

DOI 10.36074/logos-24.11.2023.20

THE THORNY PATH FORMATION AND DEVELOPMENT OF PROSECUTORIAL SELF-GOVERNANCE IN UKRAINE

ORCID ID: 0000-0002-5281-3981

Sergii V. Podkopaiev

Dr. Sc. (Law)

Senior researcher academician Stashis

Scientific Research Institute for the Study of Crime Problems

National Academy of Legal Sciences of Ukraine

UKRAINE

The first mention of organizational forms of prosecutorial self-governance in Ukraine was contained in Art. 131 of the Constitution of Ukraine as amended in 1996, which in its original version provided for the appointment of two members of the High Council of Justice by the All-Ukrainian Conference of Prosecutors [1]. Subsequently, Art. 5 of the Law of Ukraine "On the High Council of Justice", adopted in 1998, reflected the similar provision [2]. However, it was only about one subject -the All-Ukrainian Conference of Prosecutors and only about a rather restricted competence - participation in the formation of the relevant body. Any other powers of the conference, as well as other organizational forms of prosecutorial self-governance, were not normatively defined at that time. Therefore, there are no reasons to talk about the beginning of the full-fledged formation of the institution of prosecutorial self-governance in Ukraine at the times.

The draft Law of Ukraine "On the Prosecutor's Office" (No 3541), which became the basis of Law No. 1697-VII, directly provided for prosecutorial self-governance – independent collective resolution of internal activities of the prosecutor's office by prosecutors (Art. 67). The All-Ukrainian Conference of Public Prosecutors and the Council of Public Prosecutors of Ukraine had to carry it out (Art. 68). In addition, original draft's version (as of October 31, 2013) envisaged that the Council of Public Prosecutors of Ukraine included exclusively prosecutors (part 2 of Art. 73), as well as the functioning of the whole system of qualification and disciplinary commissions of prosecutors. According to the developers' plan, such system was to consist: (1) the High Qualification and Disciplinary Commission of Public Prosecutors of Ukraine; (2) regional qualification and disciplinary commissions of prosecutors operating in the regions, the Autonomous Republic of Crimea, the cities of Kyiv and Sevastopol. The regional commissions were to consist of eleven members: seven prosecutors and four persons from among scientific and scientific-pedagogical professionals in the field of jurisprudence who have a scientific degree or academic title [3].

In contrast to its draft, Law No. 1697-VII has established that: (a) the Council of Public Prosecutors of Ukraine (hereinafter – CPU) includes not only prosecutors, but also representatives (scientists) appointed by the congress of representatives of higher legal educational institutions and scientific entities (part 2 of Art. 71); (b) there is a Qualification and Disciplinary Commission of Public Prosecutors instead of the system of qualification and disciplinary commissions of prosecutors (Art. 73). Such Qualification and Disciplinary Commission of Public Prosecutors (hereinafter – QDCP) includes not only prosecutors and scholars, but also a lawyer appointed by the Congress of Advocates and persons appointed by the Commissioner for Human Rights of the Verkhovna Rada of Ukraine in agreement with the Committee of the

Verkhovna Rada of Ukraine conducting the organization and operation of the public prosecutor's office.

It should be noted that formally the legislator does not define the QDCP as a self-governance body of prosecutors. However, taking into account the nature and focus of its competence on resolving issues of internal activities of the prosecutor's office, the peculiarities of the relevant procedures and decision-making, the subject composition of the participants (five from eleven members are prosecutors appointed by the All-Ukrainian Conference of Public Prosecutors (hereinafter – the Conference of Prosecutors)) (§ 1 part 1 of Art. 74), the experience of European countries in this field, this Commission can be regarded in the frameworks of considering organizational forms of prosecutorial self-governance in Ukraine for the purposes of this article. In addition, today GRECO emphasizes that the majority in this body should be occupied by prosecutors elected by their colleagues in para. 216 of the Evaluation Report on Ukraine, adopted at the 76th plenary meeting of GRECO (June 2017) [4].

In any case, the legal basis and starting point in the process of prosecutorial self-governance formation in the country should be considered the Law No. 1697-VII, adopted on October 14, 2014. In pursuance of the requirements of its para. 6¹ of Section XIII (Transitional Provisions) (as amended at the beginning of 2016) * the Conference of Prosecutors was held on April 26-27, 2016 [5]. According to its results, among other things, 11 members were elected to the CPU, as well as 5 members to the QDCP. Even earlier, at the end of November 2014, the Congress of Advocates and the Congress of Representatives of Law Higher Educational Institutions and Scientific Institutions appointed three members to the QDCP. At the same time, the Ukrainian Parliament Commissioner for Human Rights did not appoint three persons under own quota. Therefore in 2016 the QDCP did not acquire its powers, since the minimum required quantitative composition of this body was not formed due should be at least nine members (according to part 3 of Art. 74 of Law No. 1697-VII).

Subsequently, the Law of Ukraine "On Amendments to Certain Legislative Acts of Ukraine on the Activities of the Prosecutor General's Office of Ukraine" dated May 12, 2016 No. 1355-VIII amended subpara. 3 para. 1 of Section XII of Law No. 1697-VII and postponed the entry into force of provisions regarding the activities of prosecutorial self-governance bodies until April 15, 2017 [6]. Actually, the legislator changed (postponed) the beginning of operation of already formed (partially formed) bodies for one year by this step.

Subpara. 27 of para. 3 of Section III (Final and Transitional Provisions) of the Law of Ukraine "On the High Council of Justice" of December 21, 2016 No. 1798-VIII put a new addition of para. 6¹ of Section XIII (Transitional Provisions) of Law No. 1697-VII. The name of the highest body of prosecutorial self-governance changed from the "All-Ukrainian Conference of Prosecution Officers" to the "All-Ukrainian Conference of Prosecutors" [7]. Subsequently, this made it possible to hold the Conference of Prosecutors on April 26, 2017 and to form a new composition of the CPU, as well as the QDCP, namely to appoint candidates according to the quota from the prosecutorial community. There were also representatives from the bar and the scientific community appointed earlier in 2014 who became part of the newly formed body [8].

* This paragraph provided for the need the first convocation and holding of an all-Ukrainian conference of prosecutors to fulfill the requirements of this Law within two weeks from the date of entry into force of the provisions of subpara. 3 para. 1 of Section XII (final provisions) of Law No. 1697-VII, i.e. from April 15, 2016. In particular, regarding the formation of the Council of Prosecutors of Ukraine and the Qualification and Disciplinary Commission of Prosecutors, approval of the Code of Professional Ethics and Conduct of Prosecutors, etc.

In general, the legal community and international experts positively perceived the very fact of creation and functioning of new bodies. During the conference dedicated to the first anniversary of the QDCP and CPU on July 11, 2018 in Kyiv it was noted that these bodies have been playing significant role at the national level in enhancing the independence, professionalism, integrity and effectiveness of the prosecution service, as well as ensuring the process of selection and promotion of prosecutors on the basis of merit, proper special training and disciplinary process. The Head of the Council of Europe Office in Ukraine in his welcoming speech pointed out that "the long-awaited establishment of the prosecutorial self-governance and support bodies in 2017 constituted a significant breakthrough in the reform of the prosecution service" [9].

Although the establishment of new institutions for the system of the Public Prosecutor's Office of Ukraine had a progressive character and positive impact, it had some shortcomings, so to speak, own "problems of growth", including legislative ones [10]. At the same time, there were no questions to the expediency and correctness of such step. Moreover, both the prosecutor's office [11] and international structures [12; 13] have always supported the process of formation and improvement of their operation.

Nevertheless, the head and members of the QDCP were declared dismissed from office, and their powers were early terminated by para. 2 part 21 of Section II (Final and Transitional Provisions) of the Law of Ukraine "On Amendments to Certain Legislative Acts of Ukraine on Priority Measures to Reform the Prosecutor's Office" dated September 19, 2019 No. 113-IX (hereinafter - Law No. 113-IX). In addition, the provisions of Law No. 1697-VII regulating the operation of prosecutorial self-governance bodies were suspended till September 1, 2021; the words "Qualification and Disciplinary Commission of Public Prosecutors" were replaced by the words "relevant body carrying out disciplinary proceedings" (subpara. 4 part 2 of mentioned Section) [14]. As a result, the very name of the new body ceased to correspond to the scope of its competence, since the competence to carry out disciplinary proceedings is only part of its competence. A few years later, the Law of Ukraine of April 14, 2022 No. 2203-IX "On Amendments to Certain Laws of Ukraine on Improving the Selection and Training of Prosecutors" fixed that the legislator had to basically return to the previous name of the body – the Qualification and Disciplinary Commission of Public Prosecutors [15].

Characteristically, the content of some norms of Law No. 113-IX was ambiguously evaluated at the legal circles [16; 17] and even questioned the constitutionality of the personnel reset of the prosecutor's office that was held according to its provisions [18]. At the same time, the very necessity of carrying out the reform was generally obvious and did not cause significant objections.

As a result, such deeds indicate the inconsistency of the legislator and the predominance of political expediency in making its decisions. They contradicted to provisions on reforming the prosecutor's office previously declared in para. 5.8. of Strategy of reforming for 2015-2020. These provisions are "ensuring greater institutional independence of the prosecutor's office and guarantees of protection from political influence" or creating and effective "functioning of prosecutorial self-governance bodies as an additional guarantee of the public prosecutor's office independence" or "ensuring greater functional independence of prosecutors from undue internal influence" [19].

Moreover, the legislator's actions violated the institutional continuity of the QDCP's operation that means the continuous implementation of relevant functions, accumulating of experience, and formation of a sustainable practice of law enforcement.

Therefore, it is not surprising that this situation caused the "most critical concern" on the part of GRECO, which considered the newly created prosecutorial self-governance bodies in Ukraine to be "the key to independence of public prosecutors". Such bodies should operate to protect the prosecutor's office from both real and potential improper political influence. Furthermore, GRECO has admitted "definitely unsatisfactory" the temporary replacement of the system and the assignment of selection and career advancement of prosecutors to personnel commissions without legislative regulation of their composition, functions and procedures [20, para. 134].

By the way, we should note, that the need to create and ensure the beginning of operation of the QDCP, as well as to strengthen its status and increase the effectiveness of its operation, is also mentioned in the national normative documents specifically aimed at anti-corruption: Anti-corruption strategy for 2021-2025 (para. 3.1.5.) [21]; State anti-corruption program for 2023-2025 (problem 2.1.5) [22].

In late August – early September 2021 the operation of prosecutorial self-governance bodies finally resumed after an almost two-year break. A new staff of the CPU and the relevant body carrying out disciplinary proceedings were formed. At the same time, we should take into account the fact that because of the constitutional changes in 2016 the last paragraph of the current version of Art. 131 of the Constitution of Ukraine provides for the establishment: 'of bodies and institutions in the justice system according to the law to ensure the selection of judges, prosecutors, their professional training, evaluation, consideration of cases concerning their disciplinary liability' [23]. Therefore, the existing model of prosecutor self-governance in Ukraine that was formed by the Law No. 1697-VII is temporary and is requiring its further development in accordance with this provision of the Basic Law.

As we can see, the process of establishing prosecutorial self-governance in Ukraine was not simple, and at its initial stage it rather was the presence of relevant bodies "de jure" than their functioning "de facto" in the context of ensuring the autonomy of the prosecutor's office system and the independence of prosecutors. This situation has arisen for at least two reasons: (a) first of all, due to the desire for political control over the prosecutor's office by influence on the personnel appointment mechanism that can be considered a threatening phenomenon for the justice system; (b) due to the conservative view on solving issues related to the status of prosecutors also inside of the prosecutor's office system itself, which in the past was not characterized by such self-governing forms of organization. Nevertheless, today the relevant bodies are functioning and this is definitely a positive moment for both the prosecutor's office and the justice system in Ukraine. Their activity minimizes external and internal influences on the prosecutor's office or prosecutors through the career development system, financial, material, technical and other support of prosecutors, etc.

References:

- [1] Constitution of Ukraine of 28 July 1996 (primary edition). <<https://zakon.rada.gov.ua/laws/show/254%D0%BA/96-%D0%B2%D1%80/ed19960628#Text>>
- [2] Law of Ukraine 'About the Supreme council of justice' (expired) [1998] No. 22/98-BP of 15 January 1998 <<https://zakon.rada.gov.ua/laws/show/22/98-%D0%B2%D1%80/ed19980115#Text>>
- [3] Draft Law of Ukraine 'On the Prosecutor's Office' No. 3541 of 5 November 2013. <<http://w1.c1.rada.gov.ua/pls/zweb2/webproc34?id=&pf3511=48935&pf35401=281461>>
- [4] Group of States against Corruption, 'Evaluation Report on Ukraine, which deals with corruption prevention in respect of members of parliament, judges and prosecutors' GrecoEval4Rep(2016)9 <<https://rm.coe.int/grecoeval4rep-2016-9-fourth-evaluation-round-corruption-prevention-in-/1680737207>>
- [5] 'All-Ukrainian conference of prosecutor's office workers' (2016) 4 (178) Visnyk prokuratury 5-7.

- [6] Law of Ukraine of 12 May 2016 No. 1355-VIII 'On making changes to some legislative acts of Ukraine regarding the activities of the General Prosecutor's Office of Ukraine' <<https://zakon.rada.gov.ua/laws/show/1355-19/ed20160512#n23>>
- [7] Law of Ukraine of 21 December 2016 poky No. 1798-VIII 'On the High Council of Justice' (primary edition). <<https://zakon.rada.gov.ua/laws/show/1798-19/ed20170105#n882>>
- [8] 'Prosecutorial path to self-government' (2017) 5 Visnyk prokuratury 11-12.
- [9] 'First year anniversary of the Qualification and Disciplinary Commission of Prosecutors and the Council of Public Prosecutors of Ukraine' (coe.int, 11 July 2018) <https://www.coe.int/uk/web/criminal-justice-reform/events/-/asset_publisher/ObrU0hW37muK/content/first-year-anniversary-of-the-qualification-and-disciplinary-commission-of-prosecutors-and-the-council-of-public-prosecutors-of-ukraine?inheritRedirect=false>
- [10] Podkopaiev S, 'The main areas of improvement of the legal basis of the organization and activity of the Qualification and Disciplinary Commission of Public Prosecutors' (Actual problems of judicial law: conference, Kharkiv, April 2018) 105–111.
- [11] 'A round table "Actual aspects of the activities of the Qualification and Disciplinary Commission of Prosecutors in the conditions of reform" was held, timed to the first anniversary of the QDKP' (2018) 6 Visnyk prokuratury 13.
- [12] 'The Council of Europe contributes to the competitive selection of future Ukrainian prosecutors' (coe.int, 7 – 8 November 2018). <https://www.coe.int/en/web/criminal-justice-reform/events/-/asset_publisher/ObrU0hW37muK/content/the-council-of-europe-contributes-to-the-competitive-selection-of-future-ukrainian-prosecutors?inheritRedirect=false&redirect=https%3A%2F%2Fwww.coe.int%2Fuk%2Fweb%2Fcriminal-justice-reform%2Fevents%3Fp_p_id%3D101_INSTANCE_ObrU0hW37muK%26p_p_lifecycle%3D0%26p_p_state%3Dnormal%26p_p_mode%3Dview%26p_p_col_id%3Dcolumn-4%26p_p_col_count%3D1>
- [13] 'The Council of Europe promotes the openness of the commission's activities' (kdkp.gov.ua, 10 April 2019). <<https://www.kdkp.gov.ua/international-activity/9-rada-yevropy-spryiaie-vidkrytosti-diialnosti-komisii>>
- [14] Law of Ukraine of 19 September 2019 № 113-IX 'On Amendments to Certain Legislative Acts of Ukraine Regarding Priority Measures for Reforming Public Prosecutor's Office' <<https://zakon.rada.gov.ua/laws/show/113-20#Text>>
- [15] Law of Ukraine of 14 April 2022 № 2203-IX 'On Amendments to Certain Laws of Ukraine on Improving the Selection and Training of Prosecutors' <<https://zakon.rada.gov.ua/laws/show/2203-20#Text>>
- [16] Comments to the Draft Law of Ukraine 'On Amendments to Certain Legislative Acts of Ukraine Concerning Priority Measures to Reform the Prosecutor's Office' of the Main Legal Department of the Secretariat of the Verkhovna Rada of Ukraine of 18 September 2019 <<http://w1.c1.rada.gov.ua/pls/zweb2/webproc34?id=&pf3511=66266&pf35401=500761>>
- [17] Conclusion to the draft law of Ukraine 'On Amendments to Certain Legislative Acts of Ukraine Relating to Priority Measures for the Reform of the Prosecutor's Office' of the Chief Scientific and Expert Directorate of the Secretariat of the Verkhovna Rada of Ukraine of 18 September 2019 <<http://w1.c1.rada.gov.ua/pls/zweb2/webproc34?id=&pf3511=66266&pf35401=497427>>
- [18] Stefanchuk M, 'The Recovery of Ukraine in the Field of Justice: Challenges and Priority Goals' (2022) 4-2 (17) Special Issue Access to Justice in Eastern Europe 199. <https://doi.org/10.33327/AJEE-18-5.4-n000467>
- [19] 'On the Strategy of reforming the judicial system, judicial proceedings and related legal institutions for 2015–2020' Decree of the President Ukraine of 20 May 2015 No 276/2015 <<https://zakon.rada.gov.ua/laws/show/276/2015>>
- [20] Group of States against Corruption, 'Compliance Report on Ukraine Fourth Evaluation Round, which deals with corruption prevention in respect of members of parliament, judges and prosecutors' Greco RC 4 (2019) 28 <<https://rm.coe.int/fourth-evaluation-round-corruption-prevention-in-respect-of-members-of/16809d768c>>
- [21] Law of Ukraine 'About the foundations of the state anti-corruption policy for 2021-2025' [2022] Official Gazette of Ukraine 56/3272 <https://zakon.rada.gov.ua/laws/show/2322-20#Text>
- [22] Resolution of the Cabinet of Ministers of Ukraine No 220 of 4 March 2023 'On approval of the State Anti-Corruption Program for 2023-2025' [2023] <https://www.kmu.gov.ua/storage/app/uploads/public/640/f48/c82/640f48c8250bd156947725.doc>
- [23] Constitution of Ukraine of 28 July 1996. <https://zakon.rada.gov.ua/laws/show/254%D0%BA/96-%D0%B2%D1%80?lang=en#Text>