

## **The legal regulation of prosecutor's office activities outside the criminal justice system according to the law of Ukraine and Poland**

The Ukrainian state is currently waiting for entering into legal force a new law „On Prosecutor's Office” (Law)<sup>1</sup>, adopted by Verkhovna Rada of Ukraine on October 14, 2014.

The main objectives of the developers of a new Act were to create a legal platform for reforming the Prosecutor's Office of Ukraine in the direction of an optimal model, meeting the requirements and recommendations of the European institutions, as well as national legal traditions of this body's (department) functioning.

This functional reforming is also due to the implementation by Ukraine its commitments to the European institutions.

According to the conclusion of the Parliamentary Assembly of European Council № 190 (1995) from September 26, 1995 concerning the accession of Ukraine to the Council of Europe, it was noted that one of the commitments that was assumed by our state, is that the role and functions of the Prosecutor's Office will be changed (especially on the implementation of the general supervisory action concerning the process of law) by transforming this institution into a body, which will correspond to the principles of the Council of Europe<sup>2</sup>.

The basis of the Act was a draft of legislation, the provisions of which have been analyzed by the European Commission for Democracy through Law (Venice Commission) in the Joint opinion CDL-AD (2013) 025<sup>3</sup> from October 14, 2013.

It should be noted parenthetically that this draft of legislation was one of several projects about the Prosecutor's Office, which have been prepared for several years.

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<sup>1</sup> Про прокуратуру: Закон України від 14 жовтня 2014 року № 1697-VII // Голос України. – 2014. – № 206. – 25 жовтня.

<sup>2</sup> Висновок N 190 (1995) Парламентської Асамблеї Ради Європи щодо заявки України на вступ до Ради Європи [Електронний ресурс]. – Режим доступу: [http://zakon4.rada.gov.ua/laws/show/994\\_590/conv](http://zakon4.rada.gov.ua/laws/show/994_590/conv).

<sup>3</sup> Joint opinion on the draft law on the public prosecutor's office of Ukraine Endorsed by the Venice Commission at its 96th Plenary Session (Venice, 11-12 October 2013) [Електронний ресурс]. – Режим доступу: <http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD%282013%29025-e>

Regarding them the Venice Commission was making its conclusions, and only the provisions of this draft of legislation, as it was noted by the Venice Commission, are considered to be much more advanced than the previous offers of changes in legislation, laying the ground work for the functioning of the bodies of the Prosecutor's Office in accordance with European standards, as well as the appropriate basis for the completion of the reform of the Prosecutor's Office of Ukraine (paragraphs 193, 196 of the Joint opinion).

In accordance with the provisions of the new Law, the functional direction of the modern Prosecutor's Office is determined by two directions of its activity: a prosecutor's participation in the field of criminal justice and the activity, carried out outside the criminal justice system, with the intention of protection of rights and freedom, also the legitimate interests of physical and legal bodies, as well as society and the state, which meet the European standards<sup>4</sup>.

Herewith, in accordance with the provisions of Article 2, part 3 of the Law, on Prosecutor's Office cannot be entrusted with responsibility, which is not provided by the Constitution of Ukraine.

At the same time, in accordance with the provisions of Article 4 "The Organization and the Functioning of the Prosecutor's Office of Ukraine", the status of prosecutors is determined by the Constitution of Ukraine, by this and by other laws of Ukraine, by ongoing international contracts, agreed by Verkhovna Rada of Ukraine.

Thus, we consider that the authorities of prosecutors can be determined not only by Law, but they must be directed to the realization of the constitutional functions of the Prosecutor's Office of Ukraine.

A legal analysis of the content of the new Law confirms that the potential of human rights of the Prosecutor's Office beyond the criminal justice is reduced in order to improve the legal regulation of the constitutional function by representing the interests of the citizen or the state in the court in cases defined by law.

Thus, the legal regulation of the constitutional function of the Prosecutor's Office, representing the interests of the citizen or the state in court, in cases defined by law, is defined by the member of legislative body in item 2, part 1, page 2 of the new Law as an interest intermediation of the citizen or the state in court in cases defined by *this law*.

This transformation of the constitutional name of the Prosecutor's Office of Ukraine in the provision of Law is a result of taking into account the recommendations of the European specialists by a member of legislative body (item 36 of Joint opinion CDL-AD

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<sup>4</sup> CM/AS(2004)Rec1604 final 6 February 2004 Role of the public prosecutor's office in a democratic society governed by the rule of law – Parliamentary Assembly Recommendation 1604 (2003) [Электронный ресурс]. – Режим доступа: <https://wcd.coe.int/ViewDoc.jsp?id=114263&Site=COE>.

(2013) 025), and at the same time the «ignoring» the provisions of the Basic Law of Ukraine, which endangers the corresponding provisions of the new Law, considering them as unconstitutional.

A demonstrated above legal inconsistency is explained in particular by the fact that Ukraine belongs to a few states-participants of the Council of Europe, the Basic Law of which, as well as the Constitution of Ukraine<sup>5</sup>, defines the functions of the Prosecutor's Office, as well as the activities outside the criminal justice system.

Incidentally, it should be noted that in the history of Ukrainian constitutionalism, the legislative projects were taken place, the purpose of which was the supplements of provisions to the Constitution of Ukraine that the Prosecutor's Office fulfills some other functions provided by law.

The grounds for such offers were the facts that the Prosecutor's Office, besides the basic (constitutional) functions fulfills a number of functions, which are derived from the main ones, but do not coincide with them (the coordination of the activities of law enforcement agencies on crime control, international cooperation).

Their reflection in the Constitution was inappropriate, according to the authors' opinions concerning the draft of legislation, so it was suggested to supplement the provisions of the Basic Law of Ukraine on the fact that the Prosecutor's Office fulfills some other functions provided by law<sup>6</sup>, which was remained as unperceived.

Moreover, the new Law as opposed to the Law of Ukraine «On Prosecutor's Office» from November 5, 1991<sup>7</sup>, which contained a provision stating that the Prosecutor's Office cannot fulfill functions, which are not provided by the Constitution of Ukraine and by this law, it has restricted the list with the functions, provided in the Constitution of Ukraine.

At the same time, the current Constitution of Poland of 1997<sup>8</sup>, as opposed to the Constitution of 1952, refused to determine the status and the place of public Prosecutor's Office in the system of state bodies all in all.

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<sup>5</sup> Конституція України: Закон України від 28 червня 1996 року № 254/к-96-ВР // Відомості Верховної Ради України. – 1996. – № 30. – Ст. 141.

<sup>6</sup> Проект Закону України «Про внесення змін до Конституції України» було обговорено на брифінгу за участю колишнього Генерального Секретаря Ради Європи Вальтера Швіммера [Електронний ресурс]. – Режим доступу: [http://www.gp.gov.ua/ua/news.html?\\_m=publications&\\_t=rec&i-d=84868&fp=381](http://www.gp.gov.ua/ua/news.html?_m=publications&_t=rec&i-d=84868&fp=381)

<sup>7</sup> Про прокуратуру: Закон України від 5 листопада 1991 р // Відомості Верховної Ради України. – 1991. – № 73. – Ст. 793.

<sup>8</sup> Konstytucja Rzeczypospolitej Polskiej z dnia 2 kwietnia 1997 r. [Електронний ресурс]. – Режим доступу: <http://www.arslege.pl/konstytucja-rzeczypospolitej-polskiej/k15/>.

Thus, by such kind of «deconstituization» of the Prosecutor's Office, a member of legislative body of Poland is given liberty in defining the place and the role of the Prosecutor's Office<sup>9</sup>.

Furthermore, the new Law makes modifications in the definition of the grounds and conditions for the realization of this function by the Prosecutor's Office, which, unfortunately, do not correspond to the provisions of the procedural legislation of Ukraine to the full extent.

The reason for this legal conflict, in our opinion, is that a member of legislative body has tried to introduce the procedural rules to the provision of the new Law, which by their legal nature must be contained in the correspondent Procedural Code of Ukraine.

Thus, the law defines the forms of implementation of this function by a Prosecutor's Office.

Under the terms of item 6, article 23 of the Law, the prosecutor, implementing the interests of the citizen or the state in court, has the right provided by the procedural law and the law regulating the enforcement proceeding:

- 1) to apply to the court with claim (petition, application);
- 2) to take effect, prosecuted on a claim (petition, application) of another person, at any stage of court proceeding;
- 3) to initiate a review of judicial decisions, including a prosecuted case on a claim (petition, application) of another person;
- 4) to take part in the proceedings in a case;
- 5) to put in a civil claim in the course of a criminal proceeding in cases and procedures, defined by a criminal procedural law;
- 6) to be involved in the enforcement proceedings in execution of decisions on case, which are fulfilled by a prosecutor, representing the interests of the citizen or the state in court;
- 7) with the permission of the court to familiarize with the materials of the case and enforcement proceedings in court, to abstract them, , to receive free copies of the documents, which are in the materials of the case or in the enforcement proceedings.

In the meantime, in accordance with the regulations of paragraph 2, part 4, article 23 of the law, the prosecutor represents the interests of the citizen or the state in court only if the court confirms the grounds for the representative office, the procedure of such

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<sup>9</sup> Сравнительное правоведение: национальные правовые системы. Т. 1 Правовые системы Восточной Европы / под. ред. В.И. Лафитского. – М.: Институт законодательства и сравнительного правоведения при правительстве РФ; Юридическая фирма «Контракт», 2012. – С. 276.

evidence is neither provided by the new Law, nor by the procedural legislation of Ukraine.

Furthermore, the Law established the dependence of prosecutor's right implementation to inspect the case in court and enforcement proceedings, permitted by the court in the commitment of such actions.

It should be stressed at the same time that none of the procedural codes<sup>10</sup>, as well as the Law of Ukraine «On Enforcement Proceedings»<sup>11</sup>, does not contain a legal regulation of the need to obtain such permission in court, which is a result of necessity to adjust regulations of the new Law with the norms of the correspondent procedural legislation.

In addition, in accordance with a paragraph 1, part 5, article 23 of the Law, the prosecutor in order to take measures to pre-trial adjustment of disputes and restoration of violated right of a citizen or of a legal interest in the state after the court's confirmation of the basements for the representative office, is entitled to address to the public and local authorities, military units, entities of state and municipal sectors, institutions of Pension Fund of Ukraine and institutions of compulsory national insurance, decisions, actions or the inactivity of which may lead to a threat of violation or likely the violation of legitimate interests of the citizen or the state, the application, which contains a statement of circumstances and the requirements, provided by the procedural law, the possibility of pre-trial adjustment of disputes. However, the current procedural legislation of Ukraine does not contain any legal regulation of such circumstances and requirements, which must be contained in the prosecutor's application about a possibility of pre-trial adjustment of disputes, making it impossible for the practical application of these provisions.

In view of the foregoing, our attention is drawn to the experience of the Republic of Poland in matters of legal regulation of relations in the sphere of matters under inquiry. As opposed to the special Law of Ukraine «On Prosecutor's Office», which contains a clear definition of functions of the Prosecutor's Office outside the criminal justice system, and the authority of prosecutors to implement these functions, the Law of the Republic of Poland «On Prosecutor's Office» from June 20, 1985<sup>12</sup> provides the prosecutors for the possibility of the implementation of other activities (*except that one, defined by this law* - M. Stefanchuk), defined in laws (paragraph 10, part 1, article 3).

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<sup>10</sup> Господарський процесуальний кодекс України від 6 листопада 1991 року № 1798-ХІІ (зі змінами та доповненнями) // Відомості Верховної Ради України. – 1992. – № 6. – Ст. 56; Кодекс адміністративного судочинства України від 6 липня 2005 року № 2747-VІ (зі змінами та доповненнями) // Відомості Верховної Ради України. – 2005. – №№ 35–36, 37. – Ст. 446; Цивільний процесуальний кодекс України від 18 березня 2004 року № 1618-VІ (зі змінами та доповненнями) // Відомості Верховної Ради України. – 2004. – №№ 40–42. – Ст. 492.

<sup>11</sup> Про виконавче провадження: Закон України від 21 квітня 1999 року № 606-ХІV (зі змінами та доповненнями) // Відомості Верховної Ради України. – 1999. – № 24. – Ст. 207.

<sup>12</sup> Ustawa o prokuraturze z dnia 20 czerwca 1985 r. z pozn. zm. [Електронний ресурс]. – Режим доступу: <http://www.arslege.pl/ustawa-o-prokuraturze/k42/>.

In accordance with article 2 of the Law of the Republic of Poland «On Prosecutor's Office», the main objective of the Prosecutor's Office is a protection of course of law and a control of prosecutions.

These tasks are fulfilled by a Prosecutor-General and his subordinate prosecutors by submission of claims in criminal and civil cases, as well as by filing of applications and participation in judicial proceedings, cases concerning labor relations and social insurance, if it is required in order to protect the course of law and public interests, property, or the rights of citizens (paragraph 2 part 1 article 3); appealing of court judgement of illegal administrative actions, as well as participation in judicial proceedings with regard to compliance of such law decisions (paragraph 6 part 1 article 3); implementation of other activities defined in laws (paragraph 10 part 1 article 3). In accordance with the regulations of article 42 of this law, the prosecutor's participation in civil and administrative proceedings, in the matters of law violation, as well as in other proceedings, is determined by special laws. Thus, it should be marked that the legal regulation of Polish legislation concerning the authorities of the prosecutor in the correspondent industries outside the criminal justice system, enables to avoid conflicts between the rules of proceedings and substantive law, which may occur in the legislation of Ukraine.

On the other hand, in our opinion, the legal regulation of the authorities of the Prosecutor's Office outside the sphere of criminal justice under the law of Ukraine is more consistent with the provisions of Recommendation CM / Rec (2012) 11 of the Committee of Ministers of the Council of Europe (CM CE) to states-participants «On the Role of Public Prosecutors Outside the Criminal Justice» adopted by the Cabinet of the Council of Europe on September 19, 2012 on the 1151th meeting at the level of deputy ministers<sup>13</sup>, in particular, concerning the fact that the duties and authorities of public prosecutors outside the criminal justice system must in all cases be established by law and clearly defined in it in order to avoid ambiguity.

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<sup>13</sup> Recommendation CM/Rec(2012)11 of the Committee of Ministers to member States on the role of public prosecutors outside the criminal justice system [Электронный ресурс]. – Режим доступа: <https://wcd.coe.int/ViewDoc.jsp?id=1979395&Site=CM>