

# THE DETERMINATION OF LIMITS OF THE JUDICIAL CONTROL IN CRIMINAL PROCEEDING UNDER THE CIRCUMSTANCES OF MARTIAL LAW

Chorna Olena

**Annotation.** *Some legislative changes in criminal procedure law under the circumstances of martial law connected with the implementation of judicial control were analyzed; some theoretical and practical aspects of changes of limits of judicial control were investigated. Legislative novels connected with the function of judicial control in criminal process can be divided into 5 groups (concerning the areas of authority): 1) changes due to which the powers were transferred (partially transferred) from investigating judges to prosecutors; 2) the change of powers of investigating judges or court during choosing, changes and cancellation of preventive measure; 3) changes in the procedure for detaining a person without decision of the investigating judge or court and report of suspicion; 4) assignment of new duties on investigating, judges; 5) other changes connected with other functions of judicial control. Due to applied derogation rights and freedom of a person concerning personal integrity, inviolability of housing, the respect to private and family life were temporary limited and the function of judicial control was weakened.*

*Limits of judicial control under the circumstances of martial law changed. these changes have multi-vector character: the limits of judicial control have been narrowed in a number of cases while they have been extended in other cases, Nowadays the limits of judicial control are not permanent, and continue to change. Recurrence to the limits of judicial control as of 23.02.2022 is very actual.*

**Key words:** *Judicial control, material law, human rights, derogation, criminal proceedings*

## 1. Problem definition:

The full seal invasion of Russian Federation onto the territory of Ukraine dtd. February, 24, 2022 caused the necessity of changes of Ukrainian criminal procedure legislation in order to provide proper functioning both bodies of pre-trial investigation and courts.

**2. The purpose of this article** is highlighting of legislative novels in criminal procedure legislation under the circumstances of martial law connected with implementation of judicial control in Ukraine and investigation of some theoretical and practical aspects of limits of judicial control changes in criminal process .

Judicial control institution has been investigated by many modern Ukrainian scientists such as I. Glovjuck, G. Kolesnyk, M. Makarov, R. Trakalo, I. Shapovalova, A. Tumaniantz and others.

However, the systematic analyses of judicial control functions and some of its aspects under the circumstance of martial law have not been investigated yet.

## 3. Main material presentation.

It is well-known that the Criminal Procedure Code (CPC) does not include the determination of judicial control. The term is mentioned only twice, exactly in item No 18, article No 3 and article No 2 (33-1) [1].

The concept, essence and limits of judicial control in Criminal Code of Ukraine is a subject of long-time scientific investigations from 1992 till now, [2, 3].

According to M.Makarov, the judicial control in criminal process is considered as the activity of the investigation judge at the stage of pre-trial investigation and during the extradition procedure due to the rules provided by Criminal Code, the power granted to him in order to ensure protection of rights, freedom and interests of citizens in criminal proceedings [4, p. 97].

Taking into account all scientific approaches and thoughts it is possible to conclude that limits of judicial control are determined by content and scope of powers as well as implementation procedure by the investigating judge during pre-trial investigation and court at the stage of trial concerning some items which are not connected with consideration of the case on the merits. Legislative novelties connected with function of judicial control and investigating judges' power which were entered during the legal regime of martial law can be divided into a few groups due to the areas of authority: 1) changes which were transferred fully or partially from the investigating judge to a prosecutor; 2) scope of powers of the investigating judge or court during the choice, change or abolition of precaution; 3) changes in order of detention of a person without the resolution of the investigating judge, court or notification about suspicion; 4) assignment of new duties on investigating judges; 5) other changes connected with judicial control functions.

Let us analyze each group in details.

#### 1. Changes which were transferred fully or partially from the investigating judge to a prosecutor.

Before 2022 it has been involved by the article No 615 of Criminal Procedure Code (in version of 2014 with changes in 2022) that the relevant prosecutor had to fulfill the mandate concerning choosing a precautionary measure in a form of detention at the turn up to 30 days concerning the person suspected in committing a crime due to Arts. No 109-111-1, 258-258-5, 260-263-1, 294, 348, 349, 377-379, 437-444 CC [5, 6].

After the beginning of full-scale Russian aggression against Ukraine some changes directed to further extension of powers of prosecutors under of circumstances of martial law were amended by the Law of Ukraine No 2111-IX dtd March 3, 2022 [7].

Therefore, such powers of investigating judges as consideration of the petition concerning temporary access to things, documents, seizure of property, granting permission for detention with the aim of court case, breaking into a home or other persons possession, search, obtaining samples for expertise, carrying out undercover investigative actions, extruding of terms of pre-trial investigation as well as choosing a precautionary measure in a form of detention concerning suspected in committing number of serious or extremely serious criminal offences were transferred to the prosecutor of the appropriate level.

The Law of Ukraine No 2201-IX dtd April 14, 2022 (item 2, p.1 No 615 article of CC) was given in another edition and expended the list of powers for prosecutors but not for investigating judges.

In particular, the range of prosecutor's power has been complemented with the right to make decisions concerning permission to detain with the aim of court case (No190 article), continue terms of pre-trial investigation (No 219 article), conduct an integration, identification in video conference mode while pre-trial investigation (N° 232 article) [8].

Due to the analysis of court orders of investigation judges placed in the Unified state register of court decisions (Register), prosecutors used their temporary powers concerning choosing a preventive measure in the form of detention in an active way [9, 10].

New changes were amended to item 2, part 1 of No 615 article of CDC by No 2462-IX law of Ukraine dtd July, 27, 2022.

While analyzing it we can consider that due to some stabilization of the situation in Ukraine and a complex of organization and legal actions (the change of territorial, jurisdiction of cases, transfer of judges to working courts) the need of prosecutor's performance of power concerning choosing a

preventive measure in the form of detention has disappeared. Consequently, the authority was regained to investigating judges and courts.

We consider that by assigning some functions of investigating judges on prosecutor under the circumstances of martial law, the legislator meant that such functions prosecutors fulfil only in case of legal or actual suspension of court work on the appropriate territory (temporarily occupied, the territory with active hostilities etc.)

The problem of possible abuse by prosecutors with delegated authority is the subject of the additional research.

It must be mentioned that Item 20-7 Part XI "Transitional provisions" of CPC (in edition of No 2462-IX Law of Ukraine dtd. July 27, 2022 includes one more imperative norm allowing temporary access to things and documents containing medicinal and bank secret, personal data and operators or providers information concerning subscribers' communication on the base of resolution of the prosecutor coordinated with the prosecutor's office [11]. Herewith the changes to Nos 162, 163 Articles of CPC determine as previously that the investigating judge makes a decision about temporary access to things and documents including protected by law secret [1].

Thus, there is a vivid inconsistency of legal norms. Besides, the hypothesis item 20-7 of "Transitional Provisions of CPC is put in such a way that it gives the possibility of abuse for prosecutors and contains the risk of arbitrary violation of human rights concerning the secret of correspondence, phone talks, prohibition of interference in personal and family life by prosecutors.

We consider that there is one more debatable and doubtful point and it is an amendment concerning including into the list of power of the prosecutor No 206 Article of CPC (in edition of № 2462-IX Law of Ukraine dtd July 27, 2022 [11], which regulates the duties of a judge concerning human rights protection which is a detection of the essence of judicial control of human rights. In other words, such an amendment is a recurrence to prosecutors' supervision and has a negative meaning (influence). It's absolutely clear that setting the function of the investigating judge on the prosecutor is a narrowing of limits of judicial control, we can state that limits of judicial control in the sphere of choosing a preventive measure and making decisions concerning conducting investigation actions (search, operations) and secret investigations were dramatically widen beginning the war but they have a steady tread to return to the pre-war period by limiting powers or depriving of power of prosecutors.

2. Changes of powers of investigating judges and courts during choosing, change and abolishing of precaution.

Part 2 of No 615 article of CPC (in the edition of No 2111-IX Law of Ukraine dtd March 3, 2022) regulated the problem of extension of validity periods of the decision of the investigating judge or the solution concerning custody [7].

Part 5 and 6 of No 615 article of CPC providing automatic extension of the validity term of the decision of the investigating judge (in edition of No 2462-IX Law of Ukraine dtd July 27, 2022) are complemented with the point about the validity of prosecutor's resolution concerning choosing of preventive measure in the form of detention in case of impossibility of conducting a preparatory court session or impossibility of consideration of the issue in a court session [11].

Application practice in such CPC provisions by investigating judges and judges is rather different.

Sometimes, investigating judges/courts use the automatic prolongation of validity period of the resolution concerning custody in such cases- lack of light and /or the Internet connection with the institutions of execution of punishment where the suspects/accused are kept [12, 13, 14] Impossibility of administration of justice by the court due to the proximity to the hostilities [15, 16]; due to other reasons [17, 18, 19].

It must be noted that the practice concerning choosing or prolongation of preventive measure is case of suspension of court work (application of remote work) in zones of active hostilities has been formed in different ways. There were cases when the prosecutor issued resolutions concerning keeping a person in custody in case of suspension of court work [9,20]; in other cases, precautions considered to

be automatically prolonged due to impossibility of administration of justice by the court (application of remote work) [15, 16].

Such an exceptional order of prolongation of precaution highlighted one more legal problem and it is the lack of the right of appeal [21, 22].

We can state that an automatic prolongation of terms of detention is an interference into human right and widening of limits of judicial control both concerning back of relevant judicial procedure of prolongation of detention and lack of legal mechanism of appeal against the decision.

The problem of proportionality of the interference into human rights is a subject to take the case in European Court of Human rights. The changes in No 2531-IX Law of Ukraine dtd August 16, 2022 to the No 176 Article of CPC, which were amended by part 7, with the content "During martial law exceptionally prosecutors are applied to the military who is suspected or accused in committing a crime due to Nos 402-405, 407, 408, 429 articles of CPC, determined by item 5 part 1 of the article is an example of narrowing of limits of judicial control by narrowing of discretion of investigating judge and court [23].

No 5 parts of the article is excluded and declared unconstitutional by decision of the Constitutional Court of Ukraine. The content of this part provided that detention in the form of personal commitment, personal responsibility, house arrest, guarantees can't be applied to the suspect or accused in committing crimes according to No 109-114-1, 258-5, 260, 261 articles of CPC.

Thus, the legislator excluded the unconstitutional rule of law from the text of the law but included the similar rule of law concerning another subject (military).

Furthermore, the legislator actually restored part 5 No 176 article of CPC which was defected unconstitutional by publishing it in another edition [25].

Changes to the CPC which regulate cancelation of preventive measure and transferring a person who is a new participant in the criminal process (prisoner of war) to the supervision of an authorized body for organization and exchange have been amended by No 2472-IX law of Ukraine dtd July 27, 2022 [26].

Powers of the investigating judge concerning cancellation of preventive measure for the military can be considered as an example of expansion of limits of judicial control.

Powers of the investigating judge indicated in No 616 article of CPC concerning cancellation of preventive measure for the aims of military conscription serving during mobilization is an example of extension of limits of judicial control under the circumstances of martial law as well [1].

3. Changes in order of detention of a person without court order, investigating judge order or report of suspicion.

The changes to No 615 article of CPC were amended by No 2201-IX Law of Ukraine dtd April 14, 2022. According to item 6, part 1 of the No 615 article of CPC in this edition the authorized person has a right to detain a person without a court order, investigating judge order or resolution of the head of the prosecutor's office in case there are available cases for detention of a person without the court order or investigating judge order defined by No 208 article of CPC, or other justified circumstances in cases giving a base to consider a possible escape for the aims of evading criminal responsibility of a person suspected in commitment of a crime at the term up to 216 hours beginning detention [8].

We consider that such legislative changes contradicted No 29 Article of Constitution of Ukraine and violated arbitrarily the right of the person for freedom and personal integrity and is an example of arbitrary interference into human right even on the circumstances of martial law. Unfortunately, the analysis of court decisions shows that investigating judges were quidded by these norms of procedural law [27].

Changes to item 6 part 1 No 615 Article of CPC were amended by No 2462-IX Law of Ukraine dtd July 27, 2022. According to it the terms of detention of a person without the investigating judge order or court order can't exceed the term determined by No 211 Article of CPC, which is 72 hours [11].

So, the conflict between norms of CPC of Ukraine is eliminated and procedure law is brought into line with Constitution of Ukraine as well as acceptable legal mechanism of participation or a person in

the court session without need of violation of terms of detention by videoconference connection was found.

Nevertheless, the law has contained anticonstitutional norm for 4 months and consequences of application can be the subject of complaints to ECHR in the future.

#### 4. Assignment of new duties on investigating judges as judicial control function.

The example of extension of limits of judicial control under the circumstances of martial law is the assignment of new duties on investigating judges.

Thus, paragraph 1, chapter 18 of CPC is amended by No 206-1 article by CPC due to the No 2429-IX Law of Ukraine dtd August 19, 2022.

According to it the suspect or accused who is kept detained and who declared a refusal to eat can be applied forced feeding on the base of investigating judge order or court order. The applying forced feeding without investigating, judge order or court order is prohibited [28].

Forced feeding on the base of the investigating judge order or court order is an absolute amendment of legislation; the analysis of Register shows that cases of this kind are not very common, though we can find ones. [29].

Due to the No 2858-IX Law of Ukraine dtd January 12, 2023 No 194 article of CPC was amended with Part 9, according to which in case the investigating judge or court establishes a fact while consideration of petition, concerning application of a preventive measure in a form of detention that a suspect or accused has a child who can be left without parental care, the investigating judge or court oblige the prosecutor to notify an authorized unit of National Police and body of guardianship and care at the location of such a child without parental care to take immediate action for temporary arrangement of the child. The information about it is specified in the resolution on choosing a preventive measure in the form of detention [30].

Such a legislative amendment is positive and is an example of relevant and necessary extension of limits of judicial control.

#### 5. Other changes concerning functions of judicial control.

By No 2472-IX Law of Ukraine dtd July 28, 2012 changes to No 225 Article of CPC which regulate interrogation during the pre-trial investigation in trial in the connection with appearing of a new participant in the process - a person in respect of whom an authorized body has made a decision of exchange as a prisoner of war, were amended [26].

By this law of Ukraine were amended changes to Chapter 24-1 of CPC. The Chapter is amended with regulation of order of special pre-trial investigation concerning a new participant of criminal process - the suspect, to whom has been made a decision of exchange as a prisoner of war [26].

The legislator regulated the appeal of decision, actions or inactivity of an investigator or the prosecutor made by them according to No 615 Article of CPC and determined the appeal mechanism [7, 11].

Besides, No 2137-IX Law of Ukraine dtd March 15, 2022 amended No 615 Article of CPC with No 8 part. According to it in criminal proceeding with no person report suspicion at the moment of implementation of Martial Law the term from the specified date to the date of terminating or abolishing the martial law is not counted towards the general term provided by No 219 article of CPC [31].

## 4. Conclusion.

In connection with full-scale aggression of Russian Federation Ukraine forced to apply derogation (waiver of its international obligations concerning guarantee of human rights and freedom) which was connected with implementation of a number of laws of Ukraine [7, 8, 32].

Derogation limited the volume of human rights and freedom in Ukraine and became one of the reasons of weakening of judicial control in criminal proceedings under the circumstances of martial law.

So, sum up we can consider that the limits of judicial control under the circumstances of martial law in criminal process have changed, these changes are of different vector character. In some cases, the limits of judicial control were narrowed while in other cases they were extended.

But the dynamic of development of criminal procedure law and tendencies of judicial practice forming prove that the limits of judicial control are not permanent at the time and continue to change. Along with it the tendency of recurrence to the ordinary legal regulation instead of extraordinary one including recurrence of functions of judicial control to the limits of pre-war judicial control is extremely relevant.

### References:

1. Criminal Procedure Code URL: <https://zakon.rada.gov.ua/laws/show/4651-17#Text>.
2. Siza N. Povnovajenn`a slidchogo suddi shodo zdijsnennja sudovogo kontrolu u kriminalnomu prozceci Ukraini. Chacopis Natsionalnogo universitetu «Ostrozka akademija». 2012, № 2(6) [in Ukrainian]. URL: <https://lj.oa.edu.ua/articles/2012/n2/12snpkpu.pdf>.
3. Shapovalova I. Zastosuvannja slidchim suddeju praktiki Jevropejskogo sudu z prav ludini pri zdijsnenni sudovogo kontrolu u kriminalnomu prozsesi: dis...081 «Pravo» / Dniprov. Der. un-t vnutr. Sprav. Dnipro, 2020 [in Ukrainian].
4. Makarov M. Sudovij control u kriminalnomu prozceci: teoretichni ta pravovi osnovi: dis.: 12.00.09 / Nazc. akad. vnutr. sprav. K, 2018. 495 s. [in Ukrainian]. URL: [http://elar.naiu.kiev.ua/bitstream/123456789/2960/1/dis\\_%D0%9C%D0%B0%D0%BA%D0%B0%D1%80%D0%BE%D0%B2.pdf](http://elar.naiu.kiev.ua/bitstream/123456789/2960/1/dis_%D0%9C%D0%B0%D0%BA%D0%B0%D1%80%D0%BE%D0%B2.pdf).
5. The Law of Ukraine № 1631-VII dtd 12.08.2014. URL: <https://zakon.rada.gov.ua/laws/show/1631-18#Text>.
6. The Law of Ukraine № 1422-IX dtd 27.04.2021. URL: <https://zakon.rada.gov.ua/laws/show/1422-20#n47>.
7. The Law of Ukraine № 2111-IX dtd 03.03.2022. URL: <https://zakon.rada.gov.ua/laws/show/2111-20#n7>.
8. The Law of Ukraine № 2201-IX dtd 14.04.2022. URL: <https://zakon.rada.gov.ua/laws/show/2201-20#Text>.
9. Unified state register of court decisions. URL: <https://reyestr.court.gov.ua/Review/104979909>.
10. Unified state register of court decisions. URL: <https://reyestr.court.gov.ua/Review/103744372>.
11. The Law of Ukraine № 2462-IX від 27.07.2022. URL: <https://zakon.rada.gov.ua/laws/show/2462-20#Text>.
12. Unified state register of court decisions. URL: <https://reyestr.court.gov.ua/Review/107798398>.
13. Unified state register of court decisions. URL: <https://reyestr.court.gov.ua/Review/107878965>.
14. Unified state register of court decisions. URL: <https://reyestr.court.gov.ua/Review/107390212>.
15. Unified state register of court decisions. URL: <https://reyestr.court.gov.ua/Review/104843994>.
16. Unified state register of court decisions. URL: <https://reyestr.court.gov.ua/Review/104638945>.
17. Unified state register of court decisions. URL: <https://reyestr.court.gov.ua/Review/108328277>.
18. Unified state register of court decisions. URL: <https://reyestr.court.gov.ua/Review/103828181>.
19. Unified state register of court decisions. URL: <https://reyestr.court.gov.ua/Review/108287737>.
20. Unified state register of court decisions. URL: <https://reyestr.court.gov.ua/Review/104738898>.

21. Unified state register of court decisions. URL: <https://reyestr.court.gov.ua/Review/108156524>.
22. Unified state register of court decisions. URL: <https://reyestr.court.gov.ua/Review/108593714>.
23. The Law of Ukraine № 2531-IX dtd 16.08.2022. URL: <https://zakon.rada.gov.ua/laws/show/2531-20#Text>.
24. Decision of the Constitutional Court of Ukraine № 7-p/2019 dtd 25.06. 2019. URL: <https://zakon.rada.gov.ua/laws/show/v007p710-19#Text>.
25. The Law of Ukraine № 2198-IX dtd 14.04.2022. URL: <https://zakon.rada.gov.ua/laws/show/2198-20#Text>.
26. The Law of Ukraine №2472-IX dtd 28.07.2022. URL: <https://zakon.rada.gov.ua/laws/show/2472-20#Text>.
27. Unified state register of court decisions. URL: <https://reyestr.court.gov.ua/Review/105580632>.
28. The Law of Ukraine №2429-IX dtd 19.07.2022. URL: <https://zakon.rada.gov.ua/laws/show/2429-20#Text>.
29. Unified state register of court decisions. URL: <https://reyestr.court.gov.ua/Review/108781575>.
30. The Law of Ukraine № 2858-IX dtd 12.01.2023 URL: <https://zakon.rada.gov.ua/laws/show/2858-20#Text>.
31. The Law of Ukraine № 2137-IX dtd 15.03.2022 URL: <https://zakon.rada.gov.ua/laws/show/2137-20#n81>.
32. Decree of the President of Ukraine № 64/2022 dtd 24.02.2022. URL: <https://www.president.gov.ua/documents/642022-41397>.

---

**Olena Chorna**

*a judge of Pokrovskiy District Court of Dnipropetrovsk region,  
a graduate of a Chair of criminal process and strategic investigations  
of Dnipropetrovsk State University on internal Affairs  
e-mail: chornayalena@ukr.net*