

UDC 343.163

M. M. Stefanchuk

PhD in Law, Associate Professor
National Academy of Prosecutors of Ukraine,
The Department of Administrative and Financial Law
Melnikova str., 81-b, Kyiv, 04050, Ukraine

**LEGAL REGULATION OF THE PROSECUTOR'S PARTICIPATION
IN CIVIL PROCEEDINGS THROUGH THE PRISM
OF THE CONSTITUTIONAL FUNCTIONS OF THE UKRAINIAN
PROCURACY**

The Article is devoted to legislative developments in the legal regulation of the prosecutor's participation in Ukrainian civil proceedings, as well as the implementation of the legal analysis of compliance of the prosecutor's participation in civil proceedings to the powers and functions implemented by the new Law of Ukraine «About the Procuracy», identifying problem areas and developing proposals for their solution.

Key words: prosecutor, procuracy's functions, prosecutor's participation in civil proceedings, representation of citizens' or the state interests in court, legal regulation.

Problem statement. The legal nature of the Prosecutor's participation in civil proceedings in the framework of the existing institutions of civil law and civil procedure is currently the subject of discussion. Adopted by the Supreme Council of Ukraine the new Law of Ukraine «About the Procuracy» [1] provides significant changes in the powers of the Ukrainian procuracy to fulfil its functions and makes changes to several legislative acts of Ukraine in order to bring them in line with the new functional model of the procuracy of Ukraine. Among them there are acts, containing the legal regulation of prosecutor's participation in Ukrainian civil proceedings. However, the legal analysis of these instruments raises a number of questions about the accordance of legal regulation of the prosecutor's participation in civil proceedings with its powers, implemented by the new law, so this requires more research.

Analysis of recent researches and publications. Problematic issue related to the processes of procuracy reforming is studied in the works of many scholars, including: E. M. Blazevski, Yu. M. Groshevoi, L. M. Davydenko, V. V. Dolezhan, P. M. Karkach, I. M. Koziakov, M. V. Kosuta, O. M. Litvak, I. E. Marochkin, M. I. Mychko, V. T. Nor, G. P. Sereda, V. V. Sukhonos, O. M. Tolochko, V. V. Shuba, P. V. Shumsky, M. K. Yakimchuk and others. A significant contribution to the development of theoretical and practical provisions for the prosecutor's participation in civil proceedings is made in the works of such scholars as: S. S. Bychkova, K. V. Gusarov, T. O. Dunas, M. V. Rudenko, S. Ya. Fursa, M. Y. Shtefan and others.

These works formed a significant scientific research base of the prosecutor's participation in civil proceedings; however, they were conducted through the

prism of the legal analysis of contemporary legal regulation of these relations. At the same time the legislative changes of the Ukrainian procuracy's activity legal regulation regarding the implementation of its constitutional functions and the resulted changes of the legal regulation of prosecutor's participation in civil proceedings require additional research and scientific understanding, as well as ongoing discussions regarding their validity and effectiveness.

Paper purpose. The aim of this Article is to highlight legislative developments in the legal regulation of the prosecutor's participation in Ukrainian civil proceedings, as well as analyzing the accordance of the legal regulation of the prosecutor's participation in civil proceedings with its powers implemented by the new law functions, identifying problem areas and developing proposals for their solution.

Paper main body. The prosecutor's participation in civil proceedings with the purpose of representing the interests of a citizen or the state in court is normatively regulated by Article 45 of the Civil Procedure Code of Ukraine (hereinafter — the CPC) [2], which regulates relations in the civil process participation of bodies and people, that were afforded the right to defend rights, freedoms and interests of others by law. According to Part 2 of this article for the purpose of representing the interests of citizens or the state in court, the prosecutor within the powers defined by law, goes to court with a claim (statement), participates in the proceedings on his claims, and may on their own initiative join a suit, that has been opened on the claim of other persons at any stage of its consideration, takes the appeal, appeal statement of judicial review by the Supreme Court of Ukraine on the revision of judicial decisions on newly discovered facts.

It should be noted, that this revision of this article is a fairly new. Because, before the amendment of the Ukrainian law of 20 December 2011 № 4176-VI «About Amendments to Some Laws of Ukraine Regarding Improvement the Order of Justice» [3] (became *res judicata* on 15 January 2012), the prosecutor was a part of a general list of bodies and persons specified in Part 1 of Article 45 of the CPC of Ukraine that in cases, specified by law, can apply to court with claims about protection of the rights, freedoms and interests of other persons or state or public interests and to participate in these cases.

In this regard, the question arises about the reason of such changes in Part 1 of Article 45 of the CPC of Ukraine concerning the definition of the prosecutor's place in the system of bodies and people, that were afforded the right to defend rights, freedoms and interests of others by law. Doctrines are attempting to explain these changes in legislation. These attempts, in particular, are reduced to the fact that the prosecutor is a special party in a civil process, and his involvement in civil proceedings due to the need of performing the function of representing the interests of a citizen or the state in court in cases determined by law. So, the function of representation of these interests in court is for prosecutors constitutional. In contrast, the interest of other state authorities (rather executive), local governments that were previously listed along with the prosecutor in Part 1 of Article 45 of the CPC of Ukraine, the civil process is very different. This interest is mainly

departmental in nature: they participate in cases by virtue of their official authority; may be joined by a court to participate in the case for presentation of findings on the performance of its powers (Part 3 of Article 45 of the CPC of Ukraine) [4, p. 24].

In such circumstances, the question about the validity of such legislative decisions remains open, taking into account the above features defining the functions of the procuracy in the judicial process unlike other public bodies. So, scientists claim that, as the function of the procuracy is determined at the constitutional level, appeals of the prosecutor to the court and participation in court proceedings should be regulated separately from other persons. Because prosecutor's participation in a civil trial is possible according to the general rule that in cases prescribed by law the court can contact the authorities and officials who are afforded to protect the rights, freedoms and interests of other persons or state or public interests by law (Section 2 of Article 3 of the CPC of Ukraine) [5, p. 82–3].

S. Bychkova on this occasion noted, that the legislature in Section 2 of Article 45 of the CPC of Ukraine for designation of specified forms of prosecutor's participation in civil proceedings is not correct to use the term «representation», as the prosecutor in any case does not become a procedural representative, including legal. In this regard, in her opinion, it is necessary to separate a prosecutor's participation in the case as officially acting in defense of rights, freedoms and interests of another person or state or public interests, and legal representation. Subject as aforesaid, the author proposes to designate corresponding functions of the procuracy and to use an alternative name — «participation of the prosecutor in court in order to protect the interests of citizens or the state», and to amend Part 2 of Article 45 of the CPC of Ukraine, as well as the relevant articles of the Law of Ukraine «About Procuracy» [6, p. 104–105]. We believe that this proposal is premature, at least before the revision of the Constitution of Ukraine [7] with regard to the regulation of the prosecutors' functions outside the criminal justice system.

Legal regulation of prosecutor's representation of citizens' or the state's interests in court was enshrined in the new law, which fundamentally changes the procuracy's representation of the interests of the citizen or the state in court, including, in civil proceedings, due to bringing the legislation of Ukraine in line with European standards of the prosecutor's activities outside the sphere of criminal justice.

Legal analysis of the new law allows us to claim that the constitutional function of the procuracy's representation of interests of a citizen or the state in court in cases is determined in Paragraph 2 of Part 1 of Article 2 of the new law and defined as representation of interests of citizens or the state in court in cases determined by this law. It is seen that under this formulation, the legislator has in mind the cases provided by the new law, and the manner of representation is determined by the norms of the procedural law taking into account Part 7 of Article 24 of the new law (determines the characteristics of the individual forms of representation of interests of citizens or the state in court), according to which the powers of prosecutors, provided by

this article shall be exercised exclusively on the grounds and within the limits established by the procedural legislation.

So, according to the amendments made by the new law, Part 2 of Article 45 of the CPC of Ukraine, the second sentence of the first paragraph, according to which the prosecutor must provide the court with documents proving the inability of a citizen to represent their interests independently, was excluded as the third paragraph was added to that part of article and it is said there, that the prosecutor applies to the court for representation of interests of citizens or the state in court (regardless of the form in which the representation) must justify the existence of grounds for making such representations specified in the Article 23¹ of the Law of Ukraine «About Procuracy». For representation of interests of citizens in court, the prosecutor must also provide proof of age failure, incapacity or limited capacity of the relevant citizen and written consent of the legal representative or the authority, which the law afforded the right to defend rights, freedoms and interests of such person, and also to represent this person. The failure of the prosecutor to provide requested proofs to the court for substantiating the grounds for representation of citizens' or the state's interests in court may cause consequences enshrined in the Article 121 of the CPC (the abandonment of the claim without movement, the return of the claim).

Under the new law, the prosecutor carries out representation of interests of the citizen in court (the citizen of Ukraine, foreigner or stateless person) if such person is not able to protect their violated or disputed rights or implement procedural powers through the failure of age, incapacity or limited capacity, and legal representatives or authorities afforded the right to defend rights, freedoms and interests of such person by law do not perform or improperly perform its protection.

In court Prosecutor provides representation of legal interests of the state in case of a breach or threatened breach of the interests of the state, if the protection of these interests is not performed or is improperly performed by a public authority, local government body or other entity of authority, whose terms of reference cover the appropriate authority and in the absence of such a body.

However, it is not permitted for the prosecutor to represent in court the interests of the state represented by public companies, as well as in cases related to the electoral process, referendums, the activity of the Supreme Council of Ukraine, President of Ukraine, the creation and operation of mass media, political parties, religious organizations, organizations engaged in professional self-government, and other public associations. Representation in court the interests of the state represented by the Cabinet of Ministers of Ukraine and the National Bank of Ukraine may be carried out by the General Prosecutor's office of Ukraine or regional Prosecutor's office only by written instruction

¹ Although the text of the law contains a technical error and mentions the Article 23 instead of the Article 25, which had that number in the draft law, but from the contents it is seen that we are talking about Article 23.

or order of the General Prosecutor of Ukraine or his first deputy or deputy in accordance with the competence.

Section 6 of Article 23 of the new law defined the rights of the prosecutor while representing interests of citizens or the state in court that he exercises in the manner prescribed by the procedural law and the law regulating enforcement proceedings. These rights include: the right to appeal to court with the claim (statement presentation); the right to join the case on the claim (request, view) of another person, at any stage of the proceedings; the right to initiate the revision of judgments, including in a case brought under the claim (statement, representation) of any other person; the right to participate in the trial; the right to file a civil claim during criminal proceedings in the cases and manner defined in the criminal procedure law; the right to participate in enforcement proceedings in the execution of the judgments in the case, in which prosecutor was representing the citizen or the state in court; with the permission of the court — the right to read the case materials in the court and the materials of enforcement proceedings, to make excerpts, get free copies of the documents, appeared in the case or enforcement proceedings. Rights of the prosecutor in civil proceedings, which he is exercising within the powers defined by law, are enshrined in the Part 2 of Article 45 of the CPC of Ukraine.

Legal analysis of the provisions of the new legislation allows us to claim that presenting the claim (statement) in the manner enshrined in the Article 45 of the CPC, the prosecutor among other demands from the content of these legal documents should require the demand of the prosecutor to the court for confirmation of the ground for representation. In addition to this, the prosecutor must provide the court with written consent of the legal representative or the authority, which the law afforded the right to defend rights, freedoms and interests of the person concerned, to represent this person.

During the representation of interests of citizens or the state in court, the prosecutor is entitled in the manner prescribed by the procedural law, to join the case brought under the claim (statement, representation) of another person, at any stage of the proceedings. However, you should pay attention to the content of the Part 2 of the Article 45 of the CPC of Ukraine, which specifies that the prosecutor may join the case that has been opened on the claim of other people at any stage of its consideration on his own initiative. Analyzing these powers, it should be noted that the provisions of the new law about accession of the prosecutor to the case at any stage of the proceedings is not consistent with the norms of procedural law (Par. 1 and Part 2 of Article 45 of the CPC of Ukraine), which establishes the right of a prosecutor to join the case at any stage of its consideration. On this occasion, scientists have noted that the entry of the prosecutor in the proceedings at any stage of its consideration does not mean it is right, for example, to join the case, which is considered, at the stage of judicial debate [4, p. 27; 8, p. 73]. According to T. A. Dunas and M. V. Rudenko, stages (phases) of consideration of the case should be considered as: proceedings in the court of first instance; appeals; appeal proceedings; proceedings in the Supreme Court of Ukraine; the proceeding on newly discovered facts; executive production [4, p. 27].

The prosecutor has the right to initiate a review of judicial decisions, including cases brought under the claim (statement, representation) of another person. Thus, by filing a complaint or an application for review of a judicial decision in a case in which the prosecutor did not participate, he thereby joins this case. The possibility of the prosecutor to join the case by the initiation of the review of judicial decisions is also provided by the Part 2 of the Article 45 of the CPC of Ukraine.

One of the representation forms of citizens' or the state's interests in court is participation in court cases. However, participation in court cases means not only participation in the trial, but also exercising prosecutors' powers, enshrined by the relevant procedural legislation. Thus, according to Part 2 of the Article 281 of the CPC of Ukraine the case statement on the provision of mental health care, compulsory or discontinuing the provision of outpatient psychiatric care, hospitalization forcibly is considered with obligatory participation of the prosecutor.

It should be noted that the new law defined a new concept of public procuracy outside the criminal justice system, which sets the powers of the procuracy to implement the functions of a representative office of interests of a citizen or the state in court in cases determined by law. To support this concept in Paragraph 5 of Section XII «Final Provisions» of the new law legislator made several changes in legislative acts of Ukraine in order to bring them into line with it. At the same time, the legislator made no changes to the provisions of Section 6 of Article 22 of the Law of Ukraine «On Psychiatric Care» [9], which enshrine that court cases on the provision of psychiatric care in forcibly dealt should be considered with obligatory participation of the prosecutor, clearly defining that the participation of the prosecutor in such cases is obligatory due to the exercising of the function of supervision of observance of laws during the execution of judicial decisions in criminal cases, as well as the application of other coercive measures related to the restriction of personal freedom of citizens. This conclusion can be reached by analyzing the changes made by the law to the Article 31 of this law, according to which the supervision of observance of laws in the provision of psychiatric care is exercised by the prosecutor through the exercising of powers for the execution of the constitutional functions of the procuracy of Ukraine, that is mentioned above.

According to Part 3 of Article 2 of the new law the procuracy cannot be assigned functions that are not provided by the Constitution of Ukraine. This raises the question of the legal nature of powers of the prosecutor in civil proceedings (in the context of the constitutional functions of the procuracy of Ukraine) to file a claim in court about annulment, if it is required the protection of rights and interests of the child, of the person declared legally incapable or of the person whose capacity is limited (Article 42 of the Family Code of Ukraine (the Civil Code of Ukraine) [10]; to appeal to the court with the claim about deprivation of the parental rights (Article 165 of the Family Code of Ukraine); to file a claim in court about deprivation of one or both parents parental rights or for the removal of the child from the mother and father without deprivation of parental rights (Article 170 of the Family Code

of Ukraine); to go to court with the claim about cancellation of adoption or annulment next to parents, adoptive parents, guardians, trustees, bodies of guardianship and guardianship, as well as an adopted child, under the age of fourteen years (Article 240 of the Civil Code of Ukraine).

The Law of Ukraine «About Procuracy» dated November 5, 1991 [11] among the powers of the prosecutor in exercising of prosecutorial supervision over observance and application of laws entitled the right of prosecutor to take legal recourse in cases afforded by law (Paragraph 3 of Part 3 of Article 20 of this law). According to the provisions of the new law, legal regulation of the right of a prosecutor to appeal to the court appears within the powers of the prosecutor in exercising his functions. In our opinion, with coming into legal force the new law, the norms of the family code of Ukraine, which provide the right to the prosecutor to appeal to the court in these categories of civil cases, should be practically applied concerning certain provisions regarding the representation of the interests of such categories of people, provided by the provisions of the new law, for example previous obligatory going to court, notification of the citizen and his legal representative or the authority and compulsory proving grounds for representation by the court and others.

In addition, according to the Law of Ukraine «On Amendments to Some Legislative Acts of Ukraine on Ensuring the Activities of the National Anti-corruption Bureau of Ukraine and the National Agency for Prevention of Corruption» [12] Section III of the CPC is amended by Chapter 9, which regulates particular adversary proceedings on the recognition of unjustified assets and their recovery. In accordance with the provisions of this chapter, a claim of unjustified assets and their vindication is filed in the interests of the state by the prosecutor during the whole statute of limitations from the date the judgment of conviction against a person authorized to perform the functions of a state or local government came into force.

Therefore, the question arises whether the provisions of Chapter 9 of Section III of the CPC should be implemented in regard to the changes made by the new law in Part 2 of Article 45 of the CPC of Ukraine, concerning the obligation of the prosecutor, who applies to a court for the purpose of representing the state in court (regardless of the form in which the representation) to justify the existence of grounds for the exercising such representation, provided by the Part 3 of the Article 23 of the new Law. In our opinion, such legal regulation of the aspects of the adversary proceedings on the recognition of unjustified assets and their discovery, the legislator affords the right to appeal to the court of claims of such content only to the prosecutor, and therefore it can be assumed, that under such circumstances it is presumed that the prosecutor has the grounds to represent the interests of the state that exempts the prosecutor from the duty to substantiate the grounds of representing the interests of the state in this category of cases in court, because the prosecutor is defined as an authority whose jurisdiction includes authority for the protection of state interests in this area by the legislator.

Conclusions. Given the above, it is possible to come to the following conclusions: legal regulation of prosecutor's participation in civil proceedings boils

down to a legal definition of the prosecutor's powers for the execution of the representation of citizens' or the state's interests in court in cases, determined by law and the functions of supervision over observance of laws at execution of judicial decisions in criminal cases, as well as the application of other coercive measures related to the restriction of personal freedom of citizens; the cases of the representation of citizens' or the state's interests in court by the prosecutor are determined not only by the new law, as set out in Section 2 of Part 1 of Article 2 of the new law, but also in other laws, in particular, in civil proceedings — the provisions of the Family Code of Ukraine, Chapter 9, Section III of the CPC of Ukraine; there is a need for harmonization of provisions of analyzed above legislation, that regulate the relations, connected with the participation of the prosecutor in civil proceedings, with the aim of bringing them into line with the provisions of the new law, in terms of prosecutor's powers in discharging his functions, and thus bringing it into line with the principle of legal certainty; mentioned problematic issues require further research as they are significant due to the process of reforming of prosecution's powers outside the sphere of criminal justice and bringing them in line with European standards, in particular regarding to the participation of the prosecutor in civil proceedings.

References

1. Про прокуратуру [Текст] : закон України від 14 жовтня 2014 року № 1697-VII // Голос України. — 2014. — № 206. — 25 жовтня.
2. Цивільний процесуальний кодекс України [Текст] : закон України від 18 березня 2004 р. № 1618-IV // ОВУ. — 2004. — № 16. — Ст. 1088.
3. Про внесення змін до деяких законів України щодо вдосконалення порядку здійснення судочинства [Текст] : закон України від 20 грудня 2011 р. № 4176-VI // ОВУ. — 2012. — № 4. — Ст. 117.
4. Дунас Т. Правовий статус прокурора в цивільному судочинстві: деякі проблеми [Текст] / Т. Дунас, М. Руденко // Вісник Національної академії прокуратури України. — 2013. — № 5 (33). — С. 23-29.
5. Дунас Т. Теоретичні і прикладні проблеми правового статусу прокурора у цивільному судочинстві [Текст] / Т. Дунас, М. Руденко // Вісник прокуратури. — 2013. — № 1 (139). — С. 81-90.
6. Бичкова С. Представництво прокурором інтересів громадянина або держави у справах позовного провадження [Текст] / С. Бичкова // Вісник прокуратури. — 2010. — № 10 (112). — С. 103-109.
7. Конституція України [Текст] : закон України від 28 червня 1996 р. № 254/к-96-ВР // Відомості Верховної Ради України. — 1996. — № 30. — Ст. 141.
8. Бородін М. Перегляд цивільних справ у порядку апеляції [Текст] / М. Бородін // Право України. — 2004. — № 8. — С. 71-75.
9. Про психіатричну допомогу : закон України від 22 лютого 2000 р. № 1489-III (зі змінами та доповненнями) [Текст] // Відомості Верховної Ради України. — 2000. — № 19. — Ст. 143.
10. Сімейний кодекс України [Текст] : закон України від 10 січня 2002 року № 2947-III (зі змінами та доповненнями) // Відомості Верховної Ради України. — 2002. — № 21. — Ст. 135.
11. Про прокуратуру [Текст] : закон України від 5 листопада 1991 р. № 1789-XII (зі змінами та доповненнями) // Відомості Верховної Ради України. — 1991. — № 73. — Ст. 793.
12. Про внесення змін до деяких законодавчих актів України щодо забезпечення діяльності Національного антикорупційного бюро України та Національного агентства з питань запобігання корупції [Текст] : закон України від 12 лютого 2015 р. № 198-VIII // Офіційний вісник України. — 2015. — № 18.

М. М. Стефанчук

Національна академія прокуратури України,
кафедра адміністративного та фінансового права
вул. Мельникова, буд. 81-б, м. Київ, 04050

ПРАВОВА РЕГЛАМЕНТАЦІЯ УЧАСТІ ПРОКУРОРА У ЦИВІЛЬНОМУ ПРОЦЕСІ ЧЕРЕЗ ПРИЗМУ КОНСТИТУЦІЙНИХ ФУНКЦІЙ ПРОКУРАТУРИ УКРАЇНИ

Резюме

Положення нового Закону України «Про прокуратуру» містять новели у визначенні повноважень прокуратури України з виконання покладених на неї функцій та вносять суттєві зміни до низки законодавчих актів України з тим, щоб привести їх у відповідність до нової функціональної моделі прокуратури України, у тому числі до тих, які містять правове регулювання відносин щодо участі прокурора у цивільному процесі України. Правова регламентація участі прокурора в цивільному процесі зводиться до законодавчого визначення повноважень прокурора з виконання функції представництва інтересів громадянина або держави в суді у випадках, визначених законом, та функції нагляду за додержанням законів при виконанні судових рішень у кримінальних справах, а також при застосуванні інших заходів примусового характеру, пов'язаних з обмеженням особистої свободи громадян. Встановлено, що випадки представництва прокурором інтересів громадянина або держави в суді визначені не лише новим законом, як це зазначено у п. 2 ч. 1 ст. 2 нового закону, а й у інших законах, що викликає потребу в узгодженні норм законодавства, які регулюють відносини, пов'язані із участю прокурора у цивільному процесі, з метою приведення їх у відповідність з положеннями нового закону в частині повноважень прокурора з виконання покладених на нього функцій, а отже у відповідність до принципу правової визначеності.

Ключові слова: прокурор, функції прокуратури, участь прокурора у цивільному процесі, представництво інтересів громадянина або держави в суді, правова регламентація.

М. М. Стефанчук

Національна академія прокуратури України,
кафедра адміністративного і фінансового права
ул. Мельникова, 81-б, Київ, 04050, Україна

**ПРАВОВАЯ РЕГЛАМЕНТАЦИЯ УЧАСТИЯ ПРОКУРОРА
В ГРАЖДАНСКОМ ПРОЦЕССЕ ЧЕРЕЗ ПРИЗМУ
КОНСТИТУЦИОННЫХ ФУНКЦИЙ ПРОКУРАТУРЫ УКРАИНЫ**

Резюме

Положения нового Закона Украины «О прокуратуре» содержат новеллы в определении полномочий прокуратуры Украины о выполнении возложенных на нее функций и вносят существенные изменения в ряд законодательных актов Украины с тем, чтобы привести их в соответствие с новой функциональной моделью прокуратуры Украины, в том числе к тем, которые содержат правовое регулирование отношений по участию прокурора в гражданском процессе Украины. Правовая регламентация участия прокурора в гражданском процессе сводится до законодательного определения полномочий прокурора по исполнению функции представительства интересов гражданина или государства в суде в случаях, определенных законом, и функции надзора за соблюдением законов при выполнении судебных решений в уголовных делах, а также при применении других мер принудительного характера, связанных с ограничением личной свободы граждан. Установлено, что случаи представительства прокурором интересов гражданина или государства в суде определены не только новым законом, как это указано в п. 2 ч. 1 ст. 2 нового закона, но и в других законах, что вызывает потребность в согласовании норм законодательства, которые регулируют отношения, связанные с участием прокурора в гражданском процессе, с целью приведения их в соответствие с положениями нового закона в части полномочий прокурора по выполнению возложенных на него функций, а, следовательно, в соответствие с принципом правовой определенности.

Ключевые слова: прокурор, функции прокуратуры, участие прокурора в гражданском процессе, представительство интересов гражданина или государства в суде, правовая регламентация.