enough evidence in the Unified Register of Court Decisions, it can be concluded that the court does not make a decision on the merits, but avoids it.

In accordance with the provisions of parts 1, 2 of Article 124 of the Constitution of Ukraine: ‘Delegation of the functions of the courts, as well as appropriation of these functions by other bodies or officials, is not allowed’, this is firstly, and secondly, ’**the jurisdiction of the courts extends** to any legal dispute and any criminal charge. In cases provided for by law, the courts shall also hear other cases.’ [1].

As we have repeatedly emphasised in our previous publications, the courts persistently avoid their constitutional duty to administer justice, and hence their

responsibility to make decisions, especially on issues of the greatest public interest today.

It is also worth noting that the armed conflict between Ukraine and Russia, among many other problems, has posed complex challenges to the Ukrainian legal system, which have fallen to domestic judges to solve. It is the readiness of judges to correctly understand the application of the provisions of current legislation and international humanitarian law to the armed conflict in Ukraine, interpretation of the relevant norms of international law and national legislation and their direct application that determines the fulfilment by the Ukrainian state of its obligations to its citizens and to the international community as a whole [10].

Conclusions. Thus, control, including judicial control, is one of the processes that ensures that the system achieves its goals. One of the main goals should be to comply with the basic principles of criminal proceedings as defined by the CPC of Ukraine. In order for the control processes to be implemented, it is necessary that the system also organises the following management processes: setting standards for the system's activities that are subject to inspection; adjusting management processes if the results achieved differ significantly from the established standards. The most important component of control is feedback. Effective control itself excludes a formal approach. That is why such an approach, despite the workload of the judicial system, should include an individual and comprehensive approach to resolving disputes, issues, and cases that have been brought to court for resolution.

At the same time, control should not be excessive, since insignificant deviations of the actual state of the object (managed system) from the set state, which cause the control mechanisms to be triggered, make the system ineffective. It is also important to note that excessive control can reorient elements of the managed system from achieving the set goals to meeting the control requirements.

List of used sources:

1. The Constitution of Ukraine: Law of Ukraine of 28 June 1996, No. 254/96 // Bulletin of the Verkhovna Rada of Ukraine, 1996, No. 30, p. 141. URL: https://zakon.rada.gov.ua/laws/show/254%D0%BA/96- %D0%B2%D1%80#Tex

3. Criminal Procedure Code of Ukraine: Law of Ukraine of 13 April 2012. 2012 // Holos Ukrainy. - 2012. - 19 May (No. 90-91): URL: http://zakon1.rada.gov.ua/laws/show/2341-14.

4. Law of Ukraine 'On the National Police': Law of Ukraine dated 02.07.2015 // VVR of Ukraine. - 2015. - No. 40-41, Art. 379. URI: https://zakon.rada.gov.ua/laws/show/580-19#Text.

5. Law of Ukraine 'On Operational and Investigative Activity' Law of Ukraine of 18 February 1992 No. 2135-XII [Electronic resource]: Official web-portal of the Verkhovna Rada of Ukraine: URI: https://zakon.rada.gov.ua/laws/show/2135-12#Text.

6. Law of Ukraine 'On Information' of 02.10.1992. [Electronic resource]: Official web portal of the Verkhovna Rada of Ukraine: URL: https://zakon.rada.gov.ua/laws/main/2657-12#Text.

7. Law of Ukraine 'On the Prosecutor's Office': Law of Ukraine dated 14.10.2014 // Official Gazette of Ukraine dated 07.11.2014 - No. 87 - Art. 2471. URL: https://zakon.rada.gov.ua/laws/show/1697-18#Text.

8. Law of Ukraine 'On the Judiciary and the Status of Judges': Law of Ukraine of 02.06.2016. No. 1402-VIII [Electronic resource]: URL: https://zakon.rada.gov.ua/laws/show/1402-19#Text.

9. Code of Administrative Procedure of Ukraine: Law of Ukraine of 06 July 2005 No. 2747-IV [Electronic resource]: https://zakon.rada.gov.ua/laws/show/2747-15#Text.

10. Respect for human rights in the context of armed conflict in Ukraine. URL: https://newjustice.org.ua/wp-content/uploads/2017/09/Report_Respect- for-HR-in-Conflict_Gnatovsky_UKR.pdf (accessed 29.12.2024).