

Case Note

THE MODEL OF PROSECUTORIAL SELF-GOVERNANCE IN UKRAINE AND THE BALTIC COUNTRIES: A COMPARATIVE ASPECT

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ABSTRACT

Background: New legislation in Ukraine has introduced a significant change in the function of the prosecutor's office by establishing bodies of prosecutorial self-governance. Their implementation stems from the change in the constitutional status of the prosecutor's office and the need to strengthen the independence of prosecutors while minimising external political and internal systemic influence on their work. Such reforms align with a pan-European tendency, which was formed as a result of the modernisation of approaches to the perception of the prosecutor's office. The independence of the judiciary and the effectiveness of the administration of justice depends on the independent activity of such body as the prosecutor's office. This necessitates the formation and development of the principle of political neutrality, which should form the basis of the organisation and activity of the prosecutor's office in a state governed by the rule of law.

Orientation to international standards and best practices allows us to hypothesise about the progressiveness of the Ukrainian model of prosecutorial self-governance. This hypothesis can be tested through a comparative analysis with other countries. We have chosen the Baltic countries for comparison as they are connected with Ukraine by a common Soviet past; however, they decided on the European course of their development much faster.

The article offers an overview of models of prosecutorial self-governance in Latvia, Lithuania, Estonia and Ukraine, outlining the structure and competence of their bodies. Based on a comparative analysis of Ukraine's example, the researchers have identified the main directions for strengthening the institutional capacity of prosecutorial self-governance bodies.

Methods: In conducting the scientific work, the authors employed several special legal methods, which allowed them to realise both the collection and generalisation of factual data, as well as to carry out a multi-level comparison of selected research objects at the proper level. The study relied on, in particular, formal-legal, logical-legal, historical-legal and comparative-legal methods of scientific learning.

Results and Conclusions: *It has been concluded that the introduction of prosecutorial self-governance in the states is a necessary step in the direction of strengthening the independence of prosecutors as a component of effective justice. This makes it possible to minimise external political and internal systemic influence on personnel processes in the prosecutor's office system, contributes to ensuring its political neutrality, as well as solves issues of financial, material, technical, and other provisions for prosecutors. In this sense, the Ukrainian model of prosecutorial self-governance is quite progressive, although it is not without disadvantages. In particular, the dispersion of personnel powers among different subjects makes prosecutors vulnerable in career advancement, specifically regarding clarity in the demarcation of their competence. This focuses on further developing prosecutorial self-governance, strengthening its institutional capacity.*

1 INTRODUCTION

One of the stages of the public prosecutor's office reform has recently ended in Ukraine. Among its results is a consolidation of the constitutional status of the public prosecutor's office in the justice system and determination at the legislative level of additional guarantees of independence of prosecutors, which tend to be analogous to those of judges. One is the functioning of prosecutorial self-governance bodies provided for the Law of Ukraine 'On the Public Prosecutor's Office' (2014).¹

The institutionalisation of prosecutorial self-governance aligns with the trend observed in many European countries. While there is no general standard or requirement for organisational forms of self-governance of prosecutors, their existence serves as a mechanism to uphold the independence of prosecutors, which, in turn, affects the independence of the judiciary. The substantive content of the independence of the judiciary, as stated in para. IV of Opinion No.9 (2014),² para. 3 of Opinion No.13 (2018) of the Consultative Council of European Prosecutors,³ has led to changes in approaches to determining the status of prosecutors, establishing additional guarantees of their independence and, in general, increasing the level of autonomy. Similarly, we can conclude that the experts considered the functioning of prosecutors' self-governance bodies from the point of view of a greater goal, namely the independence of the judiciary.

1 Law of Ukraine no 1697-VII of 14 October 2014 'On the Prosecutor's Office' <<https://zakon.rada.gov.ua/laws/show/1697-18>> accessed 27 October 2023.

2 Opinion of the CCPE no 9 (2014) of 17 December 2014 'On European Norms and Principles Concerning Prosecutors' <<https://rm.coe.int/168074738b>> accessed 27 October 2023.

3 Opinion of the CCPE no 13 (2018) of 23 November 2018 'Independence, Accountability and Ethics of Prosecutors' <<https://rm.coe.int/opinion-13-ccpe-2018-2e-independence-accountability-and-ethics-of-pros/1680907e9d>> accessed 27 October 2023.

The content of para. 3 of Introduction, section X (Prosecutorial Council) of the Report of the Venice Commission, adopted in December 2010, is the basis for such conclusion.⁴

Prosecutorial self-governance bodies in different countries differ in their status and degree of influence on the national prosecutorial system. Of course, they are not considered means of solving all problems in the system, but they, at least, serve as a kind of buffer between prosecutors and the political elite. It was the provision to avoid misuse of the prosecutor's office for political purposes that formed the basis for the introduction of prosecutors' self-governance.⁵

The stated goal of avoiding using the public prosecutor's office for political purposes has always been admitted as relevant. A number of legislative restrictions for achieving it have been introduced in Ukraine. For example, political neutrality is recognised as a fundamental provision of the prosecutor's office activity, which is embodied in various legislative acts by establishing various prescriptions: prosecutors cannot be members of political parties; prosecutors are obliged to observe political neutrality to avoid demonstrating of their own political convictions or views in any form while carrying out their official powers, not to use their official powers in the interests of political parties or their branches or individual politicians; a prosecutor cannot belong to a political party, participate in political actions, rallies, strikes and involve subordinate employees in them, publicly demonstrate own political convictions, etc.

The Venice Commission specifically noted the inclusion in the list of principles of the prosecutor's office activities of several new principles, in particular, the principle of political neutrality of the prosecutor's office at the stage of work on the draft law on the public prosecutor's office. Thus, over the past few years, the principle of political neutrality has been gradually formed and implemented as a principle of functioning of the prosecutor's office. Today, this principle is fundamental and unchangeable.

The issue is all the more important for Ukraine due to the direct involvement of the Verkhovna Rada of Ukraine, a political body involved in the procedure of appointing and dismissing the Prosecutor General, as it grants approach for such appointments or dismissals. The Parliament of Ukraine retains the authority to express no confidence in the Prosecutor General, leading to their actual resignation from office (para. 25 of Art. 85 of the Constitution of Ukraine).⁶

4 Report of the Venice Commission CDL-AD (2010) 040 of 3 January 2011 'On European Standards as Regards the Independence of the Judicial System: Part II – the Prosecution Service' <<https://rm.coe.int/1680700a60>> accessed 27 October 2023.

5 Laura Stefan and Ildir Peci, *Comparative Study on Prosecutorial Self-Governance in the Council of Europe Member States* (Council of Europe 2018) 5.

6 Constitution of Ukraine no 254 k/96-BP of 28 June 1996 (amended on 01 January 2020) <<https://zakon.rada.gov.ua/laws/show/254%D0%BA/96-%D0%B2%D1%80#Text>> accessed 27 October 2023.

Despite criticism, notably from international experts⁷, regarding the Ukrainian parliament's competence to express no confidence in the Prosecutor General, considering it primarily as a purely political tool, this relevant legal norm remains in the text of the Basic Law. Therefore, the introduction of the institution of prosecutorial self-governance in Ukraine is, to a certain extent, intended to minimise political influence on the procedural activities of prosecutors, particularly considering the specifics of the procedures for the appointment and resignation of the Prosecutor General.

Furthermore, the self-governance of prosecutors should, if not minimise, significantly reduce the internal systemic managerial impact on solving a list of entirely organisational and personnel issues in a traditionally centralised system, until recently with the dominant principle of unity of command.⁸

That is, it is the bodies of prosecutorial self-governance are tasked with assuming a leading role in ensuring (1) the independence of prosecutors inside the system and outside it and (2) the independence of the public prosecutor's office as a state institution, which is a component of the justice system in Ukraine. This independence of prosecutors, akin to that of judges, is not a prerogative or a privilege for them but rather a guarantee of fair, impartial and effective administration of justice, thereby safeguarding the interests of society and individuals.⁹ The independence of prosecutors is admitted as a natural consequence of the independence of the judiciary,¹⁰ and is also considered a necessary prerequisite for the rule of law,¹¹ one of the elements of which is access to justice. Accordingly, there exists a profound link between the proper functioning of prosecutorial self-governance in the country, serving as a guarantee of the independence of public prosecutors, and the independence of the judiciary, ensuring the implementation of the principle of the rule of law and access to justice.

Eventually, the prosecutorial self-governance bodies are called upon to implement a number of key tasks for a state governed by the rule of law:

- (a) to contribute to the independence of the justice system;
- (b) to act as a kind of "link" between the public prosecutor's office and society;

7 Opinion of the Venice Commission CDL-AD (2012) 019 of 15 October 2012 'On the Draft Law on the Public Prosecutor's Office of Ukraine' <[https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2012\)019-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2012)019-e)> accessed 27 October 2023.

8 The principle of unity of command provided, for example, that the Prosecutor General or regional level prosecutors solely decided personnel issues.

9 Opinion of the CCJE no 12 (2009) and Opinion of the CCPE no 4 (2009) of 8 December 2009 'On the Relations between Judges and Prosecutors in a Democratic Society' **Explanatory note**, para 27 <<https://rm.coe.int/1680747391>> accessed 27 October 2023.

10 Opinion of the CCPE no 9 (2014) (n 2) para 4.

11 Opinion of the CCPE no 16 (2021) of 26 November 2021 'Implications of the Decisions of International Courts and Treaty Bodies as Regards the Practical Independence of Prosecutors', para 4 <<https://rm.coe.int/opinion-no-16-2021-en/1680a4bd26>> accessed 27 October 2023.

- (c) to motivate the professional prosecutorial community to self-development (self-correction);
- (d) to ensure the functioning of the public prosecutor's office within the justice system and the development of the public prosecutor's office's system.

The prosecutorial self-governance is a relatively new institution for Ukraine's legal system in general and the system of the public prosecutor's office in particular. Therefore, its study is interesting in identifying existing problematic issues and developing possible ways to solve them to strengthen the institutional capacity of prosecutorial self-governance to address the assigned tasks. This examination holds relevance for all European states, considering that the Ukrainian model is new and has been formed based on established international standards while also drawing from leading practices in this matter.

In this sense, we consider it possible to refer to the relevant experience of the Baltic countries, which share a common Soviet past with Ukraine and have been members of the European Union for almost two decades. The comparison will make it possible to evaluate the existing models of prosecutorial self-governance and their competence in the context of their development progress.

2 THE STRUCTURE OF PROSECUTORIAL SELF-GOVERNANCE AND ITS COMPETENCE IN THE BALTIC STATES AND UKRAINE

In our comparison, we proceed from the fact that the Advisory Council of European Prosecutors in its Opinion No. 18 (2023) on Councils of Prosecutors as key bodies of prosecutorial self-governance considers such organisational forms as assemblies, congresses, boards, commissions as "other" bodies of prosecutorial self-governance. This underscores the variety of organisational models of the public prosecutor's office and the need ipso facto to extend the same recommendations, rules and conditions specified in this conclusion to them. This extension aims to exclude political influence on them and ensure their activities are geared towards strengthening the independence and impartiality of the prosecutor's office (para. 86, para. 88). At the same time, organisationally formalised subjects such as the Councils of Prosecutors have a greater "institutional value", taking into account their importance for ensuring the effective and impartial functioning of public prosecutor's offices and individual prosecutors through their independent decision-making (para. 1 of Chapter VIII).¹²

12 Opinion of the CCPE no 18 (2023) of 20 October 2023 'On Councils of Prosecutors as Key Bodies of Prosecutorial Self-Governance' <<https://rm.coe.int/opinion-no-18-2023-final/1680ad1b36>> accessed 27 October 2023.

Latvia

According to Art. 1 of the Law 'On the Public Prosecutor's Office,' the Prosecutor's Office of Latvia is a body of judicial power.¹³ Such institutions as *the Council of the Prosecutor General and the Attestation and Qualification Commissions* created on July 1 1994, are functioning in the country. In addition, *the Council of Justice*, created in 2010 and called the 'self-governance body of the judicial system', is also competent for the public prosecutor's office. The purpose of *the Council of Justice* is to balance relations between branches of government. It plays a decisive role in the evaluation and appointment of a candidate for the post of the Prosecutor General.¹⁴

The Council of the Prosecutor General is established by order of the Prosecutor General for an indefinite term. Today, it consists of 16 members, with only one not being a prosecutor. According to Art. 29 of the Law 'On the Public Prosecutor's Office', the Council of the Prosecutor General is a collegial advisory body that considers the main issues of the organisation and activity of the public prosecutor's office and also performs other functions provided for by this Law. Thus, it develops and approves: (1) Regulations on the Attestation and Qualification Commissions of prosecutors; (2) Code of ethics of prosecutors; (3) Regulations on the procedure for wearing and samples of uniforms and insignia of prosecutors; (4) Rules for the selection, training and qualification examination of candidates for the position of public prosecutor; (5) Regulations on evaluation of professional activity of public prosecutors, etc.

The Council of the Prosecutor General, in turn, creates *The Attestation and Qualification Commissions* for a one-year term. The Council of the Prosecutor General also determines the number and composition of their members. In addition, these commissions report on their activity to the Council of the Prosecutor General at least once a year (Art. 29¹; Art. 29²). Today, each commission consists of 8 members, all of whom are prosecutors (prior to 2023, each commission had 10 members – all of whom were prosecutors).

The Attestation Commission of Prosecutors provides an opinion on the suitability for the position before the appointment or promotion of a prosecutor, submits a proposal to the Prosecutor General to apply disciplinary sanctions to the prosecutor if the Law determines its need, and exercises other powers. At the same time, its decisions and conclusions are of a recommendatory nature (Art. 29¹).

13 Law of the Republic of Latvia of 19 May 1994 'Prokuratūras likums' <<https://likumi.lv/doc.php?id=57276>> accessed 27 October 2023.

14 CCPE, *Compilation of Responses to the Questionnaire for the Preparation of the CCPE Opinion no 18 (2023) on the Councils of Prosecutors as Key Bodies of Prosecutorial Self-Governance* (CCPE Secretariat 2023) 101 <<https://rm.coe.int/compilation-of-responses-for-opinion-no-18-2023-/1680aa9355>> accessed 27 October 2023.

In turn, *the Qualification Commission of Prosecutors* evaluates and provides an opinion on the progress of the implementation of the internship program of the candidate for the position of prosecutor, on the conformity of the knowledge and professional skills of the candidate for the position of prosecutor or prosecutor to the position he holds, etc. (Art. 29²).

Issues of bringing the prosecutor to disciplinary responsibility are resolved within the framework of the "simplified" procedure in an order determined by the Prosecutor General (Art. 45).

Lithuania

In the Constitution of the Republic of Lithuania, the norms regarding the public prosecutor's office are contained in Art. 118 of Chapter IX. Court.¹⁵ At the same time, the institution of self-governance of prosecutors is currently absent in the country as such. Although 'some elements of self-governance' are mentioned in the context of the management of the prosecutor's service in matters of selecting prosecutors, evaluating their work, and checking violations of the Code of Ethics. They are exercised by commissions created by the Prosecutor General, consisting of 7 members - 4 prosecutors and 3 public representatives.¹⁶ The conclusions of such commissions are partially binding for the Prosecutor General, who cannot strengthen the decisions of the Commission for the evaluation of the work of prosecutors; he can appoint a person to the position of a prosecutor only from the list of candidates proposed by the relevant commission; The Prosecutor General may also not impose disciplinary sanctions on a prosecutor if the Prosecutor's Ethics Commission believes that the prosecutor has not committed a breach of the law, official misconduct or a violation of the Code of Ethics of Prosecutor.

According to Art. 10 of the Law on the Public Prosecutor's Office of Lithuania, commissions function in the prosecutor's system *for the recruitment of prosecutors* (for the selection of persons who claim to occupy the vacant position of the prosecutor, with the exception of the positions of the chief prosecutor and his deputy); *for the selection of chief prosecutors* (chief prosecutor and his deputy); *attestation of prosecutors* (for evaluation of the official activities of prosecutors, their qualification and suitability for work); *on the ethics of prosecutors* (for investigation of violations of legislation, official misconduct, actions that discredit the rank of the prosecutor, as well as other violations of the Code of Ethics of Prosecutor), and also *examination commissions* for candidates for positions (for evaluation of the professional preparation of candidates for the position of prosecutor).¹⁷ All of them are formed for a period of three years. The Board of Prosecutors nominates two prosecutors;

15 Lietuvos Respublikos Konstitucija (1992) <<https://www.lrs.lt/home/Konstitucija/Konstitucija.htm>> accessed 27 October 2023.

16 CCPE (n 14) 109.

17 Law of the Republic of Lithuania no I-599 of 13 October 1994 'Lietuvos Respublikos prokuratūros įstatymas' <<https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/TAIS.5956/asr>> accessed 27 October 2023.

the Prosecutor General appoints two prosecutors (one of such appointments is based on the proposal of the public prosecutor's trade union) to the composition of these commissions (except for the examination commission). The President of the Republic, the Speaker of the Parliament and the Prime Minister also nominate one prosecutor with an impeccable reputation based on the proposal of the public prosecutors' trade union. In turn, the Prosecutor General and the Board of Prosecutors appoint two prosecutors to the examination commission, and the President of the Republic, the Speaker of the Parliament and the Prime Minister nominate one scholar in the field of legal sciences with an impeccable reputation.

The Prosecutor General approves the composition of the commissions and the order of their activities.

According to Art. 7 of the Law, there is an advisory body under the General Prosecutor's Office - the Board of the Prosecutor's Office of the Republic of Lithuania, the composition and the order of activity of which are approved by the order of the Prosecutor General. The Prosecutor General is the head of the Board, and the members are the deputies of the Prosecutor General and the chief prosecutors of the districts.

In addition, the Public Prosecutor's Office of Lithuania has two trade unions that represent the interests of prosecutors, as well as the Labor Council, which actively defends the interests of prosecutors and tries to participate in the management of the Public Prosecutor's Office. Their representatives are members of the Board of the Prosecutor's Office of the Republic of Lithuania and the commissions mentioned above created by the Prosecutor General.¹⁸

Estonia

According to § 1 of the Law 'On the Public Prosecutor's Office', the public prosecutor's office in Estonia is subordinate to the Minister of Justice, i.e., belongs to the executive branch of government.¹⁹ There is the General Assembly of Prosecutors (the General Meeting of Prosecutors) in the public prosecutor's office system. According to Art. 13 of the Law, the Prosecutor General convenes the General Assembly of Prosecutors and manages its work.

The General Assembly of Prosecutors is a meeting of all prosecutors that takes place at least once a year. It resolves the following issues: (1) election of two prosecutors of the district public prosecutor's office and one prosecutor of the State Public Prosecutor's Office as members of the Competition Commission of Prosecutors; (2) election of two prosecutors of the district public prosecutor's office and two prosecutors of the State Public Prosecutor's

18 CCPE (n 14) 109-10.

19 Law of the Republic of Estonia of 22 April 1998 'Prokuratuuriseadus' <<https://www.riigiteataja.ee/akt/13153853?leiaKehtiv>> accessed 27 October 2023.

Office as members of the Disciplinary Commission; (3) election of a prosecutor to the position of a member of the commission on professional suitability of the Bar of Estonia and his deputy; (4) approval of the procedure for holding the General Meeting of Prosecutors; (5) listening to the reports of the responsible minister and the Prosecutor General on the activity of the public prosecutor's office; (6) discussion and submission of proposals to resolve issues related to the activity of the public prosecutor's office.

The Competition Commission of Prosecutors evaluates candidates for the position of prosecutor if such a position is filled by open competition. This commission consists of the Prosecutor General, who is *ex-officio* the chairman of this commission, one prosecutor of the State Public Prosecutor's Office, two prosecutors of the district public prosecutor's office, one judge elected by the plenum of judges, one legal scholar elected by the dean of the Faculty of Law of the University of Tartu, and an official of the Ministry of Justice appointed by the minister. The term of office of a member of the Competition Commission of Prosecutors, with the exception of the Prosecutor General and an official of the Ministry of Justice, is three years (Art. 19; Art. 43). The Ministry of Justice establishes requirements for the organisation of this competition, as well as for persons applying for the position of prosecutor (Art. 44).

The Minister of Justice also determines the procedure for the work of *the Disciplinary Commission*, which considers cases of disciplinary misconduct of prosecutors (Art. 36). This commission consists of two prosecutors of the State Public Prosecutor's Office, two prosecutors of the district public prosecutor's office and one judge elected by the plenum of judges. The Disciplinary Commission is elected for a term of three years. Its chairman is elected from among the members of this commission.

Ukraine

Today in Ukraine, according to the Law operates:

- (a) the *All-Ukrainian Conference of Prosecutors* is defined as 'the highest body of prosecutorial self-governance' (Art. 67). Convened by the Council of Prosecutors of Ukraine (hereinafter – CPU) once every two years. Its competence includes hearing the CPU report on the fulfilment of tasks of public prosecutorial self-governance bodies; electing members of the High Council of Justice and deciding on the termination of their powers; appointment members of the CPU and the Qualification and Disciplinary Commission of Prosecutors (hereinafter – QDCP); approval of the Code of Professional Ethics and Rules of Professional Conduct for Public Prosecutors and the regulations on the CPU; adoption of regulations on the procedure for the work of the QDCP; appeal to public authorities and their officials with proposals for resolving issues related to the activity of the public prosecutor's office; examination of other issues of public prosecutorial self-governance and exercise of other powers in accordance with the law.

- (b) *the CPU* is the highest body of public prosecutorial self-governance between the Conferences of Prosecutors. It not only organises the implementation of decisions of the Conference or resolves issues related to its convening and holding, but also its competence includes, in particular, bringing recommendations to the heads of relevant public prosecutor's offices for appointment of prosecutors to administrative positions; contribution to assurance of the independence of prosecutors and to increasing the state of organisational support for the activities of public prosecutor's offices; resolution of issues of legal and social protection of prosecutors and members of their families; consideration of appeals on threats to the independence of prosecutors and taking appropriate measures; making proposals to state authorities on resolving issues related to the activities of the public prosecutor's office; exercising control over the implementation of decisions of public prosecutorial self-governance bodies, etc.
- (c) *a meeting of prosecutors* of the relevant public prosecutor's offices (the Prosecutor General's Office, regional public prosecutor's offices, and district public prosecutor's offices), which elects delegates to the Conference of Prosecutors. However, it should be noted that the legislator does not give them any other competence. However, this does not limit the capacity development of such meetings, taking into account, in particular, the provisions para. 8-9 of Guidelines on the Role of Prosecutors (1990)²⁰ and para. 6 of Recommendation (2000) 19 on the role of public prosecution in the criminal justice system.²¹ They refer to the possibility of prosecutors participating in professional organisations to represent their interests, increase their professional training, protect their status, and also discuss legal issues.
- (d) *the QDCP*, which keeps records of vacant and temporarily vacant positions of prosecutors; conducts a competition (selection) of candidates for the position of district prosecutor; conducts a competition for appointment to high-level public prosecutor's offices; considers issues about disciplinary responsibility of prosecutors; etc.

In general, public prosecutorial self-governance bodies in Ukraine solve tasks and exercise competence²² that are characteristic of such bodies in other European countries (where they are established).²³

20 'Guidelines on the Role of Prosecutors' (8th UN Congress on the Prevention of Crime and the Treatment of Offenders, 7 September 1990) <<https://www.ohchr.org/en/instruments-mechanisms/instruments/guidelines-role-prosecutors>> accessed 27 October 2023.

21 Recommendation Committee of Ministers of the Council of Europe R (2000) 19 and Explanatory Memorandum of 6 October 2000 'The Role of Public Prosecution in the Criminal Justice System' <https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016804be55a> accessed 27 October 2023.

22 Oksana Khotynska-Nor, Nana Bakaianova, and Maryna Kravchenko, 'Prosecutor's Office of Ukraine Under Martial Law: Challenges, Trends, Statistical Data' (2023) 6(3) Access to Justice in Eastern Europe 40, doi:10.33327/AJEE-18-6.3-a000303.

23 CCPE (n 14) 235.

The conducted comparative analysis demonstrates that one or another organisational model of public prosecutorial self-governance, which was formed in each of the countries, is a product of various political and legal events within the national legal system. Although such countries may have a common historical past, in the future, the specifics of political, social, cultural and legal development will determine individual features for each of them.

In the context of compliance with the international standards mentioned at the beginning of this section, the existing *de jure* model of public prosecutorial self-governance in Ukraine appears to be more optimal because, taking into account the structure of its bodies and powers, it has a greater ability to minimise corporate influence by reducing the participation of the Prosecutor General in the processes of formation and activity of relevant bodies, as well as external political influence, for example, of the Minister of Justice as a representative of the executive power. Although its formation was not without its disadvantages, which were the object of attention at various levels.²⁴

3 WAYS TO STRENGTHEN THE INSTITUTIONAL CAPACITY OF PROSECUTORIAL SELF-GOVERNANCE IN THE EXAMPLE OF UKRAINE

The experience of the formation of public prosecutorial self-governance, the ramifications of its model and the practice of the relevant bodies allow us to identify the following possible ways for strengthening their institutional capacity to ensure the fulfilment of their tasks:

- 1) change of corporate culture, the transformation of the consciousness of the professional prosecutorial community;
- 2) improving the legal regulation of public prosecutorial self-governance activity, in particular:
 - (a) of the formation of the relevant bodies' staff;
 - (b) of exercising their powers;
 - (c) of ensuring the enforcement of the prosecutorial self-governance bodies decisions.

1. For Ukraine and states that follow a similar course of development, this is especially important in view of the long historical traditions of building and activity of the public prosecutorial system on the principles of centralisation and unity of command. It is necessary to understand clearly the fact of changing the content and scope of traditional principles of the public prosecutor's office organisation and activity, including the principle of collegiality in resolving issues related to the status of prosecutors. This requires a certain

24 S Podkopaiev, '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, 23 April 2018) 105; GRECO, *Fourth Evaluation Round Corruption prevention in respect of members of parliament, judges and prosecutors: Compliance Report Ukraine Greco RC4(2019)28* (GRECO Secretariat 2019) para 134 <<https://rm.coe.int/fourth-evaluation-round-corruption-prevention-in-respect-of-members-of/16809d768c>> accessed 27 October 2023.

period and contains difficulties, but it is compulsory in the context of the full formation of public prosecutorial self-governance bodies and the effective performance of their tasks.

2 (a). Formation of the relevant bodies' staff

The Law of Ukraine on the Public Prosecutor's Office provides that the composition of bodies of public prosecutorial self-governance includes representatives of the legal community, scholars or lawyers. In this sense, foreign experience testifies to different organisational models of prosecutorial self-governance. Despite the organisational peculiarities in different countries, representatives of civil society, scientific schools and lawyers are involved in their work to prevent these bodies from becoming "syndicates" on a professional basis.²⁵ The aim of such involvement is to strengthen public confidence in the judiciary system and the responsibility of the judiciary to society. It is generally believed that the inclusion of representatives of other legal professions provides better public recognition of the results of the activity of relevant bodies. This partly removes fears that experts protect their colleagues from the consequences of disciplinary misconduct.²⁶ It will also ensure constant social control over the organisation of staffing of the justice system. At the same time, foreign experience shows that a majority of prosecutors are in such bodies or consist exclusively of prosecutors.

And while the CPU includes the majority of prosecutors (11 out of 13), then in the QDCP – on the contrary, prosecutors constitute a minority in the total composition (5 out of 11).

GRECO experts (2017) expressed concern about the fact that ‘... current law does not ensure that prosecutors will have a majority of seats in the QDCP’. They underline that the situation in Ukraine differs from other GRECO states that have already formed bodies of similar competence. The experts proposed amendments ‘to the provisions on the formation of the Qualification and Disciplinary Commission to ensure that the majority of seats are occupied by prosecutors elected by their colleagues’. This is considered to be a measure that will help it ‘... fully defend their legitimacy and credibility, as well as strengthen its role as a guarantor of the independence and autonomy of prosecutors’.²⁷ A similar provision is contained in para. 24 of Opinion No. 13 (2018) CCPE.²⁸ Therefore, the legislator should consider it in the context of further modernisation of public prosecutorial self-governance organisational forms.

25 Stefan and Peci (n 5) 10.

26 H Mitchell Caldwell, ‘The Prosecutor Prince: Misconduct, Accountability, and a Modest Proposal’ (2014) 63(1) *Catholic University Law Review* 100.

27 GRECO, *Fourth Evaluation Round Corruption prevention in respect of members of parliament, judges and prosecutors: Compliance Report Ukraine GrecoEval4Rep(2016)9* (GRECO Secretariat 2017) para 216 <<https://rm.coe.int/grecoeval4rep-2016-9-fourth-evaluation-round-corruption-prevention-in-1680737207>> accessed 27 October 2023.

28 Opinion of the CCPE no 13 (2018) (n 3).

It is also necessary to revise the approach, according to which a prosecutor holding an administrative position cannot be a CPU or QDCP member. The desire to protect the relevant procedures from excessive administrative pressure from managers on other members (prosecutors), which could potentially be possible if they were appointed to these bodies, is understandable. Actually, the heads of the respective prosecutor's offices and their deputies, as heads of these bodies, have a certain authority in the system, in the prosecutorial community, which, in turn, has established historical traditions of centralised construction and hierarchical subordination. At the same time, we should understand that candidates for administrative positions in the public prosecutor's office have always been subject to increased requirements for professional qualities.

In this sense, the best solution to the issue may be to impose restrictions on the appointment of a prosecutor to the CPU or to the QDCP who does not hold any administrative position of high level (of First Deputy and Deputy Prosecutor General; head, first deputy and deputy head of regional or district public prosecutor's offices).

2 (b). Exercising the powers granted to the bodies of prosecutorial self-governance

Pondering the issue of the exercise of powers granted to the prosecutorial self-governance bodies inevitably leads to the question of the scope of their competence in the field of staffing and its correlation with the competence of other subjects. The specificity of the Ukrainian realities is that, in fact, today, the career advancement of prosecutors is carried out by:

- a) the QDCP while conducting a competition for the transfer of a prosecutor to a position in a higher-level prosecutor's office;
- b) the CPU while introducing recommendations to the Prosecutor General for the appointment of prosecutors to some administrative positions;
- c) heads of prosecutor's offices of the appropriate level, who appoint prosecutors to other administrative positions without recommending the CPU.

Dispersion of personnel powers among various subjects makes the construction of the Ukrainian model of prosecutors' career advancement vulnerable, particularly in terms of clarity in the demarcation of their competence.

Given the need to ensure the unity of the status of prosecutors, there may be several options and possible ways to resolve this issue. Still, all of them will require institutional strengthening of the relevant bodies and legislative changes. In particular, (a) the establishment of a body in the justice system competent in matters of staffing of the prosecutor's office; (b) the CPU focuses on ensuring the independence of prosecutors, as well as improving the state of organisational support for the public prosecutors' offices activity. At the same time, issues of staffing, including in terms of making recommendations for the appointment and dismissal of prosecutors from administrative positions, consideration of appeals regarding improper performance by a prosecutor

holding an administrative position, or official duties established for the corresponding administrative position, are transferred to the QDCP; (c) on the contrary, the transfer of powers from the QDCP to the CPU and, accordingly, the CPU should become the sole body responsible for staffing. In any case, given the need to strengthen the independence of prosecutors, the role of heads of prosecutor's offices at the appropriate level in personnel matters should be minimised.

2 (c). Of ensuring the enforcement of the prosecutorial self-governance bodies' decisions.

Ensuring the enforcement of decisions of public prosecutorial self-governance bodies is closely connected to the issue of their binding nature for various subjects, including prosecutors, other employees of the public prosecutor's office, as well as bodies of state power and local self-governance, and citizens. The issue of the effectiveness of the mechanism for ensuring the enforcement of the CPU decisions is open and requires separate consideration. Nevertheless, the very existence of such an institution as public prosecutorial self-governance and its activity is a significant step forward in ensuring the independence of prosecutors.

Today in Ukraine, the All-Ukrainian Conference of Prosecutors adopts decisions on matters within its competence binding for the CPU and all other prosecutors. At the same time, there is no similar norm for the CPU at the legislative level. Only in the Regulations on the Council of Prosecutors of Ukraine (2017) is it stipulated that the decisions of the CPU adopted on ensuring the independence of prosecutors, protection from unlawful influence, pressure, or interference in the exercise of the prosecutor's powers may be sent to the public prosecutor's office and are binding for consideration within its competence.²⁹ As we can see, the obligation is established only for consideration of decisions by the relevant prosecutors and only on specific issues of ensuring the independence of prosecutors. The obligation to consider such decisions by subjects outside the system other than prosecutors, as well as to consider requests, appeals, decisions on improving the state of organisational support for the activity of public prosecutor's offices, legal and social protection of prosecutors, appeals with proposals for solving problematic issues of the prosecutor's office activity to state authorities or local self-government bodies etc. remains out of regulation.

In this regard, the legislation must provide that state bodies, local self-government bodies, public organisations and officials should consider requests and decisions of the CPU within a month from the date of their receipt; as for the issues of ensuring the safety of prosecutors – within 10 days with taking measures to eliminate threats to the safety of prosecutors.

29 'Regulations on the Council of Prosecutors of Ukraine' (All-Ukrainian Conference of Prosecutors, 27 April 2017) (as amended of 28 August 2021) <[https://rpu.gp.gov.ua/userfiles/file/rolojennja_pro_rpu_\(1\).docx](https://rpu.gp.gov.ua/userfiles/file/rolojennja_pro_rpu_(1).docx)> accessed 23 March 2023.

4 CONCLUSIONS

The set-up of prosecutorial self-governance in states is a significant step towards strengthening the independence of prosecutors. As the comparative analysis has shown, its Ukrainian model is quite progressive, as it has the potential to minimise both external political and internal systemic influence on personnel processes in the public prosecutor's office system and also contributes to the resolution of issues of financial, material, technical and other support of prosecutors. However, it is not without its disadvantages. Dispersion of personnel powers among different subjects makes the construction of the Ukrainian model of prosecutors' career advancement vulnerable, particularly in terms of clarity in the demarcation of their competence.

Further development of the prosecutorial self-governance should provide for strengthening its institutional capacity, taking into account the existence for a long time of conservative views on solving issues related to the status of prosecutors inside of the public prosecutor's office system, in the past self-governing forms of the organisation did not characterise this system. It can be carried out in particular by changing corporate culture, transforming the consciousness of the professional prosecutorial community, streamlining the procedure for personnel forming the relevant bodies, a clear delineation of their competence and sphere of responsibility, and ensuring the implementation of decisions. This is a necessary condition for developing the potential of the prosecutor's office, strengthening the real independence of prosecutors, and a condition for more effective functioning of the justice system in the country.

REFERENCES

1. Caldwell HM, 'The Prosecutor Prince: Misconduct, Accountability, and a Modest Proposal' (2014) 63(1) Catholic University Law Review 51.
2. Khotynska-Nor O, Bakaianova N, and Kravchenko M, 'Prosecutor's Office of Ukraine Under Martial Law: Challenges, Trends, Statistical Data' (2023) 6(3) Access to Justice in Eastern Europe 40, doi:10.33327/AJEE-18-6.3-a000303.
3. 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, 23 April 2018) 105.
4. Stefan L and Peci I, *Comparative Study on Prosecutorial Self-Governance in the Council of Europe Member States* (Council of Europe 2018) 5.

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