

## CONSTITUTIONAL AND LEGAL APPROACHES TO DETERMINING THE PLACE OF PROSECUTOR'S OFFICE IN THE SYSTEM OF PUBLIC AUTHORITIES

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### **Makosii Y. Constitutional and legal approaches to determining the place of prosecutor's office in the system of public authorities.**

The prosecutor's office in Ukraine has undergone its own path of transformational change. As of today, the constitutional and legal status of the prosecutor's office and prosecutors is regulated, along with the Basic Law of Ukraine and the relevant profile law and international treaties ratified by Ukraine.

The constitutional and legal status of the Prosecutor's Office has changed somewhat since the adoption of the Law of Ukraine "On the Prosecutor's Office" in 2014, as well as after amendments to the Constitution of Ukraine on justice in 2016. As a result, both prosecutors began to play an auxiliary role outside the criminal justice system, while public authorities and local governments were given the right to go to court on their own. The modernization of the constitutional and legal status of the Prosecutor's Office is taking place in connection with the existence of a number of obligations of the Ukrainian state to the Council of Europe.

It is determined that the modern legal doctrine is characterized by the fact that there is a rethinking of the mechanism of checks and balances and the allocation of another branch of government - control.

It is established that the prosecutor's office supervises the observance of laws (one of the functions of the prosecutor's office), the current legislation of Ukraine does not provide for the implementation of such functions on behalf of parliament. However, the most common views are that the prosecutor's office should be considered as an integral part of the law enforcement system in terms of ensuring the functioning of state bodies. Under such conditions, the prosecutor's office is positioned as having nothing to do with the executive branch. Another approach suggests that the prosecutor's office is part of a system of executive bodies with possibly potential judicial affiliation.

In Ukraine, the place of prosecutor's offices in the system of public authorities has not yet been determined; in the state mechanism, the prosecutor's office has not received its clearly defined constitutional and legal status, as it is currently not assigned to any branch of government; the legal status of the prosecutor's office in Ukraine needs to be further reformed in terms of compliance with international human rights standards.

**Key words:** prosecutor's office, state power, mechanism of checks and balances.

### **Макосій Ю. Конституційно-правові підходи до визначення місця прокуратури в системі органів державної влади.**

Прокуратура в Україні пройшла свій шлях трансформаційних змін. Станом на сьогодні конституційно-правовий статус прокуратури, прокурорів, регламентується, поряд з Основним Законом України та відповідним профільним законом і міжнародними договорами, котрі ратифіковані Україною.

Конституційно-правовий статус прокуратури після прийняття Закону України «Про прокуратуру» у 2014 році, а також після внесення змін до Конституції України щодо правосуддя у 2016 році дещо змінився. Обидві події мали своїм наслідком те, що прокуратура поза межами кримінального судочинства почала відігравати роль допоміжного призначення, у той час як органи державної влади та місцевого самоврядування були наділені правом самостійного звернення до суду. Модернізація конституційно-правового статусу прокуратури відбувається у зв'язку із існуванням ряду зобов'язань Української держави перед Радою Європи.

Визначено, що сучасна правова доктрина характеризується тим, що в ній спостерігається переосмислення механізму стримувань та противаг та виділення ще однієї гілки державної влади – контрольної.

Встановлено, прокуратура здійснює нагляд за додержанням законів (одна із функцій прокуратури), чинне законодавство України не передбачає здійснення таких функцій від імені парламенту. Однак, найбільш поширеними є погляди, відповідно до яких передбачається розгляд прокуратури як складової частини системи правоохоронних органів у аспекті забезпечення функціонування державних органів. За таких умов прокуратура позиціонується як така, що не має відношення до виконавчої гілки влади. Інший підхід дозволяє стверджувати, що прокуратура входить до системи органів виконавчої влади із, можливо, потенційною приналежністю до влади судової.

В Україні і досі не визначено місце органів прокуратури у системі органів державної влади, у державному механізмі прокуратура не отримала свого чітко визначеного конституційно-правового статусу, оскільки станом на сьогодні вона не є віднесеною до жодної гілки державної влади; правовий статус прокуратури в Україні потребує свого подальшого реформування в аспекті відповідності міжнародним стандартам захисту прав людини.

**Ключові слова:** прокуратура, державна влада, механізм стримувань і противаг.

**Introduction.** In 2016, Section VII of the Constitution of Ukraine, which regulated the general principles of the constitutional and legal status of the Prosecutor's Office, was excluded on the basis of the Law of Ukraine "On Amendments to the Constitution of Ukraine (on Justice). Instead, Section VIII of the Basic Law on Justice was supplemented by Article 131<sup>1</sup>, which regulates the powers of the Prosecutor's Office, establishes the peculiarities of the appointment and dismissal of the Prosecutor General, the term of his office, and so on.

The Prosecutor's Office in Ukraine has undergone its own path of transformational change. As of today, the constitutional and legal status of the prosecutor's office and prosecutors is regulated, along with the Basic Law of Ukraine and the relevant profile law and international treaties ratified by Ukraine.

The constitutional and legal status of the Prosecutor's Office has changed somewhat since the adoption of the Law of Ukraine "On the Prosecutor's Office" in 2014, as well as after amendments to the Constitution of Ukraine on justice in 2016. As a result, both prosecutors began to play an auxiliary role outside the criminal justice system, while public authorities and local governments were given the right to go to court on their own. Modernization of the constitutional and legal status of the prosecutor's office is due to the existence of a number of obligations of the Ukrainian state to the Council of Europe [1].

**International requirements and obligations of Ukraine regarding the prosecutor's office.** According to the Law of Ukraine "On Ukraine's Accession to the Statute of the Council of Europe" of 1995, the Ukrainian state is committed, reaffirms its commitment to "ideals and principles common to European peoples" and The implementation of these ideals, as well as the promotion of economic and social progress, require closer unity between all European countries. [2].

Ukraine, as a party to this Statute and, accordingly, a member of the Council of Europe (Article 2 of the Statute of the Council of Europe), undertakes to recognize the principles of the rule of law and human rights and fundamental freedoms (Article 3 of the Statute). fulfill such obligations (Article 4 of the Statute) [3].

Also, in accordance with Conclusion № 190 (1995) of the Parliamentary Assembly of the Council of Europe on Ukraine's application to join the Council of Europe, «the role and functions of the Prosecutor General's Office will be changed (especially with regard to general rule of law) Of Europe»[4].

This position can be seen in Resolution 1346 (2003) of the Parliamentary Assembly of the Council of Europe "Fulfillment of Ukraine's Duties and Obligations", according to which Ukraine must fully reform the Prosecutor General's Office in accordance with Council of Europe principles and standards and in close cooperation with relevant bodies of the Council of Europe to implement Joint Action Plan for Reforming the Ukrainian Prosecutor's Office " [5].

According to the provisions of Article 6 of the Constitution of Ukraine, state power in Ukraine is exercised on the basis of its division into legislative, executive and judicial. The second paragraph of the same article emphasizes that the legislative, executive and judicial authorities exercise their powers within the limits established by the Basic Law and in accordance with the laws of Ukraine [6].

**Approaches to understanding the place of the prosecutor's office in the system of checks and balances.** It should be noted that modern legal doctrine is characterized by the fact that there is a rethinking of

the mechanism of checks and balances and the allocation of another branch of government - control [7].

N. Pelykh proposes to go beyond the traditional division of state power into three branches, defined by S. Montesquieu. The researcher considers it expedient to single out such branches of state power as the presidential, supervisory and law enforcement agencies (to which, in fact, the prosecutor's office belongs) [8]. In this context, the position of researcher V. Lomovsky deserves attention, who proposes to consider prosecutorial supervision as a logical continuation of the legislative function of parliament [9].

V. Lomovsky in one of his scientific works notes that some researchers claim that the prosecutor's office is an authorized body of the legislative branch [10]. Thus, in accordance with the Law of Ukraine "On the Prosecutor's Office", the Prosecutor General submits to the Verkhovna Rada of Ukraine a report on the activities of the Prosecutor's Office by April 1 each year. 2) the actual number of prosecutor's offices in terms of the number of prosecutors, civil servants and other employees, their training, special training, the activities of the Training Center of Prosecutors of Ukraine; 3) ensuring the independence of prosecutors, in particular the number of reports on the threat to the independence of the prosecutor received by the Council of Prosecutors of Ukraine, and information on the decisions taken on such reports; 4) ensuring legality and integrity in the activities of the prosecutor's office, in particular: the number of inspections of the integrity of prosecutors conducted by internal security units, and information on the decisions taken on such inspections; the number of conducted official investigations, information on the reasons and grounds for their appointment and conduct and on the decisions made based on the results of such official investigations; the number of appeals and lawsuits for state compensation for damage caused by illegal decisions, actions or omissions of the prosecutor, and the amount of such damage reimbursed by the state during the reporting period, as well as the number of lawsuits against the state's claim against prosecutors and the amount state requirements; the number of disciplinary complaints against prosecutors, information on the decisions made based on the results of such complaints, in particular the number of decisions on the existence of disciplinary misconduct of prosecutors and on the imposed (applied) disciplinary sanctions; 5) estimates of the prosecutor's office and their implementation; 6) ensuring the activities of prosecutorial self-government bodies; 7) information specified in paragraphs 1-5 of this part regarding the activities of the Specialized Anti-Corruption Prosecutor's Office; 8) other information related to the results of the prosecutor's office.

From the above it can be concluded that the Prosecutor's Office is accountable to the Verkhovna Rada of Ukraine, although there is no direct indication of such accountability in the Constitution of Ukraine (for example, in the wording "The Prosecutor's Office is accountable to the Verkhovna Rada of Ukraine"). In our opinion, despite the fact that the prosecutor's office supervises the observance of laws (one of the functions of the prosecutor's office), the current legislation of Ukraine does not provide for the implementation of such functions on behalf of parliament.

According to J. Tolochko, there is an opinion among researchers that the prosecutor's office can be attributed to the executive branch. In this regard, the researcher notes that the nature of the prosecutor's powers to oversee compliance with the law by bodies carrying out operational and investigative activities, inquiries, pre-trial investigation, as well as compliance with the law in the execution of court decisions in criminal cases and other coercive measures, related to the restriction of personal freedom, to some extent contributes to the formation of some scholars and practitioners views on the prosecutor's office as an executive body. In addition, the researcher takes the position that "these functions of the prosecutor's office are related to the fact that the prosecutor is the subject of criminal prosecution. In their implementation, the prosecutor is not directly involved in ensuring the implementation of laws and regulations, does not manage public affairs, does not take for this purpose administrative decisions of an authoritative nature, ie has no administrative power. Prosecutorial activity does not have any characteristic features of the executive branch and therefore the prosecutor's office cannot be attributed to the executive branch [11].

According to S. Rossokha, current discussions of researchers on the affiliation of the prosecutor's office to a particular branch of government allow us to identify mainly at least two key options in the context of the study. The first point of view is to consider the prosecutor's office as part of the law enforcement system in terms of ensuring the functioning of state bodies. Under such conditions, the prosecutor's office is positioned as having nothing to do with the executive branch. Another approach suggests that the prosecutor's office is part of a system of executive bodies with possibly potential judicial affiliation [12].

**Conclusions.** Using modern methods of scientific knowledge, the views of modern researchers on determining the basic constitutional and legal approaches to determining the role and place of the prosecutor's office and its bodies in the system of public authorities were considered and analyzed. In Ukraine, the place of

prosecutor's offices in the system of public authorities has not yet been determined; in the state mechanism, the prosecutor's office has not received its clearly defined constitutional and legal status, as it is currently not assigned to any branch of government; the legal status of the prosecutor's office in Ukraine needs to be further reformed in terms of compliance with international human rights standards.

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