

Formation of a Qualitative Prosecutors Corporation Based on European Standards as One of the Factors of Increasing Efficiency of Crime Combating in Ukraine



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Abstract. *It was formulated six main institutional drawbacks in the construction of a system for the formation of the prosecutor's corps in Ukraine, requiring a legislative solution: the dependence of the Prosecutor General on political bodies; absence of the majority of prosecutors elected by their colleagues as part of the qualification-disciplinary commission of prosecutors; the lack of a regular assessment of the performance of official duties by prosecutors on the basis of pre-established and objective criteria, as well as transparent and more detailed regulation of the increase / career advancement of prosecutors; fuzzy formulation of disciplinary offenses, the need to expand the list of available disciplinary sanctions, increase the statute of limitations of prosecutors' involvement in disciplinary liability; failure to take into account the experience of member states of the Council of Europe on certain significant moments in the construction of a system for the selection of prosecutors; the institutional dependence of the Prosecutor's Office of Ukraine and the Qualifications and Disciplinary Commission of Prosecutors from the General Prosecutor's Office of Ukraine.*

Keywords: *crime criminality; prosecutor's body; European standard; authorities of the prosecutor's self-government; Board of Prosecutors of Ukraine; Qualifications and Disciplinary Commission of Prosecutors.*

Problem statement

Although the relationship between the prosecution corps and the effectiveness of the fight against crime seems obvious, solving this problem is not an easy task. Today, the focus for identifying individual correlations in this relationship is significantly shifted from the statistical indicators of the state of crime and the work of prosecutors in coordinating the counteraction of crime towards the formation of a high-quality prosecutorial corps and ensuring proper working conditions for a particular prosecutor. It is the quality and working conditions of the prosecutor that is the cornerstone on which the whole mechanism of the further influence of the prosecutor's corps on the state of counteraction to crime in the state is built.

Analysis of recent research and publications.

Among Ukrainian scientists, the issues of staffing the prosecution authorities of Ukraine and the experience of other countries in this were studied by O. Dolhyi, I. Koziakov, O. Lytvak, I. Nazarov, Yu. Polyanskyi, A. Pronevych, O. Tolochko and others.

The purpose of the article is to provide a theoretical understanding of the optimal organizational and legal characteristics of a modern legal structure for the formation of a high-quality prosecutor corps in Ukraine. In this context, new institutional mechanisms for the formation of this corps are considered as

one of the factors for improving the impact of prosecutors on the effectiveness of countering crime.

Presentation of the main research material.

According to F. Fukuyama, “public sector organizations provide primarily services, and service sector productivity is extremely difficult to measure and evaluate. It is difficult to monitor and report in private sector organizations, but at least there is a profit criterion, while there is almost no specific assessment of the product in the public sector. Since the latter cannot be accurately measured, then ultimately there can be no formal mechanism for ensuring transparency and accountability” [1].

The foregoing demonstrates that it is impossible to assess the quality of the prosecution corps and the effectiveness of its activity as a whole, as well as of any other corps of public servants. The main problem with this is that the assessment can not be given for specific periods of time, and only public opinion is the measure. Moreover, it is difficult to separately evaluate the effectiveness of the work of the prosecutor’s office alone, not in the context of the work of the entire justice system and law enforcement agencies, because for the society the “end product” of this activity of the state is a feeling of legal security from criminal encroachments authorities in the fight against crime on the other. The definition of who in this system is the “weak link” and for whatever reason, is mainly based on subjective impressions. Even experts who conduct research in this field have different opinions on this issue.

A narrow list of tasks that are solved thanks to existing methodologies for evaluating the effectiveness of the work of prosecutors as a whole is recognized by Ukraine’s European partners, noting that this process has limited goals, namely, to improve resource management and assist in the allocation of funds [2].

So, although the relationship between the prosecution corps and the effectiveness of anti-crime seems obvious, but solving this problem is not an easy task. Today, the focus for identifying individual correlations in this relationship is significantly shifted from the statistical indicators of the state of crime and the work of prosecutors in coordinating the counteraction

of crime towards the formation of a high-quality prosecutorial corps and ensuring proper working conditions for a particular prosecutor. It is the quality and working conditions of the prosecutor that is the cornerstone on which the entire mechanism of the further influence of the prosecution corps on the state of counteraction to crime in the state is built.

The formation of the prosecution corps in accordance with European standards complies with the foreign policy course of Ukraine for entering the European legal space and fulfilling the criteria to be met by the candidate countries for accession to the European Union (Copenhagen criteria) [3].

One of the stages of the implementation of this course was the publication of the Decree of the President of Ukraine of May 20, 2015 No. 276/2015, which approved the Strategy for reforming the judicial system, legal proceedings and related legal institutions for 2015–2020 [4].

The strategy proceeds from the fact that in Ukraine there is a problem of insufficient level of functional independence and the virtues of prosecutors, there is a need for more developed tools for performance management, much more stringent ethical requirements and disciplinary rules for prosecutors. By addressing the problem is to achieve a balance between independence, authority, responsibility and effectiveness of the prosecutor’s office, including through changes to the management of the prosecution system, appointment procedures, performance management and professional and continuous training systems.

The further work led to the adoption on June 2, 2016 by the Verkhovna Rada of Ukraine of the Law of Ukraine “On Amendments to the Constitution of Ukraine (on Justice)” [5], which entered into force on September 30, 2016. This Law defines not only the new constitutional and legal status of the prosecutor’s office, but also constitutional foundations were laid for solving a number of important issues on the formation of the prosecution corps on principles that comply with European standards in this field and the status of prosecutors as representatives of the justice system.

According to Article 131 of the Constitution of Ukraine [6], in the justice system, in accordance with the law, bodies and institutions must

be established to ensure the selection of prosecutors, their training, evaluation, and consideration of cases for their disciplinary responsibility.

At the same time, it should be noted that the current Law of Ukraine “On the Prosecutor’s Office” [7] (Law), which was adopted in October 2014, although received at one time positive feedback from leading European institutions that assist Ukraine in legal reforms [8], but still not aligned with constitutional amendments.

The analysis of the norms of the Law allows to conclude that they provide for the existence of three types of subjects of administration of the prosecution system (synonyms – management, administration, management). The first is the traditional one, represented by prosecutors who occupy administrative posts, and personifies the hierarchy of the prosecution system. The activity of this group of managers is primarily aimed at fulfilling the functions of the prosecutor’s office. The second is represented by the bodies of the procurator self-government and personifies democratic self-governing principles of governance. The activity is aimed at solving internal issues of the prosecutor’s office activities. The third is represented by the prosecutors qualification and disciplinary commission (hereinafter referred to as the Commission). Its functions are part of those functions that must be performed by the judicial system authorities, referred to in the above art. 131 of the Constitution. These functions were previously performed by the first of the indicated group of administrative subjects, the consequence of a significant limitation of such guarantees of the prosecutor’s activities, as his independence, and the principle of transparency in the activities of the prosecutor’s office. Therefore, a separate body of the prosecutor’s office was created with special competence in the formation of the prosecutor’s corps – the Commission.

The last two groups of subjects are also new elements of the mechanism of checks and balances, as the main means in the rule of law to prevent excessive concentration of power and abuse of it, which for a rather long historical period was characteristic of the activities of the Ukrainian prosecutor’s office.

In total (but not fully), the current model of the formation of the prosecutor’s corps complies with European standards [9], thanks to the transfer of most of the career prosecutors’ issues to the competence of the Prosecutors Council of Ukraine and the Commission. For this purpose, the European practices of creating special institutional mechanisms to ensure the functional independence of prosecutors are taken as examples.

Institutions of a similar legal nature are created in many European countries, which include the High Office of Public Prosecutor of Albania, the National Council of the Prosecutor’s Office of Poland, the State Procurator’s Council in Serbia, Croatia and Slovenia, the High Council of Prosecutors of Moldova and Portugal, the Prosecutor’s Council of Georgia and Spain, and also the Council of the Prosecutor Generals of the Netherlands.

At the same time, the most important novelty for the Ukrainian prosecutor’s office was that the powers to establish the bodies responsible for the formation of the prosecutor’s corps were received by the prosecutors themselves through the bodies of the prosecutor’s self-government. Such a mechanism is currently essential to avoid attempts to exert political influence on the activity of prosecutors, which is a serious problem for Ukraine and served as a reason for the low efficiency of the work of prosecutors on combating corruption, especially at higher levels of state power. Prosecutors’ career will continue to depend not on the Prosecutor General, but on the appointment and dismissal of which political mechanisms are preserved, and on bodies formed on a non-political basis.

Thus, the Council of Prosecutors of Ukraine consists of thirteen members, of which eleven prosecutors appoint an all-Ukrainian conference of prosecutors, and two – a congress of representatives of legal higher educational institutions and scientific institutions. Only on the advice of the Council of Prosecutors of Ukraine, the Prosecutor General has the right to appoint or dismiss prosecutors who occupy the most influential administrative posts in the prosecutor’s office, such as Deputy Prosecutor Generals, heads of regional prosecutors and their deputies, heads of local public prosecutors. At the same time, the Prosecutor General has

the right to reject the recommendations of the Council.

As part of the Commission, only five out of eleven members are prosecutors appointed by the All-Ukrainian Conference of Prosecutors. Two other persons (scientists) appoint a congress of representatives of higher educational institutions and scientific institutions; one person (lawyer) appoints a congress of lawyers of Ukraine; three persons are appointed by the Commissioner of the Verkhovna Rada of Ukraine on Human Rights in consultation with the Verkhovna Rada of Ukraine Committee, whose authority includes the organization and activities of the prosecutor's office. The minority of prosecutors in the Commission was due to fears of closure of the prosecution system.

The powers of the Commission include determining the level of professional training of persons who have expressed their intention to take the post of prosecutor, and resolving issues of disciplinary liability, transferring and dismissing prosecutors from post. In addition, in case of dismissal of the Prosecutor General by administrative post by the President of Ukraine or termination of his powers in an administrative position as a result of the Verkhovna Rada of Ukraine expressing no confidence in the Prosecutor General, the President of Ukraine or the Verkhovna Rada of Ukraine, respectively, will obtain from the Commission an opinion on the performance of professional duties by the Prosecutor General.

Regarding this, attention should be drawn to the Report on the results of the 4th round of evaluation of corruption prevention among MPs, judges and prosecutors in Ukraine, compiled by experts of such a body of the Council of Europe as the Group of States against Corruption (GRECO) and approved by the 17–23 of June, 2017 [10].

First, GRECO is concerned at the fact (p. 209 of the Report) that the dependence of the Prosecutor General on political authorities may jeopardize the independence of the prosecutor's office and recommends that due consideration be given to reviewing the appointment and dismissal of the Prosecutor General in order to make this process more durable to the political influence and more focused on objective

criteria of professional qualities of candidates (the Venice Commission also notes) [11].

Secondly, GRECO is concerned (p. 216 of the Report) that current legislation does not ensure that most of the seats in the Commission will have prosecutors. This distinguishes the situation in Ukraine practically from all the GRECO states that have formed similar bodies. Ensuring that most of the public prosecutors in the Commission are selected by their colleagues is an appropriate measure that will help them to fully defend their legitimacy and credibility, and to strengthen their role as the guarantor of the independence and autonomy of prosecutors. As a result, GRECO recommends that changes be made to the provisions on the composition of the Commission to ensure that most of the seats are held by prosecutors chosen by their colleagues.

Thirdly, GRECO drew attention (p. 228 of the Report) to the fact that in Ukraine there is still no statutory regular assessment of the performance of official duties of prosecutors on the basis of pre-established and objective criteria, while ensuring that prosecutors have sufficient opportunities to participate in the evaluation process. The establishment of formal mechanisms for assessing the performance of official duties will not only ensure the possibility of proper monitoring and evaluation of the work of prosecutors, but will also contribute to the creation of a more objective and transparent mechanism for promotion, free of any inadequate influence. In the context of Ukraine, this is especially important given the frequent allegations of political interference and the low level of public confidence in the prosecutor's office. Regular assessments of the performance of official duties in the prosecutor's office should provide guarantees of procedural justice, allowing prosecutors to express their views on their assessment. Such assessments will, of course, have a positive effect on the quality of the promotion process. In this regard, GRECO also recommends the introduction of more detailed regulation on the promotion / career advancement of prosecutors in order to ensure uniform, transparent procedures based on clear and objective criteria, in particular the candidate's prior achievements, and to ensure that any decisions on raising / raising growth

were substantiated and could be challenged (p. 223 of the Report).

Fourthly, with regard to the implementation of the Commission's responsibility for addressing the disciplinary liability of prosecutors, GRECO drew attention to the need to provide more clear wording of disciplinary offenses concerning the behavior of prosecutors and their compliance with ethical standards; to expand the list of available disciplinary penalties in order to increase their proportionality and effectiveness; to increase the limitation period of prosecuting prosecutors to disciplinary liability, which is now only one year.

In our opinion, this list of problems with formation of the prosecutor's corps in Ukraine, which are mentioned in GRECO, should be supplemented by two others.

The first concerns the selection of prosecutors.

Although the Council of Europe member states have different legislative arrangements for the selection of prosecutors, most of them have some common features that are absent in the Ukrainian selection system, which significantly reduces its effectiveness, namely:

1. A non-differentiated approach to candidates for a post of prosecutor, depending on the experience (work experience) of work in the field of law in determining the length of special training, on the one hand, and unequal conditions for access to the profession of prosecutor when appointing to positions in local and specialized prosecutors, on the other hand.

2. Lack of the opportunity to obtain the relevant experience (experience) in the field of law, which is required as a mandatory qualification for appointment by the prosecutor of the local prosecutor's office, directly in the prosecutor's office.

3. Preparation of the qualifying examination for candidates for the positions of prosecutors of the local prosecutor's office and determination of their place in the rating for filling vacant positions before the start of special training, and not after its completion.

4. The lack of norms in the legislation implementing the "competent" approach to the selection of prosecutors is determined by the bodies that should develop and approve profiles of prosecutors' offices, in particular, the profile of the office of the prosecutor of the local prosecutor as the basis for, firstly: the formation of mutual expectations between the candidate for the vacancy and future employer – the prosecutor's office, as well as an understanding of the needs of the latter from the Commission; and secondly, the development of a qualifying examination program, a plan and a special training program and the corresponding assessment methods.

The second problem concerns the institutional dependence of the prosecutorial authorities and the Commission on the leadership of the prosecutor's offices, which raises doubts both from the public and prosecutors about the functional independence of these bodies. Thus, the legislation for the Council of Prosecutors of Ukraine and the Commission does not provide for the possibility of their influence on solving issues related to the financing of their activities, the availability of separate premises, their own auxiliary staff. All these issues are solved by the General Prosecutor's Office of Ukraine. The members of the Prosecutor's Office in Ukraine are ordinary prosecutors who carry out their duties on a voluntary basis. Members of the Commission, albeit working on a permanent basis, however, determine and pay the wages of the General Prosecutor's Office of Ukraine.

Conclusions

In our opinion, the ways of solving all these problems are to amend the current legislation of Ukraine. Since the positive effect of improving staffing is always remote in time, the delay in legislative changes to improve the quality of the prosecutor's corps can also be considered a negative factor in the effectiveness of counteraction to crime.

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