



An Assessment of the Various Features of Notary Acts in Enhancing Judicial Control with in the Context of Ukrainian Legislation

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Abstract. The rule remain that judicial control is very fundamental as it takes preference over notary acts as fundamental new perspective has been considered and certain features of notary as an object of judicial control have been analysed. The importance of this area stemmed from the fact that recently this topic has not been studied in the scientific works of domestic researchers. Attention has been focused on the fact that the state and legal traditions of formation of the institute of judicial control in Ukraine date back to the mid-14th century. At the same time, it has been noted that in today's conditions, judicial control over the activities of notary is inextricably linked to certain features which are important to take into account both in the course of development of the national judicial system, training of judges, and in the course of organization of notary activities. These features include: a) digitalization of notarial activities in Ukraine; b) functioning of the State registers, the successful use of which in the current conditions of the Russian-Ukrainian war is possible only through an effective cybersecurity system; c) consideration of the potential for notaries to participate in illegal schemes, which becomes especially relevant during the period of martial law. From the findings of the research one can say that the various features provided as the notary activities are concerned is really problematic as we continue to experience violations of these features which to an extent has affected the outcome of the results of this research. So from the above analysis, there is that need in ensuring that the various features establish in issue of notary should really be implemented and applicable in matters related to judicial control as far Ukrainian legislation is concerned.

Key words: notary, court proceedings, judicial control, electronic administrative decisions, electronic notary.

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1. INTRODUCTION

A sufficient standard of living of citizens is closely related to their ability to freely acquire civil rights. At the same time, as T. I. Gudz and V. V. Maltsev (2022, p. 94) argue, “in the 21st century, the issue of ensuring a sufficient standard of living of citizens and the implementation of a stable increase in its quality indicators is assigned one of the main roles in the policy of most countries of the world. In many ways, the formation of the vector of socio-economic policy of the governments of most developed countries is also associated with the implementation of this right”. At the same time, it is difficult to disagree with the fact that “the effectiveness of ensuring the rights of citizens depends on the presence of an effective mechanism for their protection and defense, the elements of which are the regulatory and legal framework, the system of authorized entities, legal instruments (forms and methods of their activities), guarantees, etc.” (Bezpalova, 2022, p. 13). In this context, the functioning of the notary public in Ukraine is of particular importance. In this case the main determinant of the development of the notary institution in Ukraine at the present stage is the continuity of European traditions and the fundamentality of legal security of civil procedure. At the same time, the organization and implementation of effective activities of notary bodies is one of the priorities of sustainable development of the state and, at the same time, another determining factor in the transformation processes of notary in the new era of digitalization. In view of this, notary in Ukraine has long become an important institution of the state and society as a whole, which carries out public legal activities aimed at protecting the rights and interests of the individual (Opanashchuk, 2020, p. 51). Meanwhile, according to the quite fair statement of Anna Manokhina (2017), “notarial activity, like any other, requires control. The need for control is explained by at least two reasons: the emergence of new problems in real legal practice, which should be identified and effectively resolved through control; prevention and resolution of conflict situations”. That is why a very important role in this process is assigned to national courts (Bandurka et al., 2023, p. 56).

Notary activities have undergone significant changes in the context of the Russian-Ukrainian war. According to Yu. V. Orlov (2023, p. 99), “Russia’s unleashing of an aggressive war against Ukraine, unprovoked and undoubtedly illegal initiation of an international armed conflict, naturally entailed a long criminal trail arising from the crime of aggression itself”, which, according to the quite rightful statement of A. V. Voitsikhovkyi and O. S. Bakumova (2023, p. 134), “led to a change in the entire security environment”. This criminal trace of the war has also affected notarial acts, distorting them and intertwining corrupt practices in them, which significantly complicates the transformation of understanding “the essence of legal institutions, their individual elements and the solution of issues of adaptation of civil legislation to European standards” (Zhornokui, 2023, p. 113). At the same time, we cannot ignore the imperfect legislation that regulates the procedure for performing notarial acts. Some scholars, for example, O. Ye. Kukhariev (2023), draw attention to certain problems in this area, in particular, “the lack of detail at the level of bylaws on the procedure for issuing a notary’s permission to receive a part of the testator’s deposit in a bank (financial institution) for the burial of the deceased, which leads to systematic refusals by notaries to perform this notarial act”. At the same time, it is important in this context to prevent notaries from negligence and abuse of authority. According to V. V. Lazariiev (2023, p. 186) states that “abuse of power balances on a fine line with an offense. Only one minor step and in some cases an act committed by the subject can be found in the relevant article of the criminal code, which turns legally neutral behavior into an offense”. At the same time, we should be aware that “the protection of sovereignty, territorial integrity, democracy, rights and freedoms of citizens depends on a set of measures for the comprehensive defense of the country, based on the ability of the country’s defense forces, national economy, infrastructure and society to resist and recover” (Getmanets, Korobtsova, 2023, p. 169). Not the least role in this context is played by the national notary, the restoration of stable functioning of which is especially important in light of full-scale cyberattacks on the state registers of Ukraine. In addition, the notary institution helps to reduce the burden on the judicial system in resolving public law disputes through mediation procedures involving qualified lawyers (Teremetskyi et al., 2023, p. 201). In view of this, it is of particular relevance to understand the fundamental features of the formation and further development of notarial activity as an object of judicial control.

The purpose of the article is to examine the features of notary as an object of judicial control. To achieve this purpose, it is necessary to solve the following tasks:

to analyze the historical development of the elements of judicial control in Ukraine;

to find out the legal basis for judicial control in the notary activities;

to study certain features of judicial control over notarial acts;

to determine certain features of notary as an object of judicial control.

The problem here is not just in putting in place the notarial features as provided by the law, but the issue here is in ensuring that this notarial features should be able to be control by the judiciary provided by the Ukrainian legislation. One thing is to establish the features of the notarial platform, the other thing is effectively controlling these activities. It will be of no use in establishing notarial features which cannot be controlled by the judiciary in ensuring that these features meet up with its expectations in the society. We do understand that the presence of the notarial features were of huge essence on the society, but of what use will these features be if it cannot be control on the society. It is really pathetic that there continue to devastating effects in the Ukrainian society because of the non-control of the notarial activities. So there is really a need in remedying the situation through an effective and efficient control system.

2. METHODOLOGY

The author's use of a set of general and special methods of scientific cognition allowed for a comprehensive study which embodies various aspects of the issues under study. The historical and legal method made it possible to trace the genesis of the institute of judicial control over notary, some of whose origins began to emerge in the Lithuanian-Polish period. The method of documentary analysis allowed us to consider such historical documents as the Lithuanian Statute of 1588, fundamental legal acts in the field of research, in particular the Law of Ukraine "On Notaries", orders of the Ministry of Justice of Ukraine and other documents, including those containing statistical information. The use of the comparative legal method made it possible to compare different stages of digitalization of notarial activities in Ukraine. With the help of analytical, structural-logical and system-functional methods, the author determined the essence of certain features of notaries as an object of judicial control, in particular, the establishment of electronic notaries; the specific nature of notaries' activities in terms of interference by law enforcement authorities; the potential for notaries to participate in illegal schemes. The problem here is not just in having a comparative study or analysis, but the issue in ensuring that the so called notarial features in Ukraine should be effectively control in meeting up the expectations of the law, as it will go a long way in remedying available problems on the ground. One is to provide the notary acts by the available legislation, and the other thing is in ensuring that such notary acts should be implemented to the latter, as we see some infelicities of the acts which have affected the Ukrainian society. With all these ramifications noticed and stated, one is forced is asking the outcome of the non-respect of these acts and it's implications it has on the state of Ukraine. This is really a frustration environment that need to be remedy.

3. RESULTS AND DISCUSSION

The relevance of studying the features of notary as an object of judicial control is due not only to the growing role of notarial activities in the context of digitalization, but also to the need to ensure its transparency, legality and adaptation to modern challenges, including martial law and transformation processes in the Ukrainian legal system (Onishchenko et al., 2023, p. 523). Consideration of this issue involves an analysis of the historical formation, current state and prospects for the development of judicial control over notary, which allows formulating new approaches to improving this legal institution. Among other things, this is due to the fact that "in the modern world, the correctness of the actions of the authorities is sometimes questioned, because society has more and more opportunities to access information about the results of the activities of government agencies. In rule-of-law states, the basic ideas of government activities are based on legal principles, such as the rule of law, legality, publicity, etc." (Pevko, 2023, p. 224). This once again further emphasizes that judicial control plays a special role in this, since

courts today are not just arbitrators in the judicial process, but are created and operate exclusively within the framework of the current legislation, within the limits of their powers. It is also worth noting that, for example, with the introduction of the current Criminal Procedure Code of Ukraine in 2012, a new participant in criminal proceedings - the investigating judge - appeared in the history of criminal proceedings. The investigating judge is authorized to exercise judicial control over the observance of the rights, freedoms and interests of persons in criminal proceedings in accordance with the procedure provided for by the CPC of Ukraine. It is also important for the investigating judge to consider motions to conduct covert investigative (detective) actions, for example, against judges, court and law enforcement officers and/or in the court premises. From the above analysis and explanation, one is been trembling in asking the basis and rationale of the notary acts and it's controlled by the judiciary. The rule here is that for an effective notary act to be implemented, the judiciary has a serious responsibility to this effect. So in this basis, one is bound in having an understanding of the various historical issues in handling notary acts in the country.

3.1. Historical aspects of the introduction of judicial control over the notary

As we can see, the role of judicial control is growing every day, since the establishment of the rule of law in Ukraine requires real establishment of the rule of law, strengthening of discipline and legality in the country, ensuring the rights, freedoms and legitimate interests of individuals, rights and legitimate interests of legal entities and other collective entities. However, despite its widespread use in the title and text of legislative and regulatory acts, the essence, meaning and specifics of state control as one of the most common ways to ensure discipline and legality in public administration are still unclear. Both in the current legislation and in the scientific literature, it is a common mistake to refer to those subjects of state control that do not have the status of state (for example, local self-government bodies). And vice versa, there are cases when all state bodies, for example, local state administrations, are not classified as subjects of state control. Quite often, state control is considered as a synonym for the terms “control in public administration”, “civil control”, “control of executive authorities”, which is also unreasonable, since state control is one of the types of control in public administration and civil control, and control of executive authorities is only one of its subtypes, which most clearly indicates its purpose and peculiarities in the state (Muzychuk, 2014).

Historically, on the territory of our country, certain elements of judicial control over the notary began to emerge in the Lithuanian-Polish period. For example, M. V. Dzhuga (2023, p. 32) notes that “the analysis of Polish-Lithuanian legislation confirms the existence of state, or rather judicial, control over the activities of officials, including those who recorded private acts in court books or made extracts from them. Criminal or civil liability was envisaged for improper maintenance of court books. For example, the correction of entries or extracts from the “governmental books” with forged signatures and seals or pasting seals from one document to another was punishable by death by burning” (Article 16, Section I of the Lithuanian Statute of 1588). At the present stage, the basis for exercising control over the activities of the notary is defined at the level of the Law of Ukraine No. 3425-XII “On Notaries” (September 02, 1993). According to Article 2-1 of this legal act, “control over the organization of the notary, inspection of the organization of notarial activities of notaries, their compliance with the procedure for performing notarial acts and compliance with the rules of notarial record keeping are carried out by the Ministry of Justice of Ukraine and its territorial bodies”. At the same time, in the context of judicial control over notaries, Article 50 of the Law of Ukraine “On Notaries” stipulates that “a notarial act or refusal to perform it shall be appealed to a court. The right to appeal against a notarial act or refusal to perform it shall be granted to a person whose rights and interests are affected by such acts”.

3.2. Difference between judicial control and other types of control

Scholars point out that judicial control “can be exercised only within a separate proceeding, and only in the context of a direct appeal to the court to resolve a separate court case. The research suggests that judicial control is a separate institution which main role is to regulate social relations in order to ensure the protection of the rights and legitimate interests of a person and a citizen. Legislative practice shows

that the institution of judicial control should be constantly evolving" (Yesimov et al., 2022). At the same time, the concept and concept of judicial review is a necessary component that helps to guarantee respect for human dignity and inviolability (Galagan et al., 2021). In the context of the issue under study, one should be aware that "judicial control is different in nature from administrative control and is determined by the tasks of legal proceedings, as well as by the status of the court as a body entrusted with the duty to ensure the rights and freedoms of all subjects of legal relations. Judicial control is based on the constitutional right to judicial protection and is more a guarantee of protection of rights than a means of influencing the notary system; it is associated with the emergence of a specific civil case, within which the question of the legality of the notary actions is clarified. Under the current legislation, the subject matter of judicial activity may include three categories of cases related to control over the activities of notaries: consideration of claims in cases of invalidation of notarized transactions, executive inscriptions, certificates of ownership, etc.; consideration of claims against notaries for compensation for damage caused by illegal or negligent actions of notaries in accordance with Articles 21 and 27 of the Law of Ukraine "On Notaries"; consideration of complaints about an incorrectly performed notarial act or refusal to perform it" (Barankova, 2015).

3.3. Judicial control over notary activities

According to K. Chyzhmar (2022, p. 9), judicial control over the performance of notarial acts is generally divided into direct and indirect. Direct control is exercised when the courts consider cases when appealing against notarial acts or refusals to perform them. This category of cases is considered by the courts in civil proceedings, and the defendant in such cases is the notary who performed the relevant notarial act (refused to perform it). The result of a court hearing in such a case is a judicial review of the notary's compliance with the law in performing a notarial act and a court opinion on the legality or illegality of the notarial act (refusal to perform it). The main purpose and end result of court proceedings in such cases is to protect the rights and legally protected interests of the parties in legal relations with the notary. Indirect judicial control is exercised when the court considers other civil cases on challenging notarial deeds and other notarial documents in court, as well as other cases in which the disputed legal relations of the parties are related to the performance of notarial acts. In such cases, the court's assessment of the legality of notarial acts is interim. The court checks whether the notary complies with the requirements of the law when performing a notarial act in order to determine the nature of the legal relations between the parties to the litigation. In this case, the main purpose of the trial is to resolve the dispute between the parties.

When studying the peculiarities of notary as an object of judicial control, special attention should be paid to the formation of electronic notary, which is based on the orientation of public administration within the state to make electronic administrative decisions. Some scholars point out that the public administration uses technology in its administrative operations, so the use of technological tools allows the administration to issue its administrative decisions through electronic means, i.e. the administration completes its legal actions through digital tools, respectively (Al Hendi, 2023, p. 240).

I. P. Khavina, Yu. V. Hnusov and O. O. Mozhaiev (2022, p. 171) note that "with the development of information technology, the provision of electronic services in Ukraine, more and more information systems are being designed and put into operation, which are subject to mandatory information security requirements. But nowadays, modern Ukrainian enterprises are increasingly focused on creating an automated system based on the integrated use of technical, mathematical, information and organizational tools to manage complex technical and economic objects where some functions are performed by humans". In this context, M. Dolynska (2023, p. 59) identifies five main stages of digitalization of notarial activities in Ukraine: the first stage covers 1996-1999; the second - 2000-2003; the third - 2004-2012; the fourth - 2013-2020; the fifth stage began in 2021 and will last for the period of implementation of the electronic notary system in the state. The author outlines the emergence and formation of a new legal institution and legal principle - the digitalization of notarial activities, without which modern notaries cannot perform their duties. The scientist argues that the newest stage of digitalization of notarial activity, which began in 2021, will end with the introduction of an electronic e-notary system in Ukrainian realities, which, with certain regional peculiarities, functions effectively in countries with a Latin type of notary. The main

obstacle to the creation of a state system of electronic notary is the war of Russia against Ukraine, and only after its victorious end should we talk about the introduction of new information technologies, including the system of electronic notary, into notarial practice. An important role in the implementation of this system should be played by ordinary notaries as its executors and implementers, as well as their professional self-government - the Notary Chamber of Ukraine (Dolynska, 2023, p. 64). When considering this feature of notary as an object of judicial control, it is worth paying attention to the functioning of the Unified Register of Notaries in Ukraine, which is a "computer database containing information on state notary offices, state notary archives and notaries of Ukraine" (Order of the Ministry of Justice of Ukraine No. 2501/5, 2010). At the same time, in their professional activities, notaries also use the "Unified Register of Special Forms of Notarial Documents, the Unified Register of Notaries of Ukraine, the Inheritance Register, the Unified Register of Powers of Attorney, the State Register of Encumbrances on Movable Property, the Unified State Register of Legal Entities, Individual Entrepreneurs and Public Organizations, the State Register of Civil Status Acts, the State Register of Real Property Rights" (Yurydychna Gazeta, 2017), which are registers of the information system of the Ministry of Justice of Ukraine. In view of this, some scholars propose that in order to effectively implement the electronic notary system in notarial practice and improve the digital literacy of notaries and their employees, the Notary Chamber of Ukraine, as a professional organization of notaries, should hold a series of seminars and webinars under the auspices of the Ministry of Justice of Ukraine (Dolynska, 2023, p. 64). It is also worth paying attention to such a feature of notary as an object of judicial control, the importance of which is currently emphasized by representatives of the Notary Chamber of Ukraine, as the fact that the activities of notaries are quite specific in terms of interference by law enforcement officials, including in criminal proceedings. Thus, "at present, there are numerous cases of violations of the rights of notaries during searches. Investigative authorities often ignore the specifics of notaries' activities, which leads to gross violations of notarial secrecy. Searches conducted in notary offices are often carried out without taking into account the provisions of special legislation. For example, investigators seize seals, notarial forms, computer equipment and archives without proper justification and without taking into account the fact that these actions can paralyze the work of a notary for a long time. There are cases when searches are conducted simultaneously in the notary's apartment and office, where the safe was broken and important documents and equipment were seized without proper inventory. As a result, notaries are deprived of the opportunity to work for several months. The legal consequences of such actions are as follows: improper storage or loss of the notarial archive may lead to the loss of the certificate of notarial activity. It is worth noting that notarial archives are the property of the state, and the notary is only responsible for their preservation" (Yurydychna Praktyka, 2024).

Thus, according to the current legislation of Ukraine, control over notary activities is possible in the following areas: 1) state registration of real rights to immovable property and their encumbrances (carried out by the Ministry of Justice of Ukraine). This mechanism is aimed at: counteracting the arbitrariness of third parties regarding illegal re-registration of real estate ownership rights without the owner's consent to a third party; obstructing the exercise of civil rights of the plaintiff as the owner of real estate to take measures to preserve their rights to real estate and exercise their civil rights, committed intentionally for a specific purpose; 2) compliance with organizational requirements for the work of a notary, in particular, his/her workplace (notary office), rules of record keeping, etc.; 3) compliance with the rules of professional ethics of notaries, which is implemented by the Notary Chamber of Ukraine; 4) compliance with tax legislation as a taxpayer by a notary.

3.4. Counteracting illegal actions by a notary

Another feature that should be taken into account in the course of judicial control over notary is the potential for notaries to participate in illegal schemes. This situation is due to the fact that "the state is subjected to a full-scale armed aggression by the Russian Federation, part of the territory of Ukraine is temporarily occupied, martial law has been introduced, and hostilities are ongoing, which will undoubtedly have serious consequences for the Ukrainian economy. However, at the same time, the economic security of Ukraine is also negatively affected by chronic, long-standing internal problems, one of which is

corruption. Throughout the period of Ukraine independence, the society and economic system of our country have been significantly damaged by thriving systemic corruption (Parfentii, 2022, p. 13). An example is the case “in which a group of individuals illegally seized the property of a foreign enterprise using forged powers of attorney. These fake documents were submitted to notaries and state registrars for registration actions, which led to further legalization of the property through resale to third parties. There is another example where a notary, abusing his authority, illegally re-registered a share of the company's authorized capital on the basis of a forged sale and purchase agreement.” As of September 2024, “the number of cases that have reached the cassation review involving notaries is small - only 9 criminal proceedings since 2019. Most of these cases resulted in acquittals or dismissal of complaints” (Yurydychna Praktyka, 2024).

The analysis of court practice indicates the need to improve the current legislation related to notarial acts. For example, in case No. 2340/3298/1811 of January 2019, Cherkasy District Administrative Court dismissed claim No. 1, as the current legislation of Ukraine does not specify the timeframe within which the authority approves the information and technological card for the administrative service it provides in accordance with the law, i.e. the legislator has not defined specific time limits for the term “timely”. At the same time, the Court agreed with the plaintiff's position that the inclusion of a document confirming the acquisition of ownership in the application for the administrative service “Registration of the application of the owner of the real estate object for prohibition of registration actions” is unlawful, since neither the Law of Ukraine “On State Registration of Real Property Rights and Encumbrances” nor any other regulatory act contains such a requirement, i.e. the defendant acted in excess of its authority.

Thus, the problem of legal liability of notaries in the current process of reforming notary in Ukraine requires proper legislative regulation. The lack of clarity in the legislation on notaries' liability indicates a lack of guarantees in the field of notarial activity, which causes possible violations of the rights of both the notary and persons applying for notarial acts. At the same time, the legal liability of a notary is complex, which also implies moral responsibility for their actions to the state and society (Myrza, 2023).

4. CONCLUSIONS

The conducted study makes it possible to define judicial control over notarial activities as a system of measures regulated by the norms of current legislation, which are implemented in order to ensure compliance of notaries' activities with established legislative norms, professional standards, ethical requirements, etc. It is no less important that judicial control over notarial activities is carried out in order to protect the rights and interests of individuals and legal entities, because it is notaries who certify legal facts, verify the legal personality of persons who apply to them, ensure the legality of transactions, therefore it is very important to prevent possible offenses and abuses in the field of notarial services. In this case, control includes not only establishing facts of violation of legislative requirements, but also provides for providing an assessment of the notary's activities, providing an assessment of the legality of the actions taken in order to identify possible violations during the performance of notarial actions. This involves both an analysis of information and verification of the material component of the notary's activities in the form of official documentation, as well as documents on taxation, etc. At the same time, the limits of control over notarial activities become important, since, firstly, the activities of notaries are clearly defined by the norms of current legislation and the procedure for exercising control in this area; secondly, by the competence and powers of the subjects of control; thirdly, by the guarantees of the activities of notaries; fourthly, by the existence of notarial secrecy.

The article identifies such features of notary as an object of judicial control as the establishment of electronic notary, in particular, in the course of implementation of the Unified Register of Notaries in Ukraine, the Unified Register of Special Forms of Notarial Documents, the Unified Register of Notaries of Ukraine, the Inheritance Register, the Unified Register of Powers of Attorney, the State Register of Encumbrances on Movable Property, the Unified State Register of Legal Entities, Individual Entrepreneurs and Public Organizations, the State Register of Civil Status Acts, and the State Register of Real Property

Rights; the specific nature of notaries' activities in terms of interference by law enforcement officials, including in criminal proceedings; the potential for notaries to participate in illegal schemes.

As for the prospects for further scientific research in the area of public relations under study, it is important to scientifically comprehend the ways to increase the digital awareness of notaries in the course of using electronic registers; to search for promising ways to raise the awareness of investigating judges, in particular, within the framework of improving the activities of the National School of Judges of Ukraine, in terms of understanding the consequences of seizure of documents which are protected by notarial secrecy.

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