

Round table on the evolution of international legal standards on the role of public prosecutors outside the criminal justice system

As the first speaker in this roundtable on the evolution of international legal standards in light of the recommendation on the role of public prosecutors outside the criminal justice system, the first thing to say is that all European surveys show that there are no comprehensive standards on the powers and organisation of the office of the Prosecutor, although a number of guiding principles have emerged.

My function here is to present the VC's opinions on the subject, more recent ones as well. They cover some examples of systems once identified as Prokuratura.

As far as Russia is concerned, the VC has issued an opinion on the federal law on the Prosecutor's office in 2005. At that time, the Venice commission noticed that when the most important function of the prosecutor was in the penal field, it would also conduct a "*general oversight of legality*" (общий надзор за законностью). On this area of action, the opinion underlined four points. First, the illegality the prosecutor could rule on is construed very largely, even involving the questions of constitutionality. Then, whenever the prosecutor's office raises a case, it could issue orders to the State bodies, but also to private entities. The law did not define the material scope of the prosecutor's power to exercise a general oversight function: it would cover any legal area, leading to some parallelism in functions between the Prosecutor's office and specialised State control bodies. Lastly, the prosecutor's office was also entitled to participate in the civil proceedings on behalf of private individuals, if "the interests of legality" required it. One of the explanations given to this situation was that the large competence given to this hierarchical organisation was aimed at "cementing" the legal order of the vast country.

Since this first opinion changes have occurred, concerning this institution.

The major reform occurred in 2007 and implemented in 2010 when the investigation function was removed from the Prosecutor's office and entrusted to an independent Investigative Committee. This would not cancel the special and more limited investigative powers the Prosecutor's office can exercise for the oversight of legality.

Afterwards, in June this year, the decision was taken to grant to the Prosecutor General the function of Government Agent before the European Court, removing it from the Ministry of Justice. In addition, the law now entitles the Prosecutor General to bring the question of execution of international judgments to the Constitutional Court, as the Government agent. It makes in this country what I can call "the bridge" in the field of the implementation of human rights in respect of the European convention for the protection of human rights and fundamental freedoms.

Among the amendments to the Constitution discussed in the interim opinion published at the beginning of this year, the VC noticed the new Article 129 (1) which brings a constitutional basis for the supervision of the “implementation of laws” the PG is in charge of. This rise in the legal hierarchy could be connected to the new formulas used in other amendments as: “the unified system of public authority in the Russian Federation”, which aims, as stated in the presentation of it, to most efficiently resolve tasks in the interests of population and support the power given to the Federation to organise public authority. Thus, the existing model of the prosecution have a consolidated basis, on grounds very similar to the previous legal system. However, the Constitution does not define more precisely the scope of the supervisory function.

As a positive change, in the same opinion, VC wrote that it is positive that the Federation Council has a new competence to “hear” the annual report of the Prosecutor of the Russian Federation on the rule of law and public order in the Federation. This appears to be a field for the Federation council to materialise the extension of the function of controlling the executive which one of the objectives for the recent amendments of the Constitution.

About this legal situation, the VC would point out two issues which may be of relevance for our today topic, yet of different level of concern.

The first one is about the role of the Prosecutor General as the Government Agent in the Constitutional Court. The new Constitution gives a constitutional status to the PG and it raises to the constitutional level the competence of the Constitutional Court to resolve matters concerning the possibility of enforcing decisions of interstate bodies, in case they contradict the Constitution of the Russian Federation.

In respect of his/her function, implementing these provisions, the PG may propose to the Constitutional court to examine the compatibility of a given modality of execution of a judgment. The question of implementation of judgments of the ECHR is not a new one and the VC has analysed it in previous opinions. This function of the PG would not be problematic per se, should the matter remain on the agenda of the State institutions (the Government, the Parliament) which are responsible under international law for the enforcement of the judgment. And the role of the Constitutional Court should be, as the Court itself has described it, implementing, to find acceptable means of executing such decisions by the Russian Federation while steadfastly safeguarding the supreme legal authority of the Russian Federation

Constitution within the Russian system. The VC noticed that the CC has demonstrated a certain openness.

But the new legal and constitutional provisions allow the VC to underline the major strengthening of the position of the GP, in Russia, in the discussion about human rights, first before the European Court of human rights, and after, when he/she may choose the scope of the examination he asks for before the Constitutional Court.

The second issue is more general, about the functions of the Prosecutor's office outside the criminal law field, namely in the present Constitution the supervision of the implementing of laws.

In its opinion in 2005, the VC has stated that the Prosecutor's office has power on 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. It goes on writing: 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.

Since, the VC has adopted opinions on laws in various countries that help to figure out how it considers the issue today. It is true that looking at the first reforms of "Prokuratury", it claimed that it was necessary to remove powers outside of the criminal law field from the prosecutor's competences. However, in more recent opinions, looking at the steady building of various legal orders, sometimes in the same countries, VC has expressed a less strict definition of the competences of the prosecutor's offices. Examples can be found in more recent opinions about Bulgaria, Moldova, or Hungary. In these opinions, the VC admitted a possibility of having *some* non-penal functions, notably to entrust the prosecutor's office with the task of defending the state interest in court proceedings outside the field of criminal law. Anyhow, two points of necessary progress are underlined. First, in its opinion on Bulgaria, as before about Moldova, the VC recommended that "coercive powers of the prosecution service outside of the criminal law sphere should be seriously restricted, if not totally suppressed". Second, the VC underlined that the general supervision should be taken over by various courts (common court of law, administrative court and constitutional court). Moreover, some of the non-penal competences of the prosecutors – in particular those related to the defense of interests of individuals – naturally belong to ombudspersons or by the Ombudsman, not to the prosecution. Distributing its functions amongst smaller and specialised bodies reduces the "repressive potential" of the PO which appears through the

legislation, especially when exercising their investigating powers. An interesting case was Hungary in 2012. Then the VC condemned the idea of “a general supervisory power of the prosecutor both over the state administration and the court system”, which, by adverse implication means that with a court supervision those checks would not be objectionable.

Other speakers will present the position of other European institutions, and I leave it to them, but to notice that our position in the VC does not seem to be distant from the one of the Consultative Council of European Prosecutors. If I try to summarize, on specific situations, non-penal powers are not necessarily completely ruled out, but the VC would focus on formulations and safeguards that put the PO's powers in accordance with the principles of Rule of law. Amongst them is the principle of separation of powers and its consequent principles: the autonomy of individual branches of authority and the of balance (equilibrium) of powers. This would generally lead to a limitation of areas of action, even if sometimes requiring formal cooperation.

Powers must then be exhaustively and clearly defined, in a restrictive manner, and be exercised in a transparent manner and be subject to court review.

Je vous remercie de votre attention