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ON CURRENT PROBLEMS IN REFORMING OF UKRAINIAN PROSECUTOR'S OFFICE

Abstract

In the article have been raised some problems emerged in the course of reformation of Ukrainian prosecutor's office. Proposal has been brought forward to retain in the gestion of prosecutor's office the function of supervision as for the keeping within the law service activities by bodies performing operative and search missions, inquest, pre-trial investigation as well as the function of observance of legal standards while execution of court decisions with elimination of supervisory function of keeping the laws declared in Article 1 of the Law of Ukraine "On Prosecutor's Office"

Keywords

prosecutor' office, functions, supervision

Statement of the problem

Resolution №1862 (2012) "On functioning of democratic institutions in Ukraine" passed on Jan. 26th 2012 by the Parliamentary Assembly of the Council of Europe has stated that the Assembly regrets in connection with the fact that Ukraine made no attempt to reform the prosecutor's office in accordance with norms of the Council of Europe in spite of the point that such a reform still belongs to the obligations adopted by Ukrainian side at the moment of her joining [1]. The Plan of Actions in 2011-2014 prescribed for Ukraine by the Council of Europe has noted that there is a need in support for reforming of prosecutor's office minding quite substantial number of cases in which the European Court on Human Rights has found violations of Articles 2, 3, 5, 6 of European Convention on

Human Rights.¹ Some of the decisions testify that Prosecutor General's Office is in want of complex and deep reform [2]. The problem of reforming of prosecutor's office accordingly to European standards has become especially actual in this context.

Solution of the problem requires first of all a theoretical substantiation for the legal status of prosecutor's office and its tasks as good as for function of prosecution, institutional principles and organizational laying in the context of eurointegrational paradigm as a strategic priority of Ukrainian policy.

The analysis of recent research and publications

Problem field of reform in prosecutor's office has attracted attention of B.Voytsyshen, V.Dayev, V.Dolezhan, O.Dragan, O.Yelyzarov, O.Ishchuk, V.Kozhevnikov, T.Kornyakova, V.Kosyuta, O.Koshman, V.Kravchuk, P.Kulagin, A.Lapkin, O.Lytvak, V.Maluga, I.Marochkin, V.Mykolenko, O.Mykhailenko, M.Mychko, S.Novikov, V.Nor, I.Ozersky, I.Oryshchenko, Y.Polansky, Y.Popovych, V.Sukhonos, V.Tatsiy, O.Tolochko, V.Chirkin, P.Shumsky, N.Tsakadze, M.Yakymchuk and other authors. Nevertheless, no enough attention had been paid to conceptualization of reform of prosecutor's office in the context of eurointegrational processes.

The purpose of this study

The aim of the present paper is identification of components that would act in favor of prosecutor's office reform in eurointegrational dimension.

¹ Resolutions 1862 (2012) Parliamentary Assembly of the Council of Europe "functioning democratic ynstytutov in Ukraine" from 26 January 2012 year [electronic resource]. - Access http://zakon2.rada.gov.ua/laws/show/994_a57

The main material of the study

In space of theory to the most important issues appertain that of grounding for legal status of the prosecutor's office itself.² There is rather widely spread view that ascribing the prosecutor's office to executive branch of power might lead to political dependence of institution and changes in its legal nature [3]. Notions have been expressed that in this case would be ruined its socio-economic significance [4]. According to Y. Popovych' statement, the experience of activities by national prosecutor's office shows that leading functionaries and officers quite often had been turned into true hostages of some or other political situations and in key moments of Ukrainian history were perceptible to essential pressure by representatives of different branches of power [5, p. 81]. As for our position, in this issue there is a need to appeal to Recommendation №2000 (19) by the Committee of Minister of the Council of Europe,³ a document declaring that in case if prosecutor's office be a part of government or subordinate to it, a state is to guarantee the point that the government's volume of plenary powers and attitude toward a prosecutor's office are to be established by law; the government realizes its authority functions openly and accordingly to international agreements, national legislation and general principles of law; governmental general directions are to be presented in the written form and published in due way; in case of governmental authority for release of directions as for raising of a cause those are to contain guarantees of openness and fairness accordingly to national legislation; written direction are to be explained in due way, especially if those differ from the prosecutor's recommendations and passed forward subordinately; to concern for addition of explanations and directives to case materials etc. [6]

² *Council of Europe Action Plan for Ukraine for 2011 - 2014 years [electronic resource]. - Access http://hub.coe.int/c/document_library/get_file?uuid=24875c00-6299-4c4f-9bd*

³ *Ovcharenko A. Reform of Public Prosecution in Ukraine - possible trends and international experience / Anton Ovcharenko [electronic resource]. - Access http://www.younglawyers.org.ua/view_comms/141*

There are some proposals as for including a prosecutor's office into the sphere of court power [7]. Notions concerning a prosecutor's office functioning as an autonomous system of state bodies adjacent the court power have been expressed [8]. Groundings have been made for introduction of prosecutor's office as a separate branch of power [9; 10; 11]. A prosecutor's office is treated as a kind of state power [12, p.5]. There are ideas as for reformation of a prosecutor's office into a component of controlling and supervising branch of power.

In this contents there is need to note that there are different models of prosecutor's office in the world. In France, Netherland, Denmark, Poland, Romania, Israel, Japan, Estonia, Syria prosecutor's belong to Ministries of Justice. Magistrates of Prosecutorial Corps represent executive as well as court powers in Belgium and at the same time make a part of Belgian Corps of Judges.⁴ In Albania the prosecutors are organized into a centralized body and co-operate with a court system. In Bosnia and Herzegovina a prosecutor's office acts as an independent state body etc. In this connection an accent is to be put on the next point: Conclusion № 3 (2008) by Consultative Counsel of European prosecutors has underlined the claim that there are no common international legal norms and rules as for the tasks, functions and organizational structures of a prosecutor's service.⁵ Each state has possessed quite sovereign right to determine own institutional and legal procedures aiming to realize governmental functions in defense of human rights and state interests on the level of national and international obligations as well as in keeping the supremacy of law as a fundamental principle. Harmonization of different systems used nowadays by "broader Europe" has been based upon regulations of Convention on the defense of human rights and principal liberties including the Law of Precedence by the European Human Rights Court [13]. The

⁴ Popovici EM Ways of Prosecution of Ukraine / EM Popovici. - H.: Tornado, 2009. - 352 p.

⁵ Yakymchuk M. Current issues of transformation functions prosecution and its role in the government of Ukraine / Nicholas Yakymchuk // Office of Ukraine: history, present and prospects: Proceedings of the International Scientific Conference (Kyiv, Nov 25. 2011..) - Kyiv: National Academy of Prosecution of Ukraine, 2012. - S. 35 - 39.

variety of models for prosecutor's offices has been treated in the Answer of the Committee of Ministers to Recommendation of PACE №1604 (2003) [14]. In Commentary on Recommendation №2000 (19) of the Committee of Ministers the accent has been put on the point that no attempts for unification of existing systems or creation of any supranational – in this strict meaning – body should be considered.

To the most important issues has belonged one as for the functions of a prosecutor's office. Consent has been reached in the statement, that "groundless change in complement and character of functional activities of a prosecutor's office can reduce the effectiveness of its position in the sphere of national security [15, p.6]. On this plate there is a need to stress the problem field of a supervisory function as a duty of prosecutor's office. In accordance with provisions of Article 121 of the Constitution of Ukraine the prosecutor's office of Ukraine is entrusted with 1) the support of state prosecution in the courts; 2) the court representing of a citizen's or state interests in cases defined by law; 3) supervision after keeping the law by bodies that conduct operative search activities, inquiry and pre-trial investigation; 4) supervision after keeping the law during the execution of court verdicts in criminal cases as well as while the usage of other means of compulsory character and measures connected with limitations of citizens' personal liberties. In Chapter XV, paragraph 9 of Transitional regulations to the Constitution there is indication that the prosecutor's office has to continue in accordance with current legislation the execution of supervision after keeping and usage the law as well as function of the preliminary investigation – until the new laws regulating the activities of state bodies as for the control after keeping the laws will be brought in operation and the formation of a system of pre-trial investigation will be completed and the laws that regulate its functioning will be adopted and activated.⁶

⁶ Recommendation Rec (2000) 19 of the Committee of Ministers to member states on the role of public prosecution in the criminal justice system (6 October 2000) [electronic resource]. - Access <https://wcd.coe.int/ViewDoc.jsp?id=1568277&Site=DC>

After the entering into force of the Law of Ukraine "On insertion of changes to the Constitution of Ukraine" issued on Dec. 8th 2004 had been introduced paragraph 5th, in accordance with which to the gestion of prosecutor's office in fact had been left general supervision only. The mentioned function had caused criticism from the side of Venetian Commission.⁷ Critical voices had underlined the point that during acceptance of Constitution in 1996 a notion was spread as for expectant short-term command of the prosecutor's office in functions of supervision after keeping and usage the law as well as the function of preliminary investigation. The remark had been made that in 2004 to the Article 121 was added a statement charging the prosecutor's office with fifth function: "supervision after keeping a human's and a citizen's rights and liberties, keeping in mentioned issues the law by the bodies of executive power, bodies of local self-government, officers and service persons". In Conclusion of 2004 as for the corresponding statements of the Law on Prosecutor's Office the Venetian Commission noted that mentioned function was to be considered as unacceptable. It reflects a proposal aimed to introduce the emendation to Constitution, that had been presented to Verkhovna Rada (Supreme Counsel) in 2003 and got no required number of voices in its favor. In Conclusion as for the project of emendations to Constitution (CDL-AD (2003)19) the Venetian Commission had appealed the Verkhovna Rada to decline the acceptance of the mentioned emendation and Constitutional Court of Ukraine had expressed the doubts concerning correspondence of the emendation to the principle of division of power mandates. Nevertheless in the project of law (2009) a proposal had been made to pass this function to the prosecutor's office. Hence in Conclusion as for the project of the law "On the prosecutor's office" issued in 2009 there was note, that its acceptance would in result cause establishing of prosecutor's function with constant character, although earlier,

⁷ Kravchuk VM Prosecutor of Ukraine as a public authority: institutional and legal aspect dis. for the sciences. degree candidate. Legal. sciences: 12.00.10 / Valeriy Kravchuk. - K., 2012. - 224 p.

accordingly to Transitional regulations to the Constitution it was considered to be only temporary.

A notion is to be made here, that no criticism could be expressed as for supervision after keeping the law by bodies carrying out operative search activities, inquiry, pre-trial investigation as well as supervision after keeping the law during the execution of the court verdicts. In this connection we consider as quite expedient the support for the project of the law of Ukraine "On the prosecutor's office" prepared by the Commission for strengthening of democracy and approved by 92nd Plenary Session of Venetian Commission, document №667/2012.⁸ In the Project has been made explicit indication that bodies of prosecutor's office should be charged with: 1) supervision after keeping the law by bodies that conduct operative search activities, inquiry and pre-trial investigation; 2) support of the state prosecution in courts; 3) supervision after keeping the law during the execution of court verdicts in criminal cases as well as while the usage of other means of compulsory character and measures connected with limitations of citizens' personal liberties; 4) representation of person's or state's interests in courts in certain cases defined by the Articles 61 and 62 of the present Law [17]. This situation corresponds to Recommendation 1604 of the Parliamentary Assembly of the Council of Europe that has recognized the practice of supervision after the proper functioning of bodies responsible for investigation of breaking of the law and for persecution of delinquents [18].

The next quite important component bringing the shape to the problem of reforming of the prosecutor's office is the issue of non-criminal functions of prosecution.⁹

In Recommendation №2000/19 of the Committee of Ministers of the Council of Europe presented to member-countries and titled "Concerning the role of prosecutor's office in

⁸ Talochka A. Reform of Prosecution of Ukraine: institutional perspective / Alexander Talochka // Office of Ukraine: history, present and prospects: Proceedings of the International Scientific Conference (Kyiv, Nov 25. 2011..) - K., 2012. - S. 45 - 49.

⁹ Chyrkyn Kontrolnaya authority VE / VE Chyrkyn // State and Law. - 1993. - № 4. S. 18 - 20.

the system of criminal justice" there was a note claiming that prosecutor's service is a state's body working in the name of public and ensuring the legitimate nature for the usage of law in public interests in case if breaking of the law entails criminal penalty taking into consideration the person's rights on the one hand and demand for efficiency of criminal justice on the other. At the same time in Commentary to this paragraph of Recommendation more exact definition had been placed concerning the expression "in case if breaking of the law entails criminal penalty" as one that signified the criminal law in the broader sense of word. The term "criminal law", as Commentary had set it forth, was not used, as many persons associated it with criminal codices, especially at the time, when constantly grown sphere of law was defined as "criminal" not because of its possible connections with which-so-ever law considered as "criminal",¹⁰ but rather in the view of criminal sanctions, mentioned in its provisions. Stress should be put on the point that in Recommendation of PACE №1604/2003 a notion is expressed that the prosecutor's office might possess some additional functions with no relations to the sphere of criminal law [18]. In Recommendation №2012/11 issued by the Committee of Ministers to member-states "On the prosecutors' role beyond the system of criminal justice" approved by the Committee of Ministers on Sept. 19th 2012 the prosecutors' role beyond the system of criminal justice has been underlined.¹¹ Mark has been made that in case as to which the national legislation would provide fulfillment of prosecutor's functions beyond the system of criminal justice, their task is to be consisted in presentation of general or public interests, defense of the human rights and main liberties as well as in supporting the supremacy of law [20]. Non-criminal functions of a prosecutor's office have been stressed in Conclusion №3 (2008) exposed by the Consultative Council of

¹⁰ Elizarova AB Role and Place of prosecutorial supervision authorities in Triada / AB Elizarova // History of State and Law. - 2003. - № 6. - P.24 - 28.

¹¹ Andryyanov VN Prosecutor of the Russian Federation in the system Separation of powers / VN Andryyanov // Journal Tyumenskoho of the State University. - 2009. - № 2. - S. 73 - 78.

European public prosecutors [13], the document pointing out that the prosecutor's services of the majority member-states of the Council of the Europe have possessed certain tasks and functions beyond the system of criminal justice. The spheres of competence have been quite different and included civil, family, work, administrative, electoral laws as well as the care for environment, defense of social rights and rights of vulnerable groups of population as persons under age, invalids, people of moderate means. Mention has been made that in some member-states tasks and amounts of prosecutor's duties in this sphere might exceed the load of prosecutor's part in the system of criminal law proceedings. But accentuation has been put upon the clause that if the prosecutor's services should fulfill certain functions beyond the sphere of criminal law, any intervention in activities of those services would be avoided; there is need of secure realization for their functions in strict accordance with the principle of divided powers. Besides, all acts of prosecutors should be characterized by honesty and impartiality whereas their functions would be realized in the name of society, for the sake of state interests and with the aim of securing the supremacy of law and keeping general right and liberties.

The prospects for further research in the chosen direction.

Thus, in conclusion we'd like to express quite grounded notion that there are all reasons for leaving the prosecutor's office with the function of supervision as for keeping within the law service activities by bodies performing operative and search missions, inquest, pre-trial investigation as well as the function of observance of legal standards while execution of court decisions with elimination of supervisory function of keeping the laws declared in Article 1 of the Law of Ukraine "On Prosecutor's Office".

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