Генеральная прокуратура
Российской Федерации

COUNCIL OF EUROPE CONSEIL DE L'EUROPE

CONFERENCE OF PROSECUTORS GENERAL OF EUROPE

The role of public prosecution in the protection of human rights and public interests outside the criminal law field

organised by the Council of Europe and the Prosecutor General's Office of the Russian Federation

Saint Petersburg, 2-3 July 2008

Konstantinovsky Palace

"The role of the prosecutor services as regards non-criminal matters in different legal systems: different legal traditions and practices to defend common standards and goals – the constitutional perspective."

Presentation by Ms Hanna Suchocka
Vice-President of the Venice Commission, Poland

Mr Chairman, Ladies and Gentlemen,

First of all I would like to thank the organisers, the Council of Europe and the Office of the Prosecutor General of the Russian Federation, for the invitation to this Conference as a representative of the Venice Commission. I would also like to thank the general rapporteur, Mr Varga, for his report which greatly facilitated the preparation of my intervention. Otherwise my intervention will be largely based on different Opinions adopted by the Venice Commission when examining the Constitutions and relevant laws of various countries. As you probably know, the Venice Commission is the constitutional advisory body of the Council of Europe and therefore our perspective on the issue of the powers of the prosecutor is mainly a perspective of constitutional law.

When looking in the constitutions of European states for provisions on the prosecutor's office, one can distinguish two groups of countries: those where the constitutions regulate the basic functions of the office[1] and constitutions without such regulation[2]. It is no coincidence that most countries in the first group are so-called new democracies while the majority of the constitutions of so-called old democracies do not contain provisions on the prosecutor's office.

The main function of prosecutors in the light of the constitutional provisions is their role in criminal cases and in particular criminal prosecution in the courts. In some constitutions, however, we can find some general regulations on the role of prosecutors in other matters, either relating to the defence of the legal order[3] or the protection of human rights[4]. The more detailed regulation is usually left to ordinary law.

As rightly stated by Professor Varga, the complete absence of any competence of the prosecutor outside the field of criminal law is typical only for Common Law and Nordic countries[5], although such powers tend to be of only marginal importance in countries belonging to the German law family. These countries share with the countries belonging to the French law family, other Western European countries as well as some countries in Central and Eastern Europe[6] the common feature that the prosecution service, while having some non-penal tasks can proceed only or mostly only through action in the courts. It is important to note that a great number of Council of Europe member states – about half of them – belong into this category.

---

[1] Albania, Armenia, Azerbaijan, Belarus, Bulgaria, Croatia, Cyprus, Georgia, Hungary, Ireland, Italy, Lithuania, Macedonia, Moldova, Montenegro, Portugal, Romania, Russian Federation, , Serbia, Slovakia , Slovenia, Spain, Ukraine

[2] Austria, Belgium, Czech Republic, Denmark, Estonia, France, Germany, Greece, Iceland, Latvia, Luxembourg, Malta, Netherlands, Norway, Poland, Switzerland, Turkey

[3] For example Azerbaijan "defence and enforcement of the legal system"art.103; Bulgaria: "ensure that the legality is observed, art. 127; Moldova: "defends legal order" art. 124.1; Romania: "defends legal order" art.130

[4] Hungary: "ensure the protection of the rights of citizens" art. 51; Moldova: "defends the rights and freedom of citizens: art. 124.1; Romania: "defends the citizens' rights and freedoms"; Spain: "promoting the working of justice in the defence of the rule of law, of citizens' rights. Art. 124

[5] In document CCPE-Bu (2008) 4rev he lists Estonia, Finland, Georgia, Iceland, Malta, Norway, Sweden, Switzerland, United Kingdom as not having any such powers.

[6] Albania, Austria, Azerbaijan, Belgium, Czech Republic, Denmark, France, Germany, Greece, Ireland, Italy, Liechtenstein, Luxembourg, Moldova, Monaco, the Netherlands, Poland, Portugal, Romania, San Marino, Slovenia, Spain, Turkey

As regards the group of countries[7], where the prosecution service not only enjoys wide powers but can also exercise powers without going through the court system, these countries all belonged to the Soviet sphere of interest during part of the second half of the 20th century, although not all of the latter countries still follow this model. Nevertheless this fact shows the strong influence of the Soviet model of *prokuratura*. Some countries were under the influence of this model since the beginning of the 20th century, some others (the Baltic and Central European states) since the end of the second world war.

The historical role of the *prokuratura* in Russia is well known and has often been described. It is not an invention of the Soviets but goes back to Peter the Great who used the prosecutors as the *"sovereign's eye"* to ensure that the laws and instructions of the central power were faithfully implemented. The Venice Commission quoted the following description of its functions[8]: "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."

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' ('pillar') 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"*.

This system was in force in all the countries known as 'people's democracies', i.e. the countries of Central and Eastern Europe, up till 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

[7] Armenia, Bulgaria, Croatia, , Hungary, Latvia, Lithuania, Montenegro, the Russian Federation, Slovak Republic, "the former Yugoslav Republic of Macedonia" and Ukraine.

[8] In its Opinion on the Federal Law on the prokuratura (Prosecutor's office) of the Russian Federation,, document CDL-AD (2005)014

turn opened the way for a return to a political system based on the division of power. Each of those states sooner or later aspired to membership of the Council of Europe, and European standards required such a solution. 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 in line with the Council of Europe's requirements. It was far more difficult to change detailed solutions contained in legislation regulating individual state organs. As a result, some states effected those changes rather early on, whilst others are experiencing problems with them to this very day.

One of the main challenges facing ex-Soviet countries in the process of reforming their prosecutorial organs was to strip them of general supervisory powers, restrict their hitherto very broad role and focus it on criminal cases in accordance with European standards. On the European level the Parliamentary Assembly of the Council of Europe adopted in 2003 its Recommendation 1604 *"On the role of the public prosecutor's office in a democratic society governed by the rule of law".* The Parliamentary Assembly finds that, among the various peculiarities which give rise to concern as to their compatibility with the Council of Europe's basis principles, there are varied non-penal law responsibilities of public prosecutors.

Individual states have approached the reform of their prosecutorial organs in various ways. Wherever possible, the country's own democratic tradition was reverted to, as was the case in Poland. In seeking a model differing from the Soviet-era *prokuratura*, it reverted to the pre-World War II Polish system, in which the prosecutorial organ formed part of the executive authority. It was believed that such an arrangement would divest the *prokuratura* of much of its ability to dominate other organs of authority and would restore the kind of functions the prosecutor's office should perform in a democratic system. In many countries the problem was more complex, because they did not have a tradition of their own in the prosecutorial field and since there was no common European model for the prosecutor's office which they could have copied. 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.

The report by Professor Varga report shows that in a majority of states the public prosecutor has some functions other than those of criminal prosecution. The Venice Commission has taken the position that such powers are legitimate only if certain criteria are observed. These are that the competencies are operated in such a way as to respect the principles of separation of state powers, including respect for the independence of the courts, principle of exceptionality, principle of subsidiarity, principle of speciality, principle of impartiality of prosecutors.

Some of the prosecutorial powers typical of the *prokuratura* system raise particular problems and concerns. Under this system the Prosecutor General has the 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. In the case of *Brumarescu v Romania* [9] 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 that this way of proceeding violated the principle of legal certainty[10].

---

[9] Judgment of 28 October 1999 in case no. 28342/95

[10] "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

The wide right of the prosecutor to protect human and citizen's rights and freedoms, state and public interest has also always raised doubts. It was often a concern of Venice Commission. In its Opinion on the draft Law of Ukraine amending the Law on the Public Prosecutor[11] the Venice Commission states: " *It is recommended that this representation should be limited to cases where the public interest is involved and where there is no conflict with the fundamental rights and freedoms of the individual. It is up to the individual himself to decide whether to ask State assistance or not".* One can find a similar "warning" in PACE Recommendation 1604(2003) on the role of the Public Prosecutor's office in a democratic society: *"as to non-penal law responsibilities, it is essential that any role for the prosecutors in the general protection of human rights does not give rise to any conflict of interests or act as a deterrent to individuals seeking state protection of their rights."* The general protection of human rights is not an appropriate sphere of activity for the prosecutor's office. It should be better realised by an ombudsman than by the prosecutor's office[12].

This approach requires depriving the prosecutor's office of its extensive powers in the area of general supervision which should be taken over by various courts (the common courts of law, the administrative courts and the constitutional court) as well as by the ombudsman. The direction in which the Venice Commission would recommend to go corresponds to the recommendation clearly formulated in the above-mentioned Recommendation of the Parliamentary Assembly of the Council of Europe stating that *"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."* This should of course not be taken as a dogmatic statement to which no exceptions are possible. There are no objections against limited powers of prosecutors, for example as regards the status of persons or in disciplinary proceedings against the legal professions. Moreover, especially smaller countries may consider it as advantageous to entrust the prosecutor's office with the task of defending the state interest in court proceedings also outside the field of criminal law. However, a general supervisory power of the prosecutor both over the state administration and the court system is not in line with the principles of separation and division of powers which are found in democratic constitutions.

---

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."

[11] CDL (2004)038, para. 17.

[12] See also Varga's report p. IV.3 (CCPE-Bu (2008)4 rev.)