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Foreign experience of administrative and legal support of citizens' rights by prosecutor's offices and possibilities of its use in Ukraine

Зарубіжний досвід адміністративно-правового забезпечення прав громадян органами прокуратури та можливості його використання в Україні

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Abstract

The purpose of the article is to substantiate, on the basis of the analysis of the legislation of France, Italy, Germany, Great Britain and the USA, the ways of improving the legislation of Ukraine in the sphere of ensuring the rights of citizens by the prosecuting authorities.

During the writing of the article, such methods as comparative-legal, system-structural, logical-normative were used.

The relevance of the article is due to the fact that the optimization of the activity of the prosecution bodies is impossible without taking into account foreign experience. This issue is of particular importance in the field of ensuring human rights and freedoms by the prosecuting authorities. Considering that fact, the legislation of France, Italy, Germany, the United Kingdom and the United States has been analyzed, which made it possible to formulate certain ways of improving national legislation on the protection of citizens' rights by prosecuting authorities. It has been justified to improve the administrative status of the prosecution bodies, to review its functions, the requirements for the level of training and to legislate a clear mechanism for the

Анотація

Мета статті полягає в тому, щоб на підставі аналізу законодавства Франції, Італії, Німеччини, Великобританії та США обґрунтувати шляхи вдосконалення законодавства України у сфері забезпечення прав громадян органами прокуратури. Під час написання статті застосовувалися такі методи, як порівняльно-правовий, системно-структурний, логіко-нормативний.

Актуальність статті зумовлена тим, що оптимізація діяльності органів прокуратури не можлива без урахування зарубіжного досвіду. Особливого значення дане питання набуває в сфері забезпечення органами прокуратури прав і свобод людини. З огляду на це, здійснено аналіз законодавства Франції, Італії, Німеччини, Великобританії та США, що дало змогу сформулювати певні шляхи вдосконалення національного законодавства стосовно забезпечення прав громадян органами прокуратури. Визначено, що в зарубіжних країнах прокуратура володіє значно вужчими правами щодо забезпечення прав громадян. Аргументовано доцільним удосконалити адміністративний статус

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implementation of functions. According to the results of the study, the authors have identified possible ways of using the positive foreign experience of administrative and legal support of citizens' rights by prosecuting authorities.

Key words: citizens' rights, prosecutor's offices, foreign experience, administrative and legal mechanism, provision, administrative and legal support of citizens' rights by prosecutor's offices.

Introduction

The citizens' rights and freedoms are recognized and guaranteed at both international and regional levels as well as seen in the human rights instruments and documents and also provided by the reflection of rights and freedoms in the Constitutional laws of different countries, the current issue in the world today is to enforce and firmly support these rights at the country level (Zahedi, Shirin, Mahmud, 2018).

The European integration course taken by the Ukrainian government requires the continuous implementation of international standards and taking into consideration the positive experience of the leading European countries. That is why one of the main tasks of improving Ukrainian legislation, which regulates the issues of activity of the prosecutor's office, is the introduction of really effective legal mechanisms to protect the individual, the society and the state from socially dangerous acts, protection of rights, freedoms and legitimate interests of every citizen. In this context, the law-enforcement function of the prosecutor's office is important, as it is directly aimed at both protecting and restoring the violated rights and legitimate interests of citizens, society and the state as a whole. At the same time, such activity of the prosecutor's office is multifaceted and complicated, since the legal relations that arise during its implementation are regulated by different branches of law (constitutional, administrative, civil, criminal procedural, civil procedural, etc.).

The current state of respect for rights and freedoms of the individual and the citizen, in particular, the provision of rights by the prosecuting authorities, indicates that the administrative and legal mechanism of such provision requires substantial improvement. One

organів прокуратури, переглянути її функції, вимоги щодо рівня підготовки та законодавчо передбачити чіткий механізм реалізації функцій. За результатами дослідження авторами визначені можливі напрями використання позитивного зарубіжного досвіду адміністративно-правового забезпечення прав громадян органами прокуратури.

Ключові слова: права громадян, органи прокуратури, зарубіжний досвід, адміністративно-правовий механізм, забезпечення, адміністративно-правове забезпечення прав громадян органами прокуратури.

of the most effective ways of improving the administrative and legal protection of citizens' rights by prosecuting authorities is to study positive foreign experience in this field and to apply it in domestic law. This will not only solve the problematic issues of defence and protection of the rights, freedoms and legitimate interests of citizens by the prosecuting authorities, but also to do so in the shortest possible time, without resorting to legislative experiments, but acting by proven effective methods.

A comparative law study proves that there is no constitution of a EU Member State which does not include the separation of powers, even if, most of the times, it is not expressly stipulated, but inferred from the content of the constitutions and from the prerogatives of the state bodies endowed with the exercise of public power. The express consecration of this principle has the advantage that any written, express norm has over the one resulting from interpretation, and this advantage is called certainty. In this sense, we may notice that, explicitly or implicitly, the rule of law is organized and structured through bodies with distinct prerogatives. The state prosecution service is an executive authority, but it is also, like the courts, an independent organ administering the law (Carausan, 2009p. 106).

The purpose of the article. In view of the above, in this article we aim to analyze the legislation of France, Italy, Germany, the United Kingdom and the United States, which will allow to justify ways of improving the legislation of Ukraine in the field of citizens' rights protection by the prosecuting authorities.

Theoretical framework

A large body of scientific literature has been studied to prepare this study. First of all, it should be noted that many works by *S. Ye. Ablamskiy* (Protection of the rights and legitimate interests of the victim in criminal proceedings, 2015), *V. B. Averyanov* (Administrative Law of Ukraine, 2004), *M. Carauşan* (Institutional uncertainties of the rule of law – the public prosecutor's office between the executive and the judiciary, 2009), *A. A. Chuvilev* (Prosecutor's supervision in the Russian Federation, 1999), *R. David*, *K. Geoffre-Spinoza* (Basic legal systems of modernity, 1998), *Z. Dillon* (Good Prosecutor and Good Person? The Conflict of Humanness and the Prosecutorial Field, 2019), *O. V. Ganin*, *V. V. Zakharov* (Constitutional Law of Foreign Countries: Anthology, 2006), *W. Geelhoed*, *A. Meij*, *L. Erkelens* (Shifting Perspectives on the European Public Prosecutor's Office, 2018), *M. Godsey* (Blind Injustice: A former prosecutor exposes the psychology and politics of wrongful convictions, 2019), *S. Holovaty* (Universal Declaration of Human Rights, 1995), *M. I. Khavroniuk* (Criminal law of Ukraine and other continental European states: comparative analysis, problems of harmonization, 2006), *A. A. Mishin* (Sources of Administrative Law of Foreign Countries (USA and UK), 1978), *S. A. Mokhov* (Functions of the French Prosecutor's Office in Civil Relations, 2011), *N. Yu. Popov*, *V. A. Tumanova*, *T. A. Vasilieva* (Italy: Constitution and Legislative Acts, 1988), *K. Sliadnieva* (Disposition as an organizational component of prosecutor's participation in criminal proceedings in Ukraine, 2019), *A. Ya. Sukharev* (The Russian prosecutor's supervision, 2001), *Yu. E. Vinokurov* (Prosecutorial supervision of foreign countries, 2013), *F. J. Zahedi*, *O. H. Shirin*, *I. Mahmood* (An Alysis of the protection of citizens' rights and freedoms in the judicial system of Iran, 2018), *Ya. S. Zavorotnyi* (Analogue of the Prosecutor's Offices in Great Britain, Ireland and Malta, 2009) and others have been dedicated to the issues of ensuring the rights of citizens by various law enforcement agencies during the years of Ukraine's independence.

However, while paying due attention to the scientific efforts of these and other researchers, it will be fair to mention that the foreign experience of administrative and legal support of the rights of citizens by prosecuting authorities and the possibilities of its use in Ukraine have been studied fragmentarily and, as a rule, within the broader scope.

In addition, the recent legislative amendments to the Constitution of Ukraine and the Law of Ukraine "On the Prosecutor's Office" clearly indicate the existence of a number of contradictions and gaps on the issue examined in the article, which has a negative impact on the implementation by the prosecutor of his powers. Thus, the need for further improvement and coordination of legal acts concerning the regulation of the prosecutor's powers to ensure the rights of citizens, on the one hand, and the lack of scientific research on these issues, on the other, make it relevant and indicate the feasibility to study foreign experience.

Methodology

To achieve this goal, to fulfill its tasks, to provide scientific substantiation of the research results, a set of general scientific and special methods of scientific knowledge were used. Their significance and the method of applying these methods in a scientific article will be discussed in detail below.

The comparative-legal method is the basis for the analysis and comparison of the norms of domestic and foreign legislation, which made it possible to make specific proposals to improve the current legislation of Ukraine. Using the system-structural method, the place of the prosecutor's office in the system of state bodies in different countries was determined. The logical-normative method was applied during the substantiation and formulation of directions to use the positive foreign experience of administrative and legal support of citizens' rights by the prosecuting authorities.

Results and discussion

At each stage of state formation, prosecutorial bodies occupied a special place in the system of state bodies. At the present stage of development of our country, the priority of the prosecutorial bodies is to ensure the rights, freedoms and legitimate interests of the person in criminal proceedings, as well as to direct its activity to establishing of the rule of law, legality and strengthening the legal order in the state (Ablamskiy, 2015).

The adoption of the new Law of Ukraine "On the Prosecutor's Office" by the Verkhovna Rada of Ukraine in 2014 is a testimony of the introduction of the European principles of justice in the domestic process and the approximation of the status of the prosecutor to the generally recognized international legal standards.

International organizations that coordinate and regulate the activities of the national prosecutor's offices of their member states pay considerable attention to shape the content of the dispositive framework of the prosecutor's activity (Slyadneva, 2018, p. 137; Sliadnieva, 2019, p. 75).

Investigating the issue of foreign experience of administrative and legal support of citizens' rights by prosecuting authorities it should be noted that in the state apparatus of some countries (in particular, the USA, Great Britain and others) there is no system of prosecution service. However, in every state there is a body that performs functions similar to those exercised by the prosecutorial authorities in Ukraine. In other countries, although a system of prosecutorial bodies is present, however, their powers and place in the state mechanism are significantly different from the position of the prosecutor's office in the Ukrainian system of state bodies. Nevertheless, the legal systems of all states deserve attention, since in the context of law enforcement reform the prosecuting authorities in Ukraine can be transformed depending on the needs of state development.

We consider it expedient to begin our research with the experience of administrative and legal support of the rights of citizens by the bodies of the European countries Prosecutor's Office as the closest in nature to the law and mentality in Ukraine.

France, Italy, Germany, the United Kingdom and others are considered to be developed countries in Europe. These are countries with strong economic potential, stable legislation and a high standard of living for citizens. The state of observance and protection of citizens' rights, including law enforcement and judicial authorities contributes greatly to this. That is why the experience of organizing the system of prosecuting authorities activity which plays an important role in securing the rights of citizens in these states may prove useful for Ukraine.

Thus, in France, the legal basis for the administrative protection of citizens' rights by the prosecuting authorities is the Constitution of France, the Code of Criminal Procedure, Ordinance No. 59-1 from January 2, 1953, etc. In addition, it should be remembered that France is an active member of the European Union, that is why international acts, such as the Universal Declaration of Human Rights (Holovaty, 1995), the Convention for the Protection of Human Rights and Fundamental Freedoms (Convention,

1950) and others, are ratified and enforced in this country.

In France, the system of prosecution is a part of the Ministry of Justice, and here prosecutors are appointed by the President of France (Sukharev, 2001, p. 112). The president also dismisses prosecutors of all levels from service. Such system of prosecutor's office formation increases the guarantees of independence for these bodies at all levels and reduces the possibility of influencing the prosecutor's decision.

Among the main features in the sphere of ensuring the rights of citizens by the prosecuting authorities in France criminal prosecution and law enforcement supervision are determined by all the parties involved in criminal proceedings.

In the exercise of his or her powers, the prosecutor shall have the right to directly request the assistance of the public armed forces. Officials and police agents are under the supervision of the prosecutor. He or she may entrust them with the collection of any information which he deems useful in the interests of the best administration of justice (Article 38 CPC of France) (Sukharev, 2001, p. 112). Thus, the prosecutor has a wide range of powers in criminal proceedings, in particular: 1) to decide on the initiation or refusal on criminal proceedings. According to some researchers, the share of prosecutors' refusal to initiate a criminal case is 70%, however, a criminal case already initiated can no longer be closed at the initiative of the prosecutor (Chuvilev, 1999, p. 327); 2) to supervise, give obligatory for execution of the order instructions to the employees of criminal police and other bodies and officials who carry out criminal proceedings; 3) is directly involved in the investigation of criminal cases.

In addition to these powers, the French Prosecutor's Office also protects the civil and labor rights of citizens. In particular, French law defines the categories of civil, employment and other non-criminal cases in which the participation of a prosecutor is mandatory. These include matters related to adoption, the organization of care of minors, the establishment and modification of care of minors; dismiss from service, bankruptcy, liquidation of property, liability of commercial firms heads (Mokhov, 2011, p. 35-36). It should be noted that in these cases the French prosecutor performs a function similar to that of the Ukrainian prosecutor in representing the interests of citizens in court. The main difference is that the legislation of Ukraine defines not only the category of cases in which the prosecutor is

required to participate, but also the category of persons entitled to represent their interests by the prosecutor in court.

The prosecution system of another European country, Italy, is very similar to the French system. However, the prosecutor also oversees the accurate administration of justice and the protection of state rights. The prosecutor is vested with direct powers to enforce public order laws (Ganin, Zakharov, 2006, p. 161). Also the organization of the prosecution system is different while in Italy it is formed in the courts.

However, the functions of the Italian prosecutor's office, including the field of ensuring the rights of citizens, as well as in France, are mainly related to the prosecution and support of state prosecution in court. This, in particular, is evidenced by the Judgment of the Italian Judiciary from 20.01.1941. In addition, in court, a prosecutor is vested with direct authority to compel enforcement or compliance with laws when their non-compliance directly affects the interests of the state, unless such actions are outside the jurisdiction of other authorities (Popov, Tumanova, Vasilieva, 1988, p. 306–307). As Yu. E. Vinokurov emphasizes, in the Italian Republic the prosecutor has the right to take such protective measures as he deems necessary (Vinokurov, 2013, p. 32). In addition to participating in criminal prosecution and criminal proceedings, the Italian Prosecutor's Office also assures the civil, economic and other rights of citizens in an appropriate form of justice.

In Germany, the legal basis for administrative protection of citizens' rights is the Constitution, laws, decisions of the Federal Administrative Court and international agreements. Activities in the field of public administration are to issue regulatory and individual legal acts, as well as to conclude administrative and legal agreements (Averyanov, 2004, p. 467).

The German Prosecutor's Office, as well as the French Prosecutor's Office, is an organisational part of the German Ministry of Justice. Therefore, the basic questions regarding the organization and procedure of the performing the functions of the German prosecutor's office are determined by the Minister of Justice orders.

The system of prosecuting authorities ensures the realization of citizens' rights through criminal proceedings, and support of state prosecution in court. These are the most characteristic functions of the prosecutor's office of continental Europe.

Among the specific features of the German prosecutor's office M. I. Khavroniuk, in his monograph, notes the peculiarities of the prosecutors' administrative status. In particular, the fact that prosecutors in Germany are equal to judges in matters of independence from external influence, so they are a subject to the provisions of Art. 97 of the Basic Law. In addition, according to the author, a considerable influence on the efficiency of the functions of ensuring the citizens' rights implementation by the German prosecutors is played by rather rigid disciplinary measures. In particular, there are the following disciplinary sanctions for prosecutors in Germany: warnings; fine - up to EUR 2.500; wage cuts (up to 20 % over three years); transfer to a lower level of remuneration; dismissal with the loss of special pension (in this case the ordinary pension is paid) (Khavroniuk, 2006, p. 971).

We believe that from the German experience of administrative protection of citizens' rights by prosecuting authorities, it may be useful for Ukraine to establish more stringent disciplinary measures for prosecutors, since, in view of the high level of corruption among state officials, including law enforcement officials, along with a low level of awareness, there is a need to strengthen their discipline and to cultivate a conscientious attitude towards the discharge of their official duties.

One of the developed European countries is Great Britain. However, despite its territorial location, this country has a completely different historically developed legal system than in other European countries. It is of great importance in the system of legal regulation of judicial and administrative precedents. In addition, circulars, instructions, orders and other regulations of ministries and departments are in effect; acts of local self-government bodies; decisions of the administration on individual cases that became administrative precedents (Mishin, 1978, p. 18). R. David, K. Geoffre-Spinoza, notes that there are no prosecuting authorities in the courts in England. The presence of a representative of the executive would seem to the British incompatible with the autonomy and dignity of the judiciary. In addition, the status of the prosecutor, as they see it, violates the equality of the prosecution and the accused, which should be in a criminal case. There is also no Ministry of Justice here, although many prophesy that such an authority should be formed (David, Geoffre-Spinoza, 1998, p. 249). In addition, in England there is a system of *attonai service* and other

bodies, which in their functions are close to the prosecuting authorities.

In particular, such institutions are a special system of bodies - the Attorney General's Office, the Royal Prosecution Service, the Department (Office, Directorate, Department) of Public Prosecutions, the State Solicitor's Service. Unlike the Continental Prosecutor's Office, the organization of this organs system is characterized as follows. First, the role of the officials (Attorney General, General Solicitor or Lord at law) in the prosecution. Secondly, there is no single centralized system of bodies that perform functions similar to those of the Continental Prosecutor's Office, which does not exclude systematic nature both in their structural organization and in their functional activity (Zavorotnyi, 2009, p. 129). These services mainly safeguard citizens' rights by supporting the prosecution in court. They do not prosecute as they rely on the police.

A similar Attorney Service operates in the United States. But, in contrast to English, the functions of the public attorney service in the United States include:

- 1) criminal prosecution of perpetrators of crimes;
- 2) legal advice to the government of the country, separate states, other executive bodies;
- 3) representation of interests of the federal government, state administration on different legal relations in court;
- 4) enforcement of laws;
- 5) participation in legislative and judicial rulemaking;
- 6) coordination of criminal prosecution activities;
- 7) participation in the formation of the judicial corps (Sukharev, 2001, p. 110).

Therefore, we can conclude that the prosecutor's offices in the countries of continental Europe are part of the system of the Ministry of Justice (except for Italy and Spain, where the prosecutor's office is formed directly by the courts). Administrative prosecution of the citizens' rights in these countries is carried out by the prosecutor's office mainly in the process of criminal prosecution and criminal proceedings. In addition, the prosecuting authorities of European countries are entrusted with the function of overseeing pre-trial investigative bodies, administering justice, as well as protecting the rights of citizens in a specific category of cases (establishing or changing

custody, adoption, etc.). Atypical functions for the system of prosecuting authorities are to oversee other state authorities (except criminal investigation bodies), enterprises, institutions, as well as represent the interests of citizens and the state in court.

As for the countries of the Anglo-Saxon system of law, there are no prosecuting authorities in these states, however, there are other institutions that perform similar functions, in particular, the support of state criminal charges, criminal prosecution (in the USA), etc. Thus, the system of prosecuting authorities of Ukraine has much broader powers in the area of administrative security of citizens' rights, given the specifics of the Ukrainian legal system. However, at the same time, higher demands are placed on prosecutors in foreign countries regarding the level of training, discipline, etc.

Finishing our research, we pay attention to the fact that in July 2013 the European Commission presented a legislative proposal for a regulation establishing a European Public Prosecutor's Office (EPPO). Undeniably, the Commission's proposal provoked many serious comments. However, the scholarly world reacted quite favourably to the proposal. It was considered to be a reasonable attempt at creating a European Public Prosecutor's Office, though the proposal was deemed to be in need of improvement. This was thought to be particularly necessary in order to establish the Office in such a way that it would be able to function effectively. It was suggested that the effectiveness of the Office could be improved through increasing the level of harmonisation of the rules that the Office would need to apply, whether these rules related to procedure or substantive criminal law or to the determining of its competences *ratione materiae* (Geelhoed, ets, 2017).

Conclusions

Generalizing the foreign experience of administrative protection of citizens' rights by prosecuting authorities, it is possible to propose improvement of the Ukrainian legislation in this field in the following areas:

- 1) strengthening of discipline in prosecuting authorities by introducing additional disciplinary measures;
- 2) expanding the functions of prosecuting authorities in the field of ensuring the rights of citizens (introducing the function of clarifying legislation and public education, etc.);

- 3) determination of procedure and mechanism of implementation of functions in separate spheres;
- 4) expansion of prosecutorial response measures, in particular, prosecutorial acts (protest, warning, etc.);
- 5) granting to the General Prosecutor of Ukraine the right of legislative initiative and the right to appeal to the Constitutional Court with the issue of compliance with the laws of the Constitution of Ukraine.

The proposed changes are based on positive foreign experience that has proven effectiveness over time. In particular, in countries where the prosecutor is endowed with a wide range of powers, at the same time there are rigid disciplinary actions for committing violations of the law or improper performance of official duties; in countries which legislation provides for the respective functions and powers of the prosecutor, while practically defining them implementation. In addition, in comparison with foreign countries, the Ukrainian prosecutor's office has a much broader capacity to guarantee the rights of citizens, covering all spheres of government, labor, civil, economic and other relations. These functions require clarification, determination of the mechanism of their implementation and improvement of the administrative status of the prosecutor.

Before any structural changes can be made, we need to “embrace our humanity and not be afraid to acknowledge and mitigate human error... we need humility and the ability to accept our human limitations”. The specifically for prosecutors and police officers, there needs to be some form of formal training on the pernicious effects of tunnel vision and other psychological flaws that people suffer from. Following this acceptance, the attitudes of those current police officers, prosecutors, and judges must be lightly commuted so that a small adjustment can be established before tackling the rest of the system (Godsey, 2019; Dillon, 2019).

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