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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

DRAFT OPINION ON THE FEDERAL LAW ON THE PROSECUTOR'S OFFICE OF THE RUSSIAN FEDERATION

On the basis of comments by

Mr J. HAMILTON (Member, Ireland)
Mrs H. SUCHOCKA (Member, Poland)

I. Introduction

1. By letter dated 27 April 2005, the Monitoring Committee of the Parliamentary Assembly asked the Venice Commission to prepare an opinion on whether the current functions and structure of the Russian Federation Prokuratura (Public Prosecutor's Office), as envisaged in the Federal Law on the Prosecutor's Office conform with relevant Council of Europe standards.

2. Ms Suchocka (Poland) and Mr Hamilton (Ireland) were appointed as rapporteurs by the Commission. *The present draft Opinion is based on their comments. It was adopted by the Commission …*

3. The Federal Law (N2202-1) on the Prosecutor's Office of the Russian Federation (CDL(2005)040) dates from 17 January 1992 but has been amended on a number of occasions by Federal Laws and following a number of decisions of the Constitutional Court. During that same period, a number of other laws and, in particular, the Russian Code of Criminal Procedure were adopted which regulate some basic prerogatives of the Prosecutor's Office in the conduct of investigations and participation in penal proceedings. This Opinion only examines the Law on the Prosecutor's Office itself and therefore provides only a partial picture of the activities of this Office. It is nevertheless of particular significance since it is this law which, in accordance with Article 129.5 of the Constitution of the Russian Federation, defines the powers, the organisation and procedure of activity of the Prosecutor's Office. Any other relevant ordinary laws will therefore have to comply with the general approach chosen in this Law.

4. The following comments are based solely on an examination of the text of the Law. The examination has not involved any discussion with legal practitioners or members of the Prosecutor's Office, and the Commission cannot therefore assess the extent to which the Law is applied in practice or whether there may be problems which would not be apparent from a reading of the text.

II. Historical background

5. The historical role of the Prokuratura in Russia is well known and has often been described. Established during the reign of Peter the Great, it became an instrument of control in Tsarist Russia, a role which was further developed during the Soviet period. Its function in Soviet times has been described as follows:

> *"The prosecution of criminal cases in court represented only one aspect of the procuracy's work, matched in significance throughout much of Soviet history by a set of supervisory functions. In a nutshell, the procuracy bore responsibility for supervising the legality of public administration. Through the power of what was known as "general supervision", it became the duty of the procuracy to monitor the production of laws and instructions by lower levels of government; to investigate illegal actions by any governmental body or official (and issue protests); and to receive and process complaints from citizens about such actions. In addition, the procuracy supervised the work of the police and prisons and the pre-trial phase of criminal cases, and, in particular, making decisions on such crucial matters as pre-trial detention, search and seizure, and eavesdropping. Finally, the procuracy was expected to exercise scrutiny over the legality of court proceedings. Supervision of*

trials gave the procurators at various levels of the hierarchy the right to review the legality of any verdict, sentence, or decision that had already gone into effect (after cassation review) and, through a protest, to initiate yet another review by a court. Even more troubling, the duty to supervise the legality of trials meant that an assistant procurator, who was conducting a prosecution in a criminal case, had an added responsibility of monitoring the conduct of the judge and making protests. This power placed the procurator in the courtroom above both the defence counsel and the judge, in theory if not also in practice.

At the same time, for much of the Soviet period, the procuracy and procurators held higher status and had more political clout than did courts and judges. The heads of the procuracy in cities and regions belonged to the political elite and usually were members of the appropriate Communist Party committee, if not also in its bureau (for example, gorkombiuro or obkombiuro). The political leaders of cities and regions needed the co-operation of their procurators and, in turn, supported the latter's needs, especially in matters relating to the common cause of the fight against crime. For their part, the local judges had no such elevated status and, furthermore, depended on those same party bosses for financial support of the courts, including perks, and for the continuation of their careers – local politicians had a say in the renomination of judges for periodic elections and in their possible recall."[1]

6. This strong role of the Prokuratura was linked to the political principles of a system whose cornerstone was the leading role of the communist party. This principle determined the interrelationship between state organs and lay at the basis of the entire political system. Its basic consequence was the rejection of the separation of powers and the grounding of the entire structure of state organs upon the concept of unity of power. Four sets of state organs were distinguished within the framework of this uniform system. The somewhat enigmatic term 'vertikal' of state organs was used for each such set in order to avoid the term 'authorities' (powers), since within a uniform system several equivalent authorities (powers) could not exist. That term ('vertikal') was therefore indicative of the structure's essential feature: a vertical chain of command entailing the complete subordination of lower-raking organs to higher-ranking ones, and that meant the strong centralisation of all power. One of those 'pillars' was the "Prokuratura".

7. This system was in force in all the countries known as 'people's democracies', i.e. the countries of Central and Eastern Europe, up until the political turning point of 1989-1990. In this period individual countries launched political reforms, and typically that meant breaking with the principle of unity of power and repudiating the leading role of a single party. This in turn opened the way for a return to a political system based on the division of authority. Each of those states sooner or later aspired to membership of the Council of Europe, and European standards required such a solution. Hence each of those states received from the Council of Europe recommendations on concrete solutions for bringing their systems into line with European democratic standards. Most of those recommendations included suggestions pertaining to the reform of the prosecutor's office and judicial system. That required rethinking the very foundations of the existing structure of state organs. Naturally, it was easiest to change the constitution and bring general principles into line with the Council of Europe's requirements. It was far more difficult to change detailed provisions contained in legislation regulating individual state organs. As a result, some states effected

[1] Solomon and Foglesong *The Procuracy and the Courts in Russia: A New Relationship?* In East European Constitutional Review Vol 9 No 4 Fall 2000.

those changes rather early on, whilst others are experiencing problems with them to this very day.

8. The numerous amendments to the Law examined here show that such a reform process has taken place in the Russian Federation as well. The task of this Opinion is to determine whether this process can be regarded as largely successfully completed or whether the Law still reflects to a considerable extent the concepts of the previous system.

III. European standards on the Prosecutor's Office

9. The reform of the office of the public prosecutor in the countries of Central and Eastern Europe was particularly difficult due to the lack of a common European model of the prosecutor's office. European standards dealt with the problems of the judiciary, but they lacked a precise, clearly formulated catalogue of principles defining the position of the prosecutor's office from which a democratic state could not deviate. It was not until much later that recommendations emphasising the necessity of ensuring an independent prosecutor's office emerged (Recommendation (2000)19 of the Committee of Ministers of the Council of Europe).

10. Apart from the well-known civil/ common law divide, there are other key differences between prosecution systems which do not always follow the common/ civil law line of division. There is, for example, the distinction between countries which apply the "legality" principle of mandatory prosecution and those where prosecution is discretionary. There are countries where the prosecutor controls the investigation and others where the prosecutor and investigator are independent of each other. In some systems the prosecutors are part of the judiciary, whereas in others they are part of the executive. While judicial prosecutors are independent by their nature, prosecutors who are part of the executive may be completely independent of government (as in Ireland, Finland, Nova Scotia, Tasmania and soon to be in Northern Ireland) or may be subject, in varying degrees, to control from the Ministry of Justice or a politically appointed Attorney General. Where there is control it can vary from general supervision (as in England) to control over day-to-day decisions, or a power to issue particular instructions but subject to tight controls such as an obligation to give reasons for the instruction and inform parliament (British Columbia). Prosecution services can be organised on a hierarchical principle or can respect the autonomy of individual prosecutors. Finally, in what is perhaps the ultimate in democratic control, in the United States prosecutors are elected.

11. As far as internationally agreed standards are concerned, as a general rule they have nothing to say about how prosecution services should be organised. The most important instrument is the Council of Europe Recommendation (2000) 19 of the Committee of Ministers (6 October 2000). The Recommendation is not legally binding. It deals only with the role of the public prosecution in the criminal justice system. It does not deal with other functions which may be assigned to the public prosecutor.

12. The Council of Europe Prosecutors Network has recently conducted a survey on prosecutors' competencies outside the criminal field in the member states of the Council of Europe[2]. The survey shows that in a majority of states the public prosecutor has functions other than those of criminal prosecution. Most of the states which were formerly part of the

[2] See András Zs Varga, Reflection Document on Prosecutors Competencies outside the Criminal Field in the member States of the Council of Europe, accessible at http://www.coe.int/prosecutor/.

Soviet Union or the Soviet bloc have prosecutors' offices which retain the functions of supervision. Furthermore, even if one excludes those states, in a significant number of Western European states, the prosecutor exercises important functions outside the sphere of criminal prosecution[3]. The author of the commentary on the survey suggests that the legal basis for prosecutors' intervention in cases of civil and administrative law fall into three categories: the protection of state interest, the protection of public interest, and the protection of human rights.

The Reflection Document presented to the Prosecutors Network of the Council of Europe proposes that these competencies of the prosecutor may be legitimate and in accordance with the rule of law provided certain criteria are observed. These are that the competencies are exercised in such a way as to respect the principles of separation of state powers, including respect for the independence of the courts, equality of parties (equality of arms) and non-discrimination. In relation to separation of powers, in addition to respect for the independence of the court, the document refers to the need to respect the decision-making power of the presidency and the problems which can arise where the Prosecutor General attends the Cabinet[4].

[3] It may be worth noting that common law countries tend to fall into the camp where the public prosecutor does not exercise functions other than those of criminal prosecution. That this is so is largely due to the modern tendency to transfer these functions to specialised prosecution agencies. Historically, however, in common law countries prosecution was the function of an Attorney General who also was responsible for the protection of state interest and public interest.

[4] In conclusion, the author of the paper proposes fifteen tests which are as follows:

1. In addition to the essential role played by prosecutors in the criminal justice system, some member states of the Council of Europe provide for the participation of the prosecutor in the civil and administrative sectors for historical, efficiency and economic reasons but their role should always be exceptional (principle of exceptionality).
2. The role of the prosecutor in civil and administrative procedures should not be predominant; the intervention of the prosecutor can only be accepted when the objective of this procedure cannot, or hardly be ensured otherwise (principle of subsidiarity).
3. The participation of the prosecutor in the civil and administrative sectors should be limited and must always have a well-founded, recognisable aim (principle of speciality).
4. States can entitle prosecutors to defend the interest of the state (principle of protection of state interest).
5. Prosecutors can be entitled to initiate procedures or to intervene into on-going procedures or to use various legal remedies to ensure legality (principle of legality).
6. In case it is required for reasons of public interest and/or the legality of decisions (e.g. in cases of protection of the environment, insolvency etc.) the participation of the prosecutor can be justified (principle of public interest).
7. Protecting the rights and interests of disadvantaged groups of the society unable to exercise their rights can be an exceptional reason for the intervention of the prosecutor (principle of protection of human rights).
8. If co-operation between prosecution services and other subjects of public law - the executive, the legislative, local government entities -seems indispensable, member states can allow prosecutors general to consult with the representatives of the mentioned authorities (principle of consultative co-operation).
9. The principle of separation of powers should also be ensured in connection with the prosecutor's tasks outside the criminal sector (principle of separation of state powers).
10. Prosecutor's activities outside the criminal field should not affect the sovereignty of the legislative power (principle of sovereignty of the legislative).
11. The participation of the prosecution service in the decision-making by the executive should not engage the responsibility of the prosecution service for the executive's decisions (principle of responsibility of the executive).
12. The participation of the prosecution in court procedures should not affect the independence of the courts (principle of independence of the courts).
13. Prosecutors should have no decision making powers outside the criminal field or be given more rights than other parties before courts (principle of equality of arms).
14. Prosecutors should not discriminate among persons when protecting their rights and should only

13. There are thus no comprehensive standards on the powers and organisation of the office of the public prosecutor although a number of guiding principles have emerged. It is therefore necessary to be guided by the general democratic principles of a law-governed state. Foremost amongst them is the principle of separation of powers and its consequent principle: the autonomy of individual branches of authority and the principle of balance (equilibrium) of powers. That means prosecution organs should not overstep the bounds of areas reserved for legislative authority, executive power and an independent judiciary. It is therefore necessary to do away with those functions of the prosecutor's office that do not conform to those principles and may actually constitute a threat to their implementation.

IV. Key features of the Law

1. General Provisions

14. Article 1(1) of the Law sets out concisely the core principle of the Russian Prosecutor's Office:

> *"The Prosecutor's Office of the Russian Federation shall be a single, federal, centralised system of bodies exercising on behalf of the Russian Federation supervision over compliance with the Constitution of the Russian Federation and execution of the laws in force within the territory of the Russian Federation."*

15. Article 1(2) goes on to set out the key functions which can be paraphrased as follows:

a. Supervision over the execution of laws by named state authorities appears to include all state executive bodies except the Government itself, although it includes individual ministries. It includes legislative bodies of the subjects of the Russian Federation, but not the Russian Parliament. It even includes heads of commercial and non-commercial organisations. It includes supervisory bodies. It does not include the judiciary.
b. Supervision to ensure legal instruments used by these bodies are in conformity with the law.
c. Supervision over the observance of human rights and freedoms by these bodies.
d. Supervision over preliminary investigations, inquiries and searches.
e. Supervision over the execution of laws by bailiffs.
f. Supervision over the execution of laws in prisons and places of detention.
g. Criminal prosecution.
h. Coordination of the crime control activities of law-enforcement agencies.

16. It is interesting to note that the functions of supervision are set out before the reference to criminal prosecution which suggests these are seen as the primary role of the Procuracy.

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intervene upon well-grounded reasons (principle of non-discrimination).

15. If the prosecutor is entitled to take measures in the civil and administrative law area, the rights and guarantees listed in Rec 19(2000) in connection with the criminal jurisdiction also apply, such as the duty to carry out their functions fairly, impartially and objectively (principle of impartiality of prosecutors).

17. Articles 1(3-5) set out further functions of the Prosecutor's Office. Paragraph 4 states that the Prosecutor's Office shall participate in law-making activities. Paragraph 3 provides as follows:

> *"In accordance with the procedural legislation of the Russian Federation, prosecutors shall participate in the hearing of cases by courts of law and commercial courts (hereinafter referred to as the "courts") and shall challenge any court decisions, sentences and rulings which are contrary to the law."*

2. Organisation and main tasks

18. Article 4 sets out certain principles governing the organisation and operation of the Office. Paragraph 1 sets out the basic principle of organisation:

> *"The Prosecutor's Office of the Russian Federation shall be a single, federal, centralised system of bodies (hereinafter referred to as the "prosecution bodies") and institutions and shall operate on the principle of subordination of lower-ranking prosecutors to higher-ranking prosecutors and to the Prosecutor General of the Russian Federation."*

19. This principle is given detailed expression in Section II of the Law (Articles 11-20). Broadly, separate offices are established in the Federation, the subjects of the Federation, within the military and other specialised establishments including scientific and educational establishments, the editorial offices of publications which are legal entities, and in cities and districts (Article 11). The system is entirely hierarchical; under Article 17 the Prosecutor General may issue "commands, directives, orders, regulations and instructions" which "shall be binding on all members of staff of the prosecution service" (i.e. the service at all levels).

20. Article 4 states a number of other key principles:

i. the independence of the Prosecutor's Office from all other state authorities;
ii. its duty to act in accordance with law;
iii. a duty to act openly subject to legislation on the protection of civil rights and freedoms and the protection of state and other secrets;
iv. a duty to report on the state of the rule of law;
v. non-involvement of prosecutors and investigators in executive bodies or public associations pursuing political aims; and
vi. employment in the Prosecutor's Office is a full-time activity except for teaching, scientific and creative activities.

21. Interference by any other state authorities with the Prosecutor's Office is prohibited by Article 5, which also provides that prosecutors are not required to give explanations or make their files available.

22. Article 11(3) gives the prosecution service a monopoly on prosecution powers.

23. Article 7 of the Law provides that the Prosecutor General and certain other prosecutors may attend sessions of the Federal Assembly and the Government as well as other legislative and executive bodies. Under Article 9, prosecutors are given a right to initiate legislation.

24. Article 18 deals with the prosecutors' powers to co-ordinate the crime-control activities of other agencies These powers appear to be extensive, and include the power to call co-ordination meetings, organise working groups and request information. The Commission has not seen the regulations under which the prosecutors may be given further powers. The powers do not, however, extend to the tax authorities or the police.

25. Article 10 deals with the petition system. Prosecutors have a duty to consider petitions from members of the public concerning violations of the law. Replies must state their reasons, and the prosecutor is obliged to institute proceedings against transgressors. A negative decision by the prosecutor does not prevent the petitioner from bringing his own court proceedings.

26. Article 12 deals with the appointment and removal of the Prosecutor General. Appointment is made by the Federation Council of the Federal Assembly on the President's recommendation. If the President's nominee is not accepted he must make another nomination within 30 days. Presumably – in theory at any rate – this process could be repeated more than once.

27. Removal from office is by the same body, again on the recommendation of the President. This means he cannot be removed unless the President seeks his removal. Presumably the Federation Council can block his removal. No criteria for dismissal are set out. The term of office is for five years. There is no prohibition on reappointment.

28. In accordance with the hierarchical principle, the Prosecutor General in turn appoints the heads of the prosecution offices of the subjects of the Federation "in agreement with" its state authorities (Article 13). These prosecutors are all subordinate and accountable to and may be dismissed by him. (Article 13(1)). He also appoints and removes city and district prosecutors and specialist prosecutors who are similarly subordinate and accountable to him (Article 13(2)).

28. The Prosecutor General has a first deputy and other deputies who are appointed and removed by the Federation Council of the Federal Assembly on his recommendation (Article 14(2)). Article 14 provides for the detailed hierarchical structure of the Prosecutor General's Office. It establishes a board consisting of the Prosecutor General and senior staff. The Board's functions are not defined. Article 15 has similar provisions relating to subordinate prosecutor's offices.

3. Prosecutorial supervision

29. The objects and purpose of prosecutorial supervision have already been described (para 15 above). It seems from the way the text is set out that this is seen as the primary function of the Prosecutor's Office.

30. In exercising supervisory functions over the execution of laws and the observance of human rights, the prosecutor has the following powers:

a. to enter the premises of any of the bodies over whom supervision is exercised, and to have access to all documents and material (Articles 22 and 27); and
b. to require the production of documents, material, and information, to question and require explanations, and carry out reviews. The power to summon persons for questioning extends to private individuals (Articles 22 and 27).

It may be noted that under Article 6 such orders have binding effect and "are subject to unconditional execution". The possibility of court intervention does not seem to be envisaged.

31. Where the prosecutor finds a violation of law, there are a number of options:

a. to institute criminal proceedings;
b. to institute administrative proceedings;
c. to invoke any other applicable statutory liability;
d. to issue a warning; and
e. in the case of violation of human rights, the prosecutor may bring civil proceedings but only where for age or health or other reasons the injured party cannot personally defend his rights in a court of law, or where the rights of a significant number of persons are involved, or where the violation "has acquired particular social significance".

(Articles 22(2) and 27(2) and (3))

32. Article 21(2) provides that in exercising supervision over the execution of laws, prosecution bodies are not to be a substitute for other state bodies. Article 26(2) contains a similar provision in relation to supervision over the observance of human rights. In addition, in the latter case prosecution bodies are not to interfere in the operational and administrative activities of organisations.

33. Where the prosecutor finds a violation of the law, he may order the release of any persons unlawfully subjected to administrative detention pursuant to the decisions of non-judicial bodies (Article 22(3)). There seems to be no requirement to refer the matter to a court of law. He may also appeal against any legal instruments which are contrary to the law, or which violates human rights, or apply to a court for a declaration that the instrument is invalid. Articles 23 and 28 provide for an appeal to the body which issued the instrument. The appeal is to be heard within 10 days or at the next session in the case of a legislative body. It is not clear to the Commission how this works: is the body concerned bound by the prosecutor's view of the law? Are there any circumstances in which the matter can or must be referred to a court?

34. Articles 22 and 28 also enables the prosecutor to make recommendations for the elimination of violations of the law. Under Article 24 these must be filed with the body or official empowered to eliminate the violation and must be examined without delay. Measures to eliminate the violation are to be taken within one month. Again, it is not clear to the Commission if the body or official is bound by the prosecutor's finding; the text seems predicated on the assumption that this is so.

35. Article 24(3) provides as follows:

> *"In the event that resolutions of the Government of the Russian Federation should conflict with the Constitution of the Russian Federation and the laws of the Russian Federation, the Prosecutor General of the Russian Federation shall notify the President of the Russian Federation accordingly."*

The precise scope of this provision is unclear to the Commission since the Government of the Russian Federation is not one of the bodies listed in Articles 1(2) or 21(1) as being subject to prosecutorial supervision. Presumably this provision is meant to stand alone.

36. The prosecutor is empowered by Article 25 to issue a reasoned decree ordering the institution of criminal or administrative proceedings. It is not clear whether the person affected by such a decree has any option but to comply. Can he challenge the matter in a court if he does not accept the prosecutor's reasoning?

37. Article 25(1) provides for warnings against apprehended violations of the laws. Again, the binding nature of such warnings or the power to appeal them to a court of law is not made clear.

38. In relation to supervision over violations of human rights, there are some other features worth noting. There is a duty to explain to the injured parties the procedure for protecting their rights and freedoms and to compensate them (Article 27(1)).

39. Articles 29-31 deal with supervision over preliminary investigation and searches. The powers are described as serving the purposes of ensuring the observance of human and civil rights and freedoms, and ensuring the legality of decisions. Directives are subject to compulsory execution (Article 30). The prosecutor is himself empowered to conduct an investigation or assign it to a subordinate prosecutor (Article 31).

40. Articles 32-34 empower the prosecutor to supervise penal bodies and other bodies which detain people. The object is to supervise both the legality of the detention itself and the observance of the rights of detained persons. The legality of the execution of non-custodial sentences is also subject to supervision.

41. In exercising these powers the prosecutor is entitled:

a. to visit places of detention at any time;
b. to question prisoners and detainees;
c. to inspect all records;
d. to require the administration to safeguard detainees' and prisoners' rights;
e. to demand explanations from officials;
f. to make appeals and recommendations;
g. to institute criminal and administrative proceedings; and
h. to set aside disciplinary penalties imposed in violation of law.

Where an appeal is issued, the effect of the instrument appealed against is suspended. The prosecutor is under a duty to order the immediate release of any person unlawfully detained. The prosecutor's decrees and requests are binding.

42. Both Articles 21(2) and 26(2) provide that in exercising supervision, prosecution bodies are not to be a substitute for other state bodies. In view of the sweeping powers conferred on the prosecution bodies and the apparent absence of provisions relating to judicial control concerning the manner of their exercise, it is not clear what these provisions mean in practice.

4. Participation in court hearings

43. Articles 35-39 deal with the prosecutor's participation in court hearings. Article 35 is an enabling section providing that the prosecutor shall take part in hearings in the cases provided for by law. When conducting a criminal prosecution he acts as the public prosecutor. He may apply to the court or enter the case at any stage of the proceedings if the protection of civil rights and lawful interests of society or of the state so require. The Prosecutor General may take part in hearings of the Supreme Court of the Russian Federation as well as the Higher Arbitration Court. He may also apply to the Constitutional Court in matters concerning a violation of constitutional rights and civil proceedings.

44. Article 36 provides for a right to file an appeal in cassation, to appeal, or to appeal in exercise of supervisory power against an unlawful or unfounded court decision. Prosecutors may demand the record of any case or category of case where the decision has entered into legal force.

45. This power has been the subject of a number of decisions of the European Court of Human Rights, notably *Ryabykh v. Russia* (52854/99, Judgment of 24 July 2003), which followed the decision in *Brumarescu v Romania* (28342/95, Judgment of 28 October 1999) and *Nikitin v Russia* (50178/99, Judgment of 20 July 2004). As a result of these cases and legislative response to them, the power of supervisory review has been substantially curtailed. In criminal cases, the prosecutor may no longer[5] use the power to seek to reverse an acquittal or increase a sentence. In all cases, civil as well as criminal, supervisory review must be sought within 12 months.

5. Employment

46. The Law contains extensive provisions relating to employment in the prosecution service (Articles 40-45). Of these, most do not call for comment. Reference is made only to two matters.

47. Article 42(2) prohibits the detention, arrest or search of a prosecutor, a prosecutor's property or vehicles, except for the purpose of ensuring the safety of others, or where a prosecutor is caught red-handed. Any other investigation of prosecutors is exclusively within the competence of the Prosecutor's Office.

48. Article 43 deals with termination of prosecutors' employments. Termination may take place for "violation of the prosecutor's oath and the commission of infringements prejudicial to the honour of prosecution staff". The latter seems rather imprecise. The oath is set out in Article 40.4. It includes swearing "to cherish my professional honour, be a model of integrity, moral purity and modesty and to piously protect and propagate the finest traditions of the prosecution service". Certain important safeguards for the rights of individual prosecutors, particularly in the matter of security of employment, do not appear to be provided for.

6. Military prosecutors and other matters

49. Articles 46-50 deal with military prosecution bodies. The provisions closely parallel those already discussed. Articles 51-54 refer to statistics, finance, and the seal of the prosecutor and do not call for comment.

[5] There are some exceptions following a decision of the Constitutional Court of 11 May 2005, see below at Footnote 7.

V. Comments on the Law

1. Responsibilities and powers of the Prosecutor's Office

50. From the description of the key features of the Law above, it clearly follows that the Law establishes a very powerful institution. The first thing that strikes the reader is that it is not merely, or perhaps even primarily, an office concerned with criminal prosecution. Its primary function is that of control over the State apparatus. If the State withdraws from large areas of activity its power will diminish, but as long as the State remains powerful so will the Prokuratura. The overall structure of the Prosecutor's Office during the Soviet period is still recognisable in the present Law on the Prosecutor's Office despite some welcome changes which have taken place, notably in the limitation of the power to exercise supervision over the legality of court proceedings and in making it clear that the final decision is with the courts.

51. The general supervisory function appears as the primary task of the Prosecutor's Office. This approach gives rise to misgivings. Such a broadly defined general supervisory function was a logical component of the system of unity of power and resulted from that system's lack of administrative and constitutional courts and the institution of an ombudsman. The prosecutor therefore combined the functions of different organs within his function of general supervision. The justification for such a broad definition of the role of the Prosecutor's Office vanishes, when other institutions to safeguard the legal order and adherence to civil rights are established. In a democratic law-governed state, protection of the rule of law is the task of independent courts. This is not reflected in the Law under consideration.

52. The broad extent of the Prosecutor General's supervisory power over state authorities compared with the court functions in this area risks inhibiting the courts' developing their own remedies and acts as a brake on the development of administrative law. On the other side of the coin, the system of petitioning the Prosecutor General appears to provide an effective and cheap remedy where officials of the state break the law. Any reform will therefore have to take care that alternative remedies are made available to the people.

53. Chapter III of the Law entitled 'Prosecutorial supervision' is devoted to the detailed instruments whereby the prosecutor exercises supervision and endows the prosecutor with extremely broad rights. Article 22 defines the specific instruments of the said supervision. In order to perform his functions, the prosecutor has access to all those entities' documents and materials and can ask them to clarify all matters pertaining to the violation of the law. Item 4 of the same article states that "*officials of the bodies referred to in Article 21, item 1[…] shall be bound to comply immediately with any requests by the prosecutor or his deputy to carry out checks and inspection*". Article 6 introduces the principle that all requests by the prosecutor are binding. This once again raises doubts as to whether such powers do not violate the system of balance inherent in the separation of powers, obliterate the division of authority and grant the Prosecutor's Office the rank of an authority above all other bodies.

54. These misgivings are reinforced by the fact that Article 21 of the Law listing the bodies under supervision by the Prosecutor's Office includes, without any differentiation, in addition to public bodies also "*governing bodies and heads of commercial and non-commercial organisations*".

55. Against this background the Commission would support a very different approach to the powers of the prosecutor's office which results from a text adopted by the Parliamentary Assembly. While it is not binding on Member States, the Parliamentary Assembly of the Council of Europe, in Recommendation 1604 (2003) on the role of the public prosecutor's office in a democratic society governed by the rule of law, having recited (at paragraph 6) that the various non-penal law responsibilities of public prosecutors *"give rise to concern as to their compatibility with the Council of Europe's basic principles"* went on to declare its opinion (at paragraph 7):

> *"it is essential… that the powers and responsibilities of prosecutors are limited to the prosecution of criminal offences and a general role in defending public interest through the criminal justice system, with separate, appropriately located and effective bodies established to discharge any other function."*

56. While this represents the Parliamentary Assembly's opinion, it does not necessarily reflect the practice within the majority of Council of Europe Member States. It is, of course, clear that the Russian Office of the Prosecutor General is among those Offices which does not conform to the model which the Parliamentary Assembly considered to be essential. Moreover, in respect of the Prosecutor's predominant role in the Russian administration, which can hardly be described as limited or exceptional, the Prosecutor's Office does not seem to conform to the tests proposed by Varga[6].

57. On the whole, a possible solution would seem to lie in separating the function of ensuring compliance with the law by state authorities from the function of criminal prosecution. In the existing scheme of things it is difficult to avoid the conclusion that the supervisory power predominates over that of criminal prosecution.

2. The relations of the Prosecutor's Office with other State organs

58. Article 21 defines the organs over which supervision is exercised: *"federal ministries, state committees, services and other federal executive authorities, representative (legislative) and executive state authorities of subjects of the Russian Federation, local self-government bodies, military administration bodies[…] and heads of commercial and non-commercial organisations"*. That is an exceptionally wide circle of entities, encompassing as it does organs of legislative, executive and local-government authority as well as commercial and non-commercial institutions. Combined with the sweeping powers of the Prosecutor's Office as described above, this inevitably raises concerns as to the compatibility of these supervisory powers with the checks and balances required for the functioning of a democratic system.

59. When one adds to this combination of extensive powers the fact that the Prosecutor General is independent of all other state authorities and cannot be compelled to give explanations or make files available, that his reporting obligations are confined to a duty to report on the state of the rule of law, that he has complete power to issue binding orders to the entire Procuracy, that he appoints and dismisses the key figures, that the Procuracy is established even in bodies as scientific and educational establishments and publications, and that the Prosecutor General cannot be removed unless the President seeks his removal and that the criteria for removal are not specified, the extent of the Prosecutor General's power is very great indeed. Furthermore, the relationship between the Procuracy and the Presidency

[6] See Footnote 4 above.

appears to be such that it is not difficult to imagine that in practice the Procuracy could become an extension of Presidential power.

60. The provisions of Articles 7 and 9 of the Law, which provide for the Prosecutor General and other prosecutors to attend sessions of the Federal Assembly and the Government, as well as other legislative and executive bodies, and to initiate legislation, give rise to additional concerns. Attendance by the Prosecutor General at the Government necessarily gives rise to real doubt concerning the reality of his independence from Government, despite the statement in Article 4 of his Office's independence from all other state authorities and the prohibition in Article 5 on interference with the Prosecutor's Office by them. Conversely, paragraph 12 of Recommendation (2000) 19 provides: *"public prosecutors should not interfere with the competence of the legislative and the executive powers"*. Furthermore, where the public prosecution is part of, or subordinate to, the government, by virtue of paragraph 13 of that recommendation, states have to take effective measures to ensure the transparency of the exercise of governmental powers with respect to the public prosecution. In Russia it is by no means clear what the precise relationship is of the Prosecutor General to the Government. If the current arrangements are to continue, there is a need for more strictly defined rules.

61. With respect to the legislative power, the principle established by paragraph 12 of Recommendation (2000) 19, that *"public prosecutors should not interfere with the competence of the legislative and the executive powers"*, runs counter to the provision in the Law that the prosecutor may at any time according to his own will, and not the will of parliament, take part in plenary sittings of parliament (*"to attend sessions of the chambers of the Federal Assembly of the Russian Federation*") as well as in the meetings of individual commissions and committees of the legislative, government and local-government authorities. Even less compatible with this provision is the fact that the Prosecutor's Office may even become directly involved in the legislative process. Article 9 clearly indicates that the prosecutor enjoys the right of legislative initiative by stating: *'The prosecutor may apply to the legislative authorities and bodies with the right to initiate legislation[…] with proposals to amend, supplement, repeal or adopt laws or other regulatory legal instruments.'* The prosecutor may, of course, hand down an opinion on a legal act within his scope of interest being dealt with by parliament. Upon a motion of the legislative authorities, he may take part in committee work on the appropriate draft law. He should not, however, be endowed with the formal right of legislative initiative. He may enjoy the right to submit a motion or a request to parliament or the government, which have the right to initiate legislation. His participation in parliamentary sittings should be possible only at the invitation of parliament or a parliamentary committee. That is required by the rules of the balance of power. For that reason, Article 9 should be considerably amended to eliminate all misgivings over the prosecutor's scope of responsibilities.

3. The Prosecutor's Office and court proceedings

62. The Prosecutor General retains a power, as part of his supervisory review powers, to intervene in any court proceedings and to seek a review by a superior court even if a final judicial decision has been given. That power has, however, now been limited.

63. In the case of *Brumarescu v Romania* (28342/95, Judgment of 28 October 1999), the European Court of Human Rights held that a similar power exercised by the Prosecutor General of Romania to set aside a civil judgment in a case in which the Romanian State had

not been a party was contrary to Article 6.1 of the European Convention on Human Rights. The Court stated:

> *"The right to a fair hearing before a tribunal as guaranteed by Article 6.1 of the Convention must be interpreted in the light of the Preamble to the Convention, which declares, among other things, the rule of law to be part of the common heritage of the Contracting States. One of the fundamental aspects of the rule of law is the principle of legal certainty, which requires, inter alia, that where the courts finally determined an issue, their ruling should not be called into question.*
> *In the present case the Court notes that at the material time the Procurator-General of Romania – who was not a party to the proceedings – had a power under Article 330 of the Code of Civil Procedure to apply for a final judgment to be quashed. The Court notes that the exercise of that power by the Procurator-General was not subject to any time-limit, so that judgments were liable to change infinitely.*
> *The Court observes that, by allowing the application lodged under that power, the Supreme Court of Justice set at naught an entire judicial process which had ended in – to use the Supreme Court of Justice's words – a judicial decision that was "irreversible" and thus res judicata – and which had, moreover, been executed.*
> *In applying the provisions of Article 330 in that manner, the Supreme Court of Justice infringed the principle of legal certainty. On the facts of the present case, that action breached the applicant's right to a fair hearing under Article 6.1 of the Convention.*
> *There has thus been a violation of that Article."*

64. In a later case of *Ryabykh v Russia* (52854/99 Judgment of 24 July 2003) the European Court of Human Rights applied the same principle where supervisory review was set in train by the president of a superior court. It is clear that same principle would have applied had the application been by the Procurator General:

> *"The Court reiterates that Article 6.1 secures everyone the right to have any claim relating to his civil rights and obligations brought before a court or tribunal. In this way it embodies the "right to a court" of which the right of access, that is the right to institute proceedings before courts in civil matters, constitutes one aspect. However, that right would be illusory if a Contracting State's domestic legal system allowed a final, binding judicial decision to remain inoperative to the detriment of one party. It would be inconceivable that Article 6.1 should describe in detail procedural guarantees afforded to litigants – proceedings that are fair, public and expeditious – without protecting the implementation of judicial decision; construe to Article 6 as being concerned exclusively with access to a court and the conduct of proceedings would be likely to lead to situations incompatible with the principle of the rule of law which the Contracting States undertook to respect when they ratified the Convention (see Hornsby v. Greece, judgment of 19 March 1997, Reports 1997-II, p.510,40).*
>
> *The Court considers that the right of a litigant to a court could be equally illusory if a Contracting State's legal system allowed a judicial decision which had become final and binding to be quashed by a higher court on an application made by a State official."*

65. The time period for lodging an application for supervisory review both in civil and criminal cases has now been limited to one year. (Code of Civil Procedure, Article 396; Code of Criminal Procedure, Article 371). In addition, and more importantly in the criminal law context, Article 405 of the Code of Criminal Procedure now limits the application of

supervisory review to cases which do not involve changes to the detriment of the accused[7]. In other words, a supervisory review cannot reverse an acquittal, or a decision to terminate proceedings, or result in a higher sentence. These changes represent a significant and very welcome development.

4. The organisation of the Prosecutor's Office

66. It is extremely difficult to provide a detailed analysis of the entire structure of the Prosecutor's Office, since it remains an open question to what degree that structure (centralised and internally subordinated as it is) is connected to the necessity of exercising general supervision and to what extent it is indispensable to the performance of other functions of the Prosecutor's Office. Does such a degree of subordination and centralisation not violate the general rule of a specific prosecutor's independence in the conduct of specific, notably penal proceedings?

67. The position of individual prosecutors with respect to their superiors seems weak and not in compliance with Recommendation (2000) 19. Paragraph 5(d) of Recommendation (2000) 19 refers to prosecutors having tenure. Paragraph 5(e) requires disciplinary proceedings to be governed by law and to guarantee a fair and objective evaluation and decision which should be subject to independent review. There is nothing in Article 43 on termination of employment to indicate compliance with this. Indeed, it seems that dismissal is by decision of the head – there is no provision for appeal at least in this Law.

68. There are a number of other matters where it is unclear whether the provisions of Recommendation (2000) 19 are being complied with (the references are to paragraphs in the Recommendation):

a. Paragraph 5(f) refers to a satisfactory grievance procedure. There is no evidence that there is one.
b. Prosecutors are guaranteed freedom of expression, association, assembly and public discussion. There is no indication in the Law that these rights are guaranteed. The emphasis on secrecy in the service, and the reference to grounds of resignation as including *"failure to agree with the decisions or actions of a state body or of a higher official"* do not tend to indicate a culture of respect for freedom of expression.
c. Paragraph 10 refers to a prosecutor's right to request that instructions addressed to him are put in writing. Nothing suggests that this is applied.

69. The hierarchical centralised structure of the Prosecutor's Office at all levels does also not seem to fit well into a federal system. In other federal states, for example, in Canada, Australia and Germany where criminal prosecution exists both at the level of the federation and its entities, separate prosecution offices are established at each level which are independent of each other. Where criminal jurisdiction is reserved to the entities, the federal prosecutor does not instruct the State, provincial or land prosecutor as to what he is to do. By contrast, while the Prosecutor General's Office in the Russian Federation is organised both at the level of the Federation and the subjects of the Federation, the Prosecutor General may issue commands to the prosecutors of the subjects of the Federation, and has the power to

[7] Following a decision of the Constitutional Court of 11 May 2005, exceptionally, supervisory review to the detriment of the accused remains possible in cases of exceptionally grave violations of procedural standards by a court which could be considered as violations of the European Convention of Human Rights. This exception seems justified.

appoint and dismiss them, although appointment must be "in agreement with" the state authorities of the respective subject of the Federation. When it is taken into account that supervision over the execution of the laws includes supervision over the legislative bodies of the subjects of the Russian Federation, the role of the Prosecutor General as an instrument of centralised control is clear. It is assumed, however, that in the final analysis, the Prosecutor General is subject to the decision of the Constitutional Court where any issue of competence of powers between the Federation and its subjects arises. Moreover, the specific situation in the Russian Federation may require solutions which differ from other federal systems.

5. Other aspects

70. Paragraph 29 of Recommendation (2000) 19 states as follows: *"Public prosecutors should seek to safeguard the principle of equality of arms, in particular by disclosing to the other parties – save where otherwise provided by the law – any information which they possess which may affect the justice of the proceedings."* No provision of this Law seems to implement this provision. Given the secrecy (particularly in the prosecutor's oath, the breach of which is a ground for dismissal) there seems again to be a problem of culture.

71. The immunity of prosecutors from detention, arrest or search is not justifiable. Special arrangements need to be in place to ensure that prosecutors do not sit in judgment on themselves. Prosecutors should not be above the law.

72. There is also no provision for independent monitoring or inspection of the Prosecutor's Office.

Conclusions

73. There have been undoubted reforms in the Russian system of Procuracy, notably the limitations on the prosecutor's powers of supervisory review of court decisions, the fact that the Law provides for the subordination of the prosecutor to the courts, and the fact that intervention in court cases on behalf of the citizens is limited to cases where they are unable to act for themselves or where this is justified because numerous citizens are affected by the wrongdoing concerned.

74. Nevertheless the overwhelming impression remains of an organisation which is still too big, too powerful, not transparent at all, exercises too many functions which actually and potentially cut across the sphere of other State institutions, in which the function of supervision predominates over that of criminal prosecution, but which nevertheless, despite its powers, remains vulnerable to presidential and other political power. The strongly hierarchical structure of the Procuracy, concentrating power in the hands of the Prosecutor General, reinforces these concerns. As it stands, the system does not seem to comply with Recommendation (2000)19 and raises serious concerns of compatibility with democratic principles and the rule of law.

73. A further reform of the system seems therefore indispensable. It should be brought into line with European standards of a law-governed state as well as Russia's new penal and civil laws. A new, comprehensive, politically definitive legal instrument based on different fundamental principles in accordance with democratic norms should be adopted. That would require depriving the Prosecutor's Office of its extensive powers in the area of general supervision which should be taken over by various courts (common courts of law, an

administrative court and constitutional court) as well as the ombudsman. The direction in which the Venice Commission would recommend to go has been clearly formulated in Recommendation 1604 (2003) of the Parliamentary Assembly, which states: "*the power and responsibilities of prosecutors are limited to the prosecution of criminal offences and a general role in defending public interest through the criminal-justice system, with separate, appropriately located and effective bodies established to discharge any other function.*"