



NATIONAL RESEARCH TOMSK STATE UNIVERSITY

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Prosecution Service in Russia



TOMSK
Scientific Technology
Publishing House
2014

UDC 347.963(470)(076.58)
V92

V92 **Voronin Oleg V. PROSECUTION SERVICE IN RUSSIA.**
– Tomsk: Scientific Technology Publishing House, 2014.
– 80 p.

ISBN 978-5-89503-540-5

This monograph discusses the theoretical problems of functioning of the modern Prosecutor's Office in Russia during judicial and legal reforms. It examines such key functions and activities of the Prosecutor's Office as the prosecutor's supervision, criminal prosecution, prosecution on behalf of the state and prosecutor's participation in court hearings.

The author bases his research on legislation and law enforcement practices as of the beginning of 2013.

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ISBN 978-5-89503-540-5

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2014

PREFACE

The judicial and legal reforms have substantially modified the functional organisation and content of prosecution. Many theoretical provisions developed in the Concept of the Prosecutor's Office Development for the transitional period that later entered the Law on the Public Prosecution Service of the Russian Federation are in the state of losing their determining role. The legal status of the Prosecutor's Office is being changed by modifying the branch-specific legislation with formal preservation of the basic requirements of the Law on the Public Prosecution Service of the Russian Federation. As a result, the traditional functions and directions acquire new content that is not always consistent with the previous foundation of prosecutorial activities.

Thus, the monograph attempts to carry out a complex study of the functional organisation and content of the prosecution service in modern conditions. Special attention is paid to tendencies in development of the national Prosecutor's Office, the typology, organisation and content of prosecution as well as the prosecutor's supervision, criminal prosecution, prosecution on behalf of the state, prosecutor's participation in a court hearing and other activities of the national Prosecutor's Office.

Chapter 1

A SHORT HISTORY OF PROSECUTION IN RUSSIA

The establishment of the Prosecutor's Office in Russia is traditionally assigned to Peter I (Peter the Great) whose Decrees of January 12, January 18 and April 27, 1772 instituted a new type of supervision over the noblemen based on surveillance and rapid response to detected violations. However, it would be prematurely to associate the establishment of the Russian Prosecution Service as an independent institution with these Decrees, as the newly established Service included a few prosecutorial officials responsible for the State Treasury security.

The further development of prosecution goes back to Catherine II and her *Statute on the Administration of the Provinces of the All-Russian Empire* adopted in 1775 (hereinafter referred to as the *Statute*) which resulted in the increased number of prosecutorial officials and their extended powers. According to the *Statute*, prosecutors were generally responsible for securing the “integrity of power, institutions and interests of the Imperial Majesty”. The newly established Guberniya Prosecutor represented the local level of imperial power and had to supervise the enforcement of Imperial decrees.

The Prosecutor's Office as an independent public agency appeared together with the Ministry of Justice. The Manifesto *On the Establishment of Ministries* of July 25, 1811 separated the Prosecutor's Office within the Ministry of Justice, determined the hierarchy of prosecutorial officials, their interaction with courts and general administration as well as practices of appointment to and dismissal from office. It is for the first time in history when the Prosecutor's Office had to assume responsibilities of surveillance over laws and order in the institutions it supervised. According to Article 2474 of *General Administrative Guberniya Institutions of 1857* the

prosecutor's supervision included three activities: protection of public services and amenities, government supervision, and trial and judgement supervision. Thus, it is only by the beginning of the 19th century that the Prosecutor's Office in Russia became an independent public agency responsible for supervision over other imperial and local institutions and officials. By its type the Prosecutor's Office in Russia belonged to the first European fiscal Prosecutor's Offices, yet it had some peculiarities. Firstly, due to the undeveloped social and economical relations the Prosecutor's custody over fiscal liabilities to the Imperial Treasury were substituted for supervision over officials who were responsible for manufacturing and managerial resources in the state. Secondly, the protection of fiscal interests was limited only to primitive non-admission of peculation and malfeasance in office in the usual regulatory order without complex legal procedures. Consequently, the first Russian prosecutors were not legal professionals like French "*gens du roi, avocats du roi*", but representatives of various social classes employed for the civil service, i.e. they were public officers of a special type.

The Judicial Reform of 1864 considerably changed the status of the Prosecutor's Office in Russia. As its primary function was to serve the interests of justice, mainly in criminal cases, The Prosecutor's Office could employ only legal professionals who satisfied very stringent requirements. The content of its basic activity also changed: the Prosecutor's Office lost a good deal of its supervisory powers, though retaining some of them.

During this time the activities of the prosecutor in Russia comprised prosecution and administrative surveillance. The accusational aspect implied management of the police inquiry, surveillance over preliminary investigation, initiation of criminal prosecution and appearance for the prosecution in public courts. The administrative surveillance, in its turn, implied "protection of government interest in the proper application of laws". It included, above all, "the supervision over courts" and "participation in law protection in various spheres of government regulation and public administration". Thus, the result of the Judicial Reform in 1864 was that the Russian Prosecutor's Office became more of a judicial type, though retaining some of the supervisory powers. Organisationally it

ceased to exist as an independent supervisory institution and became a judicial magistrate within the Ministry of Justice, yet functioning at courts and possessing considerable administrative autonomy. It was the way the Prosecutor's Office functioned till 1917.

On November 24, 1917 Decree No. 1 of the Council of People's Commissars of the RSFSR abolished the Prosecutor's Office, with its functions delegated to various revolutionary legality bodies. However, the first Soviet legal bodies suffered from lack of legal authority and professionalism and faced constant interference of the Party and Soviet structures into their affairs. These were the factors that made the legal community advocate re-establishment of the Prosecutor's Office. In January 1922 the IV All-Russian Congress of the Soviet Judiciary passed the decision on re-establishment of the Prosecutor's Office.

On May 28, 1922 the Third Session of VTsIK (the All-Russian Central Executive Committee) of the IX Call approved the first Statute on Prosecutor's Supervision. The Soviet Prosecutor's Office was established to supervise over implementation of laws for the proper organisation of crime prevention. In other words, it was re-established as a system of mostly supervisory agencies and institutions with only external judiciary features. However, the Prosecutor's Office entered the People's Commissariat for Justice (*Narkomat Yustitsii*) of the RSFSR as its department. The Head of the Department of Prosecution (*Otdel Prokuratury*) was the Prosecutor of the Republic who served as the People's Commissar (*Narkom*) for Justice at the same time. Reporting directly to him were the Guberniya Prosecutors unaccountable to local authorities. Thus, even at the initial stage the Soviet Prosecutor's Office showed its clearly pronounced supervisory character, a high degree of centralisation and administrative autonomy.

The further development of the Soviet prosecution system was determined by the Constitution of the USSR in 1936 that enshrined the legal status of the Prosecutor's Office of the USSR as a unified centralised system of bodies. The Prosecutor's Office of the USSR was responsible for supervision over the strict execution of laws by all agencies and their subordinate institutions, officials and Soviet citizens (Article 113).

On May 24, 1955 the Presidium of the Supreme Soviet of the USSR approved the Statute on the Prosecutor's Supervision of the USSR. It created conditions for the formation of prosecutor's supervision as the highest form of public monitoring (supreme supervision). Besides, it resulted in the consolidation of the Soviet legislative norms that formerly regulated the structure and functioning of the Prosecutor's Office, which, in its turn, initiated the process of autonomy of the Prosecutor's Office from other Soviet judicial bodies and agencies.

The formation of the autonomous centralised system of Soviet prosecutorial bodies had finished by 1979 when the Soviet Law "On the Prosecution Service in the USSR" was passed. According to the Law, the Prosecutor's Office of the USSR became completely independent from other Soviet judicial bodies and was subordinate to the Supreme Soviet of the USSR. Organisationally the Prosecutor's Office represented a uniform system of centralised independent bodies of supreme supervision over all spheres of state and public life within the borders of the Soviet Union. The Law entrenched four branches of prosecutorial supervision: general supervision, supervision over the execution of laws by bodies of inquiry and preliminary investigation, supervision over the execution of laws in court hearings, supervision over observance of laws in places of pre-trial detention, temporary containment cells, at the execution of punishments and other compulsory measures imposed by courts.

Thus, the end of 1970s saw the formation of the Soviet type of the Prosecutor's Office that could be considered a classical type of supervisory prosecution. Firstly, the primary function of the Soviet Prosecutor's Office consisted in supervision. The other prosecutorial activities were conditioned by the general supervisory function and represented special kinds of prosecutor's supervision over definite spheres of the state and public life. Secondly, due to its supreme character the prosecutor's supervision included all bodies, agencies, institutions, enterprises as well as behaviour of individual Soviet citizens. Finally, the Soviet prosecutorial agencies were independent and subordinate only to the Supreme Soviet of the USSR.

It was the way the Prosecutor's Office functioned till 1991.

With the collapse of the USSR it ceased to exist. The Russian Soviet Federative Socialist Republic was claimed sovereign. In accordance with Resolution No. 1879-1 of the Supreme Soviet of the RSFSR of November 15, 1991 “On Establishment of Unified Prosecution of the RSFSR” the Prosecutor-General of the RSFSR was empowered with supervising over the local prosecutorial bodies and agencies as well as enterprises and institutions within the borders of the RSFSR that used to be subordinate to the Prosecutor's Office of the USSR.

The new stage in the development of the national Prosecutor's Office started with the RF Law “On the Public Prosecution Service of the Russian Federation” of January 17, 1992 that significantly modified prosecutorial activities. Firstly, under Article 176 of the RF Constitution the Prosecutor's Office was empowered with the supreme supervision function, however, the Law “On the Public Prosecution Service” of 1992 refused from the term “supreme” and made the Prosecutor's Office responsible for supervision over legal implementation of laws by public agencies and officials. Thus, along with the reduced supervisory powers it ensured a multifunctional model of the Prosecutor's Office in Russia. Secondly, the Prosecutor's Office was no longer responsible for supervision over the behaviour of individuals, which reduced the scope of supervision in all fields. Thirdly, the Prosecutor's Office was no longer in charge with supervision over all kinds of judicial activities, which resulted in a new area of prosecutorial work – prosecutor's participation in court hearings.

The further legal regulation of the prosecution service is connected with the adoption of the Constitution of the Russian Federation in 1993. The Basic Law of the Russian Federation included Article 129 that enshrined the newly declared political priorities in the state legal construction and established legal principles of the Prosecutor's Office of the Russian Federation. However, the legal status of the Prosecutor's Office remained completely ambiguous. Article 11 of the Constitution of the Russian Federation enlisted supreme state institution without including the Prosecutor's Office among them. In its turn, Article 129 of the Constitution of the Russian Federation defined the legal status of the Prosecutor's Office as equal to courts,

yet left the question of their interaction and legal nature unanswered. The uncertain legal status of the Prosecutor's Office triggered debates concerning its role in the current system of public authorities and necessitated the development of a conceptual framework for the Prosecutor's Office in the changed social and political circumstances. In 1994 the *Prosecution Service Development Framework* for the transitional period was developed. According to it, the Prosecutor's Office was viewed as having a special position in the system of public authority. Though the aforementioned Development Framework failed to define the legal status of the Prosecutor's Office, it entrenched the trends of development of the Prosecutor's Office as a multifunctional agency, performing primarily supervisory functions, yet realising other immanent activities.

The Constitution of the Russian Federation stipulated amending the Law on the Public Prosecution Service of 1992. The Federal Law of the Russian Federation “On Amendments and Addenda to the Law of the Russian Federation *On the Public Prosecution Service of the Russian Federation*” of November 17, 1995 approved a new edition of the Law on the Public Prosecution Service (hereinafter referred to as the Law on the Public Prosecution of 1995).

Though the main mission of the Prosecutor's Office consisted in supervision over the execution of laws of the Russian Federation, the Law on the Public Prosecution of 1995 ensured a multifunctional model of the Prosecutor's Office in Russia, according to which the Prosecutor's Office was responsible for criminal prosecution, participation in court hearings, and coordination of crime prevention activities of other law enforcement agencies. This, as well as the previous law, failed to define the state legal nature of prosecutorial agencies, referring to it as a unified centralised system of bodies. On the other hand, the new edition excluded many provisions of the law concerning supervision by the Prosecutor's Office over the procedural and other activities of courts. As the legal status of the Prosecutor's Office remained undetermined, the problem of correlation between the prosecutorial and judicial authorities was not solved either.

Subject to legal priorities enshrined in the Constitution of the Russian Federation, the Law on the Public Prosecution Service determined a new independent branch of the prosecutor's supervision

– that over observance of human and civil rights and freedoms. At the same time other branches of the prosecutor's supervision included independent supervision over the observance of human and civil rights and freedoms by the bodies, institutions and officials subordinate to the prosecutorial bodies within the relevant branches. Later, the aforementioned cross-functional activities of the Prosecutor's Office were named the protection of human rights by the Prosecutor's Office.

In the early 1990s the Concept of the Judicial Reform was developed and partly implemented. On June 26, 1992 the RF Law “On the Status of Judges in the Russian Federation” was passed. This Law determined the content of judicial power as well as a number of other legal acts concerning independence of judges administering justice. The judicial bodies were excluded from the scope of prosecutorial supervision. Their priority was to provide, protect and vindicate human rights. Besides, the Law contained the legal basis for the system of judicial control in almost all spheres of the national life. Therefore, the Law of the Russian Federation of May 23, 1992 introduced amendment and addenda into the Criminal Procedure Code of the Russian Federation of 1960 concerning temporary (before adoption of the new Criminal Procedure Code of the Russian Federation) introduction of judicial supervision over the rule of law and justification of pre-trial detention. This triggered a debate about the correlation between the judicial and prosecutorial powers.

Expanded rights to appeal against decisions of almost all officials, public agencies and institutions, with the unchanged scope of prosecutorial supervision, promoted the search for alternative ways to stand up for rights. In the early 1990s the Prosecutor's Office formally remained the sole public body responsible for supervision over legality, though the judicial procedure was gradually becoming an alternative means of protection and vindication of infringed rights and legitimate interests through ideological support and new judicial priorities.

The Law of the Russian Federation “On the Appeal to the Court of illegitimate actions and decisions infringing human and civil rights and freedoms” was passed on April 27, 1993. Under Article 3 of this law any decision of a public body or official could be appealed against in the court.

Finally, the gradual implementation of the Concept of the Judicial Reform in the Constitution of the Russian Federation and a number of other federal laws stirred up rivalry between prosecutorial and judicial bodies. Some questions that had been under prosecutorial jurisdiction were sent to courts.

According to the Provisions of the Law of the Russian Federation “On the Accession of the Russian Federation to the General Agreement on Privileges and Immunities of the Council of Europe and Its Protocols”, Russia joined the Fourth Protocol governing the Provisions concerning the European Court of Human Rights (hereinafter referred to as the European Court). In conformity with the aforementioned documents, the citizens of the Russian Federation and other individuals on the territory of the Russian Federation could appeal to the European Court in relation to any violated provision of the European Convention for the Protection of Human Rights and Fundamental Freedoms of November 4, 1950 (hereinafter referred to as the Convention). Moreover, Russia recognised the regulatory power of the European Court towards citizens of other CE member states. The Convention as well as decisions of the European Court on certain cases did not contain direct instructions concerning organisation and structure of the Prosecutor's Office, but as far as judicial procedure was the main form of lawsuit regulation in the above mentioned countries, the practice focused on judicial law enforcement. It resulted in the increased criticism of the national model of the Prosecution Service as inconsistent with its analogues in some European countries. According to some scholars, the right protection activities of the Prosecutor's Office could substitute the corresponding judicial remedy, while in the legal state advocacy could be performed only by courts. They also failed to take into account the legal bases for the activity of the European court, according to which the above mentioned judicial body was entitled only to assess observance of the fundamental rights of an individual and citizen established by the Convention in a particular case without assessing the legality of the national law enforcement.

The reduction of the supervisory powers of the Prosecutor's Office was accompanied by the change of the role it performed in the criminal procedure, with its basic function consisting in criminal

prosecution. As it has already been mentioned above, in 1995 this activity was enshrined in the Law on the Public Prosecution Service of 1995. The Prosecutor's Office in Russia got its further development after adoption of the Criminal Procedure Code of the Russian Federation of 2001.

The original Criminal Procedure Code of the Russian Federation of 2001 gave the Prosecutor's Office wide legal powers for criminal prosecution: the prosecutor was determined as the body of criminal prosecution, entitled to approve initiation of a criminal case, participate in court hearings by selection of preventive measures, perform procedural supervision over pre-trial investigation and approve its results, prosecute the case on behalf of the state and secure its legality and validity at the trial stage. Further amendments in the criminal procedure legislation caused changes in supervision in this sphere: the prosecutor's supervision was restricted to procedural activities performed through procedural remedies as provided for by the Criminal Procedure Code of the Russian Federation. Thus, the supervisory activities of the prosecutor at the pre-trial stages of criminal proceedings practically merged with criminal prosecution. Despite the nominal priority of supervision, there were much wider procedural opportunities, not resulting from the supervisory function. It led to the conclusion that the Prosecutor's Office in Russia finally adopted the bifunctional, or mixed model. So, the Prosecutor's Office in this case performed two basic functions – supervision and criminal prosecution, each of which had its own independent legal content.

However, the growing tendencies of the 2000s for the national Prosecutor's Office to function as an agency of primarily criminal prosecution was interrupted with the pre-trial investigation reform. Preliminary investigation was excluded from the Prosecutor's Office functions. It was accompanied with the reduction of prosecutorial opportunities in terms of procedural supervision over and administration of the procedural activities of investigators. All this significantly modified the status of the Prosecutor's Office as of a body of criminal prosecution. Though formally it retained the status of a criminal prosecution body, the content of its criminal procedural activities consisted in affirming the results of preliminary investigation followed by prosecution on behalf of the state. So, having retained its

supervisory function, the Prosecutor's Office focused on the protection of rights. Now the basic priority of supervision is the legal status of the individual in all law enforcement and right protection fields, including criminal proceedings. The prosecutor often appears as an advocate, with criminal prosecution function relegated to the background. Thus, it can be asserted that there is a new trend towards a new model of the Prosecutor's Office as a right protection body.

The review of legal regulation of the Prosecutor's Office leads to the conclusion that nowadays there are no definite trends in its development. The only tendency that can be more or less observed is a systematic reduction of supervisory powers, with other prosecutorial functions modified from time to time. These modifications do not result from the revision of the Law of the Russian Federation “On the Public Prosecution Service of the Russian Federation”, which is the basic law governing the prosecution service, yet from adoption of new legal acts and amendments into and addenda to the procedural legislation. Due to such an approach, the nominally enshrined content of the Prosecutor's Office fails to reflect the existing tendencies of its development and to disclose its traditional social role of a body aimed at securing and protecting lawfulness and legality.

Chapter 2

TYOLOGY OF PUBLIC PROSECUTION

The literature, as a rule, describes two main types of the Prosecutor's Office depending on its main functions:

- 1) the Prosecutor's Office as a body of criminal prosecution (the prosecutor as a legal representative of the prosecution);
- 2) the Prosecutor's Office as a body of legal supervision (the prosecutor as a guardian of the laws).

Besides the main function, the Prosecutor's Office of any type exercises a number of additional functions, which makes it possible to speak about the mixed model of the Prosecutor's Office that exercises numerous functions. An example is the modern Prosecutor's Office in Russia.

The first type of the Prosecutor's Office historically derives from the judicial system of prosecution (“the judicial magistracy”). In this case the Prosecutor's Office is a body of criminal prosecution that prosecutes on behalf of the state. This model of prosecution is characteristic for the adversarial type of criminal proceedings. The prosecutor pursues the goal of indictment only: s/he is to publicly charge a person with a crime and assign a fair punishment. Thus, the only function of the Prosecutor's Office is prosecution on behalf of the state or, in more general terms, criminal prosecution. The relationships between the prosecutor, the court and the counsel for the defence are of adversarial character. The court often acts as a body that monitors prosecution. In particular, the court grants permission for the prosecutor to use coercive measures necessary to collect and present evidence. In some cases, the court affirms the initial and final indictment. When considering the merits of the case, the court verifies whether the prosecutor complies with the requirements concerning the burden and limits of proof. Formally, the Prosecutor's Office has equal

legal opportunities with the counsel for the defence, but in fact procedural advantage is on the side of the prosecution because the prosecutor is the party that initiates criminal prosecution in the court to punish the guilty.

Recently, the Prosecutor's Office of the first type generated a new type of the prosecutor (attorney) who acts as a representative of justice. As in the first case, the prosecutorial activities focus on the administration of justice in criminal cases. However, the fundamental difference is that the prosecutor in the basic model is the main engine of criminal proceedings, as it is him/her who initiates and applies criminal law, while in the second model the right to initiate a criminal procedure belongs to other participants of criminal proceedings. Thus, indictments and prosecution become less important, giving way to legal assessment of procedural activities of other parties to criminal proceedings. In this case the role of the prosecutor is similar to that of the “judicial assistant”. The difference is that the prosecutor has a greater autonomy in assessing others' evidence, but is less active in establishing other circumstances relevant to the application of the rule of law. Formally, the prosecutor performs the function of prosecution, but his/her goal is to ensure public interests in resolving the social conflict caused by the offence rather than to expose the perpetrators of crimes and assign a fair punishment to them. Thus, the prosecutor's basic procedural goals are to find out whether the society is interested in pursuing the act and whether there are methods to restore social justice alternative to criminal punishment. The prosecutor as a representative of justice is a part of the judicial system. Meanwhile, s/he has neither practical nor formal privileges in relation to the defence.

The second type – the Prosecutor's Office as a body of legal supervision – historically derives from the judiciary and administrative as well as fiscal components of prosecution. The main objective is supervision over legality, which is the fulfilment of the requirements laid down in laws as acts of higher legal force. All other functions, including criminal prosecution and bringing charges, are subject to the main function and determined by it. The prosecutor's supervision covers all public bodies, institutions and individuals, including other control, law enforcement and judiciary bodies. In fact, the Prosecutor's

Office is a supervisory body and quite often refers to the law enforcement agencies that are entitled to apply state coercion measures under the simplified procedure (out of court). In the course of proceedings the prosecutor has formal or practical procedural privileges over other actors as well as overt or covert supervisory powers in relation to court.

Nowadays the above mentioned serves as the base for a new type of prosecutorial activities that can be designated as “the Prosecutor’s Office as a law enforcement body” (“the prosecutor as a legal advocate” or “the prosecutor as a human rights defender”). The principal difference from the basic definition is that the traditional concept of legality as the main subject of the prosecutor’s activity becomes less significant, being replaced by a more traditional category of public interest that refers to protection and defence of public benefits, values and relations rather than compliance with the law. The prosecutorial activities concerning public interest include protection and defence of the interests of the state and society as well as the legal status of the individual. Moreover, the rights and freedoms of man and citizen are a priority as a protected public benefit equivalent to other public values. The second distinguishing feature is the limited scope of bodies supervised by the Prosecutor’s Office. This scope does not include the court as the main guarantor of the legal status of the individual as well as restoration of infringed public interests that are to be ensured through administration of justice. The prosecutor has an exceptional procedural position. Being neither a party to the proceedings nor a body connected with any of the parties to the proceedings, the prosecutor acts as a disinterested independent observer – an expert in law enforcement who has the right to participate in proceedings. In a way, this status is similar to that of the “judicial assistant”, though, unlike judicial assistants, the prosecutor is not a part of the judicial system. Furthermore, for the purpose of law enforcement, the judicial interests of the prosecutor may not coincide with the interests of the parties and other participants of certain proceedings. In this case the activities of the Prosecutor’s Office include surveillance (supervision) and judicial and procedural activity (participation of the prosecutor in court hearings). Other activities,

including criminal prosecution and prosecution on behalf of the state, are either not applicable to or insignificant for this type of prosecution.

A specific national model of prosecution bodies is a symbiosis of several types of prosecutorial activities with the features of one type prevailing. For instance, the current Russian legislation enshrines the model that contains elements of all four types, with supervisory functions prevailing. This can be concluded on the basis of provisions of Articles 1, 21, 35 of the Law “On the Public Prosecution Service”, Articles 21, 37, 221, 226, 244, 246 of the Criminal Procedure Code of the Russian Federation, Article 45 of the Code of Civil Procedure of the Russian Federation, Article 52 of the Arbitration Procedure Code of the Russian Federation, Article 25.11 of the Administrative Offences Code of the Russian Federation as well as other provisions.

The main factors that influence the formation of the national model of the prosecution bodies and institutions are: the type of criminal proceedings, the content and ratio of dispositivity and publicity in law enforcement as well as the role of prosecution bodies and institutions in the current national system of authorities.

The role of the Prosecutor's Office in the modern system of state authorities of the Russian Federation is in the centre of heated debate. This issue has a number of historical and legal prerequisites.

Firstly, as it has already been noted, the role of the Prosecutor's Office has been revised many times during over three hundred years. Initially, it was established as a body of Imperial supervision. The supervisory institution turned into a justice institution to serve the interests of justice. In Soviet times, the Prosecutor's Office was revived and developed as a body of legal supervision.

The year of 1992 brought about the multifunctional type of the Prosecutor's Office. Thus, it is rather difficult to determine which historical type of the Prosecutor's Office is the most characteristic for Russia. Moreover, it is unlikely to be of any use, provided that almost all European Prosecutor's Offices also evolved from fiscal and supervisory to law enforcement or other types of activities.

Secondly, the theoretical bases of prosecutorial supervision and activities formed mainly in the Soviet period. The Soviet statebuilding doctrine did not officially recognise the separation of powers. The Prosecutor's Office was traditionally regarded as an independent

system of supervisory bodies reporting to the Supreme Soviet of the USSR as the highest state body. The recognised priority of the separation of powers in the modern state-legal structure caused some scholars to think over the role of the Prosecutor's Office in the system of public authorities considering the classic triad of the separation of powers. The lack of theoretical and legal traditions led some of the scholars to define its institutional identity by referring to one or another traditional branch, while the others recognised the special state-legal nature of the Prosecutor's Office.

Finally, the lack of clear-cut approaches to the subject under discussion is caused by the uncertainty of the current legislation regarding the nature of prosecutorial bodies. On the one hand, Article 11 of the Constitution of the Russian Federation does not include the Prosecutor's Office into the list of state authorities. On the other hand, Article 129 of the Constitution of the Russian Federation defines the legal status of the Prosecutor's Office together with that of judicial bodies in Chapter 7. However, it fails to define the nature of their interrelations as well as the legal nature of the Prosecutor's Office. In its turn, the Law "On the Public Prosecution Service" establishes the jurisdiction, organisation and procedure of the Prosecutor's Office, yet leaves the questions about its state-legal nature and role in the government open. Apparently, such a legislative approach predetermines various theoretical models of the Prosecutor's Office, including rather radical ones.

In this context, the Prosecutor's Office is either referred to one of the traditional branches of government (representative [12, p. 8], executive [6, p. 23] or judicial [3, p. 25]) or treated as playing a special role in the current system of government bodies [29, p. 21], which does not exclude its belonging to the presidential structures [17, p. 29] or special bodies of power [39, p. 358].

All these assertions, though seemingly consistent, demonstrate some deficiencies.

Firstly, they suffer from the lack of legal argumentation. All the aforesaid assertions either do not conform to or contradict the current legislation. Secondly, as a rule, the proponents of the aforesaid assertions reduce the role of the Prosecutor's Office to a single function (preferably supervisory), while in modern Russia the

Prosecutor's Office is a multifunctional body. The disregard for other activities of the Prosecutor's Office results in inadequate understanding of how significant the Prosecutor's Office is in the Russian state apparatus. Finally, the aforesaid assertions constitute a near-successful attempt to modify the Soviet legal doctrine approach to identify the institutional affiliation of the Prosecutor's Office based on the theory of the separation of powers. Thus, as a rule, the Prosecutor's Office is formally referred to a certain branch on the basis of a single feature without disclosing the nature and significance of the prosecutorial bodies in general. For instance, as the Prosecutor's Office was hosted within the Ministry of Justice for quite a long time, it can be referred to the executive branch. As the basic provisions defining its status were included in Chapter 7 *The Judicial Power* of the Constitution of the Russian Federation, it can be referred to the judicial branch. As the Prosecutor's Office was accountable to the Supreme Soviet of the USSR as the highest legislative body, it can be considered as belonging to the legislative branch.

I believe that it is more reasonable to consider the Prosecutor's Office not within the traditional or newly-designed branches of power, but as a body that does not belong to any branch, yet has an exceptional position in the system of state authorities. This approach was first laid in the Concept of the Prosecutor's Office Development for the transitional period (hereinafter referred to as the Concept).

According to the Concept, the traditional branches of power – legislative, executive and judicial – represent the sovereignty and its separation, though they do not rule out other independent legal institutions, like the Prosecutor's Office. With its functional relationship to each of the government branches, the Prosecutor's Office, however, does not fully belong to any of them. This exceptional position in the state system, on the one hand, allows the Prosecutor's Office to act as an independent efficient element of the system of checks and balances and, on the other hand, to exercise numerous functions assigned to it by law.

Due to its exceptional position among state authorities the Prosecutor's Office exercises numerous functions that are performed by various branches of power. For instance, criminal prosecution is mainly the function of executive bodies, while the supervisory

function is exercised mainly by representative bodies (at least when it comes to supervision over the execution of laws). Then, public prosecution and participation of the prosecutor in other cases are primarily to promote the administration of justice, which is the objective of the judicial branch of the government.

Speaking about the exceptional position of the prosecutorial bodies, it should be born in mind that the Prosecutor's Office in foreign countries can hardly be referred to a particular branch of power either (moreover, no one discusses the problem in such terms).

For instance, the literature describes four groups of countries basing on the role of the Prosecutor's Office in the system of state authorities: "1) countries where the Prosecutor's Office is a part of the Ministry of Justice, although it can belong to judicial bodies, act in courts, and prosecutors can belong to the judiciary ("magistracy"); 2) countries where the Prosecutor's Office is fully incorporated into the judicial system and acts in courts or has the administrative autonomy within the judicial branch; 3) countries where the Prosecutor's Office is an independent system accountable either to the Parliament or the Head of State, and 4) countries where there is no Prosecutor's Office or its direct analogue" [8, p. 5].

This classification serves as the basis for the following typology of national Prosecutor's Offices:

1. The American and British types of the Prosecutor's Office. The main function for this type of the Prosecutor's Office is criminal and public prosecution, support of public prosecution as well as participation in court hearings as a representative body of the public authority. It exercises no prosecutor's supervision. Organisationally, the Prosecutor's Office is not a body of public authority (at least in the continental sense), but a set of professional corporations of lawyers in the public service (hired by a client who represents the public authority). This group includes two subtypes of the Prosecutor's Office: American and British.

The American model is determined by a higher degree of inclusion into the state apparatus at the federal level. The traditional Russian term *prokuratura* corresponds to a number of institutions and officials in the USA: the Attorney Service headed by the *US Attorney General* who is also the Minister of Justice; the Solicitor Service headed by *the*

US Solicitor General, and the *Independent Counsel* acting in the special presence and appointed by the *Special Division of Appointing Independent Counsels* of the *U.S. Court of Appeals for the District of Columbia*. While at the federal level the U.S. Attorney's Office is a unified system of bodies and officials, at the state-level the *Attorney's Office for the Commonwealth*, *Attorney's Office for the People*, *Attorney's Office for the State* are professional corporations of lawyers representing the interests of the state (public authorities) in criminal proceedings and in court cases rather than an independent centralised service. There is no direct hierarchy of federal and state attorneys. Their interrelations are just coordinated.

The British model [7. p. 256] represents a public corporation of lawyers based on the principles of professional cooperation rather than on the principles of centralisation and unity. The corporation is headed by the *Attorney-General* whose status is equal to that of the MP, though s/he is not a member of the Cabinet of the UK [26, p. 293]. As the highest official of the British Lawyers Society, the Attorney General of the United Kingdom prosecutes on behalf of the government in court hearings for major criminal cases and represents the interests of the government as a plaintiff or a defendant.

2. The Prosecutor's Office in Continental Europe. The Prosecutor's Office of this type aims at implementing criminal prosecution, prosecution on behalf of the state and participation in court hearings. Besides, these Offices act on behalf of states and carry out some supervisory powers.

Thus, European Prosecutor's Offices are often referred to law enforcement bodies or judicial authorities. Organisationally they have a dual position. On the one hand, they are in administrative subordination to Ministers of Justice (i.e., they formally belong to the executive branch), while on the other hand they refer to and exercise their functions in courts (i.e. they function within the judicial system). Unlike the American-British type, they enjoy a high degree of centralisation and subordinate relations between higher-level and lower-level prosecutors. The most typical of this type are the French, German and Russian Prosecutor's Offices.

The French Prosecutor's Office (*Ministère public, parquet*) has the basic features of the Prosecutor's Office as a judicial authority. The

Prosecutors of the Republic (*les procureurs de la république*) who operate in a larger process tribunals report to the Prosecutors General of Courts of Cassation and Appeal (*les procureurs généraux de La Cour de cassation, les cours d'appel*) appointed and dismissed by the President of the Republic on recommendation by the Minister of Justice. The French Prosecutor's Office carries out a number of functions: criminal prosecution, prosecution on behalf of the state, supervision over preliminary investigation and police inquiry, participation in civil court proceedings, representation of public authorities in courts. It should be noted that in exercising their powers French Prosecutors have the right for extrajudicial use of state coercion.

The German Prosecutor's Office (*Staatsanwaltschaft*) is a law enforcement agency by its nature that serves the interests of justice. Its basic function consists in criminal prosecution. In a broader sense, it includes the pursuit of criminal proceedings, the procedural lead of preliminary investigation, formulation, direction and support of the charges in courts, and participation in enforcement proceedings [23, p. 30]. The Prosecutor's Office in modern Germany is almost devoid of supervisory powers, which allows considering it as a separate type. Another distinguishing feature is its lesser degree of centralisation, which is partly due to the federal structure of Germany.

The Soviet (Russian) Prosecutor's Office has a special place in the system of European prosecution bodies. As it was mentioned above, it was initially instituted and later functioned on the basis of special principles. What was special about the Soviet the Prosecutor's Office is that all types of prosecutorial institutions here had supervisory powers.

In most cases the Russian Prosecutor's Office was a system of independent bodies with the external features of judicial bodies. Its main objective was to ensure the interests of the central government throughout the state by implementing supervision. Thus, it has always been a law enforcement body that is entitled to apply the state coercion measures under the simplified procedure (out of court). All other functions derived from its supervisory power. Later, under the Soviet influence, this model became defining for a number of countries that had not known, used or had refused the US-British or European traditions of legal construction before.

Chapter 3

THE CONTENT AND STRUCTURE OF THE PROSECUTOR'S ACTIVITIES IN RUSSIA

Activities of a public authority are expressed in the social role it plays through exercising its functions. The literature describes two main approaches to the role of the Prosecutor's Office in modern Russia. The institutional approach implies definition of the role of the Prosecutor's Office in the system of state authorities, while the functional approach implies definition of functions and activities of the Prosecutor's Office.

The modern approach to the functional content of the prosecutor's activity involves the identification of the functions, the determination of specific qualities for each of them, and, finally, the study of links, relationships and dependencies among them.

The debates over the meaning, concept and range of functions carried out by the Russian Prosecutor's Office are caused primarily by the compromise character of the current legislation and the lack of clear legal regulation. Today the content of the prosecutor's activity is determined by some laws that are identical in their legal effect, but different in their branch functions. Moreover, it is also the result of the uncertain concept of the "prosecutor's function" arising from the ambiguity of criteria this category is based on.

As far as I agree that this concept is historically and legally determined by the previous legislation and take into account the logical links among such categories as the "purpose", "objectives" and "responsibilities", I believe that the functions of the Prosecutor's Office are its basic activities determined by its responsibilities. Functions as the main directions have a significant proportion in the scope of the agency actions and reflect its nature determined by

existing policy priorities and national traditions of its functioning. Moreover, due to the dynamic development of the law on prosecution, the normative consolidation and the nature of legal regulation of certain prosecutor's activities are no longer determining for their definition and list. In this regard, the modern concept of "functions", though determined by legislation, loses its strict normative content and becomes a theoretical construct that reflects a certain (mainstream, according to some scholars) vector of the prosecutor's activities.

In other words, the following criteria are used to define the "prosecutor's function" category:

1. The regulatory consolidation of this type of activities.
2. A significant proportion in the total scope of the prosecutor's activities (their basic character).
3. The nature of the prosecutorial bodies (the social mission of the Prosecutor's Office, according to some scholars) determined by the national and historical traditions of their functioning as well as by the current political priorities in the legal regulation of social relations and activities of public authorities.
4. The theoretical focus of this category determined by the result of the analytical synthesis of the prosecutors' practices in certain historical conditions.

Article 1 of the Law "On the Public Prosecution Service" establishes the following activities of the Prosecutor's Office: prosecutor's supervision, criminal prosecution, co-ordination of the crime-control activities of law enforcement agencies, institution of proceedings for administrative offences, administrative investigation, participation in court hearings, participation in the law-making process.

With the specified criteria it seems that the modern list of the prosecutor's functions is limited to prosecutor's supervision, criminal prosecution, participation in court hearings and prosecution on behalf of the state. A different way of legal regulation and unequal proportion in the total scope of the prosecutor's activities are indicative of their different roles.

As Part 1 of Article 1 of the Law on the Public Prosecution Service distinguishes supervision among other prosecutor's activities, it seems reasonable to agree with those who support the idea that the

prosecutor's supervision is the basic immanent function of the national Prosecutor's Office. Thus, the modern Prosecutor's Office, as the successor of Peter the Great's and Soviet Prosecution Services, is a supervisory body with the features of a judicial authority, though it carries out various activities.

Then, Articles 1 and 31 of the Law on the Public Prosecution Service compared with Article 37 of the Criminal Procedure Code of the Russian Federation make it possible to conclude that criminal prosecution is an independent function of the modern Prosecutor's Office in Russia, not initially determined by prosecutor's supervision. However, due to its legal regulation subsidiary to the Law on the Public Prosecution Service (only at the level of criminal procedural law), it can not be considered as a function of the main prosecutor's supervision or equivalent. Thus, it is possible to define it as an independent additional function of the Prosecutor's Office [37, p. 12].

This activity can be considered as an independent function due to the broad participation of the prosecutor in court hearings, the institutional affiliation of the national Prosecutor's Office to the bodies and agencies of justice in certain historical periods, and a broad procedural competence of the Prosecutor's Office. However, it can hardly be recognised as an independent or equal to criminal prosecution and prosecutor's supervision [12, p. 15]. It seems reasonable that the prosecutor's procedural competence at the trial stages derives from the prosecutor's supervision or criminal prosecution [38, p. 297]. Anyway, in criminal proceedings the participation in court hearings is completely replaced with the prosecution in court on behalf of the state. Therefore, participation of the prosecutor in court hearings should be considered as a separate derivative function of the Prosecutor's Office in modern Russia.

Prosecution in court on behalf of the state should be considered as a separate function of the Prosecutor's Office that is derivative from criminal prosecution. First of all, this activity, as other previously discussed functions, satisfies the stated criteria regarding regulatory consolidation, presence in the total scope of prosecutorial activities, reflection of the social mission of the prosecution authorities, as well as national and historical traditions. Thus, it can be agreed that the judicial reform and changes in the criminal procedure legislation

connected with it have put forward as dominant the supervisory function of the Prosecutor's Office, though, however, it is realised outside the participation of the prosecutor in court hearings.

This conclusion is based on the fact that the category of “prosecution on behalf of the state” has its clear-cut criminal procedural content. According to the Criminal Procedure Law, the Prosecutor's Office is the sole authority that is responsible for prosecuting on behalf of the state in each criminal case of private-public and public prosecution, which logically distinguishes this prosecutorial activity among others. Since the criminal procedural activity related to the prosecution on behalf of the state is significantly different from other judicial activities of the prosecutor and reflects the special character of the national prosecution authorities, it is hardly reasonable to include it into the prosecutor's participation in court hearings. Furthermore, in this case prosecution on behalf of the state as an independent function should be distinguished from the prosecutor's activities within criminal proceedings to support prosecution.

Hence, it should be recognised that the national Prosecutor's Office carries out four functions: prosecutor's supervision, criminal prosecution, participation in court hearings and prosecution on behalf of the state. The first two functions are independent, the former being basic and the latter – supplementary. The other two functions – participation of the prosecutor in court hearings and prosecution on behalf of the state – are to be considered derivative determined by the prosecutor's supervision or criminal prosecution. If at least one of these functions is ignored or disparaged, it can lead to misinterpretation of the prosecutor's activities and their role in the regulation of social relations and activities of various parties. However, taking into account the dynamic nature of the legal regulation of prosecutorial activities, it should be agreed that the prosecutor's functions can change both in their structure and character in future [41, p. 81].

The multifunctional activities of the Prosecutor's Office in modern Russia determine its implementation of the functions described above as well as other functions that are additional to the basic ones. However, they do not reflect the nature of modern prosecutorial

bodies and do not play a significant role in the total scope of prosecutorial activities. Moreover, some of them can be assigned to other public bodies. These functions include: coordination of other law enforcement agencies for crime prevention as well as preventive and administrative functions of the Prosecutor's Office.

Chapter 4

THE PROSECUTOR'S SUPERVISION

The prosecutor's supervision as the main function of the national Prosecutor's Office is an activity of prosecution bodies and institutions that on behalf of the Russian Federation monitor the compliance with the Constitution of the Russian Federation and the execution of laws on its territory. Some scholars consider it a separate kind of the government activity different from control [41, p. 85], others consider it a type of control [15, p. 7].

Subject to the requirements of current legislation and historical role, the prosecutor's supervision should be regarded as an independent legal phenomenon, distinct from other types of control activities. This conclusion is based on the fact that it is the only kind of public inspection that involves the legal assessment of compliance and enforcement of laws by the greatest possible scope of supervised entities, including the overwhelming majority of public bodies, institutions and officials. The prosecutor's supervision is similar to control, but its purpose, principles of organisation and forms of implementation do not allow considering it as any ordinary or specific form of control. As an independent legal phenomenon, it has its specific content traditionally linked with the concept of legality.

Legality implies regulatory factors providing lawfulness that is achieved by:

- 1) ensuring compliance of any entity's activity with the legal norms fixed in the acts of higher legal force – the Constitution of the Russian Federation and the laws;

- 2) ensuring the exceptional role of the Constitution of the Russian Federation and the laws as acts of higher legal force in the regulation of key public relations;

3) observing human and civil rights and freedoms as the highest value;

4) ensuring the equality (parity of legal opportunities) for all individuals before the Constitution and the laws as the primary regulators of public relations.

The legality of the activities of the Prosecutor's Office is stated in Paragraph 2 of Article 1 of the Law on the Public Prosecution Service that determines the objectives of supervision including the supremacy of the law, unity and consolidation of legality (unity and consolidation of the rule of law), protection of human rights and freedoms and of the lawful interests of society and the state.

Legality as the purpose of the prosecutor's supervision consists in monitoring the compliance, execution and application of the rule of law together with ensuring the rights and freedoms of man and citizen by the supervised bodies, institutions and officials.

The main way to implement the prosecutor's supervision is surveillance that includes identification (detection and tracking) and response to violations. The response is provided by restoring the impaired legality through the elimination of the negative effects and return of violated social relations to their former lawful state.

Restoration of the infringed law is carried out in a simple and a complicated form. In the first case the infringed law is restored through the use of supervisory legal remedies involving positive and negative obligation of the supervised individuals to eliminate violations and restore the infringed public relations to their former legal status. The main objective in this case is the efficient restoration of legality without initiating more complex law enforcement (e.g., judicial). The second case implies the institution of administrative, judicial and other proceedings, because the prosecutor faces some obstacles in his/her recovery activities. Accordingly, there appears a supplementary objective – the enforcement of prosecutorial power aimed at restoring the infringed law. However, there can be no obstacles in case recovery actions are carried out in the normal mode. Therefore, restoration of legality implies the prosecutor's activities aimed at restoring the infringed public relations to their former legal status through the prosecutor's supervision. The complex form of

restoration (through the legal process and administrative powers) is a special case of the prosecutor's practice.

In the literature the prosecutor's supervision is divided into separate branches (directions). Distinguishing these branches, almost all authors emphasise that they imply specialised activities within the prosecutor's supervision that have their objective, object and legal instruments.

The most reasonable is the idea that the object is an activity of the supervised bodies and individuals. The Law "On the Public Prosecution Service" determines the object with the use of the listing method by identifying certain bodies, institutions and officials subject to the prosecutor's supervision within a particular branch.

It is impossible to identify the object without determining the scope of the prosecutor's supervision. As a rule, they are the limits of both inter-branch division and the outer separation of the prosecutor's supervision from other types of inspection. Thus, it is possible to distinguish general and special scopes of supervision.

The former is fixed in Article 21 of the Law on the Public Prosecution Service. It implies that in exercising supervision over the execution of laws the prosecutor:

- a) shall not interfere in the operational and administrative activities of the supervised bodies and individuals;
- b) shall not be a substitute for other state bodies;
- c) shall conduct checks only on the basis of information received by the prosecution bodies concerning violations of the law which require action by the prosecutor.

In fact, the general scope determines the independence of the prosecutor's supervision as of a separate legal phenomenon, because it does not allow it to merge with the managerial and administrative practices of other public agencies and institutions.

The special scope of supervision determines the subject-matter of supervision within certain branches. Some of them, namely, the scope of supervision for groups of people and acts (Articles 21, 26, 29, 32), are established by the Law on the Public Prosecution Service. The others either derive from the Law on the Public Prosecution Service or result from the system interpretation of the current legislation.

The scope of supervision for groups of people determines the agencies, institutions and officials to be supervised by the prosecutor.

The scope of prosecutorial supervision for groups of people is based on independent activities of some agencies, institutions and officials as well as on legal norms (institutions) regulating their activities.

In this case the criteria include:

- the set of agencies, institutions and officials with similar activities, close objectives and functions;
- their powers, which, however, does not exclude state coercion;
- a high degree of their independence as well as a long period of their functioning as such;
- independent legal institutions that regulate their activities.

The first two criteria allow grouping certain agencies, institutions and officials in time-honoured independent systems subject to the prosecutor's supervision. Taking into account the second criterion – the special character of the legal regulation of their activities, it is possible to divide these agencies, institutions and officials into separate branches.

Traditionally, the aforesaid systems of bodies include: public agencies, preliminary investigation and crime detection bodies, penitentiary system as well as the agencies, institutions and officials that enforce the execution of judgements (i.e. court bailiffs).

The scope of acts determines the legal acts supervised by the prosecutor within a certain branch.

There is no consensus on the scope of acts in the literature as well. According to some scholars, the scope of acts is confined to laws, others believe that it includes not only laws, but also subordinate legislation. The former judge from a literal interpretation of the Law on the Public Prosecution Service that establishes that the prosecutor exercises supervision over compliance with the Constitution of the Russian Federation and execution of the laws in force within the territory of the Russian Federation. The latter build upon the current practice of regulating the prosecutor's activities, when the most important issues are regulated not only by laws, but also by other acts equal to laws.

The scope for acts is determined for each branch of the prosecutor's supervision separately. This is their meaning as one of the criteria for identifying the branches of the prosecutor's supervision. They are based on the direct requirements of the Law on the Public Prosecution Service and the existing practice of regulating the activities of the supervised entities.

The scope of legal relations is determined in two ways: 1) by direct reference to the law; 2) by means of the system interpretation of the current legislation that regulates the prosecutor's supervision within a certain branch. These criteria can be applied both collectively and discretely.

The following two points are of fundamental importance for the analysis of relations that serve as the basis for the activities of the supervised bodies and institutions: their panel – one of the participants involved in legal relations should be an entity supervised by the prosecutor, and the type of relationship between the participants – the lack of equality. The former derives from the specified subject of supervision determined for groups of people. The latter results from the analysis of the content of prosecution. The subject of the prosecutor's supervision in this case should include the activities based on the legal relationship where:

- one of the participants is in a dependent or unequal position to the supervised individual;
- the supervised individuals have possibilities to restrict the legal status of other participants of the legal relations;
- the number of such participants is rather large or uncertain;
- these possibilities can be realised through extrajudicial procedures (out of court);
- there is no judicial or another exclusive security and protection scheme applied to these legal relations.

The proposed criteria, namely the possibility to significantly restrict the legal status of dependent individuals in the ordinary course of action of the supervised bodies and institutions, derive from the role of the Prosecutor's Office in ensuring legality and declared legal priorities. As far as the individual's legal status is the content of legality, the prosecutor's supervision becomes important in those spheres of public life where there is a potential danger of denied rights

and freedoms. They include all kinds of public activities involving any restriction of the individual's legal status as well as the cases when the implementation of certain legal possibilities of man and citizen depends on a public person or when that public person is required to perform certain acts to provide an individual with a possibility to exercise a certain legal possibility in the usual manner in the course of their duties.

The scope described above allows distinguishing the following branches of the prosecutor's supervision:

- over the execution of laws and also to ensure that any legal instruments are in conformity with the law;
- over the execution of laws by bodies carrying out operative-and-search activities, inquiries and preliminary investigations;
- over the execution of laws by the administrations of penal bodies and institutions and by the administrations of detention and remand facilities;
- over the execution of laws by court bailiffs.

However, the prosecutor's activities focused on providing the person's legal status do not fall within these criteria, for instance, the prosecutor's supervision over the observance of human and civil rights and freedoms.

Traditionally, the provision of the person's legal status consists of safeguard and protection of the rights and freedoms of man and citizen. In general, safeguard consists in maintaining the unhindered exercise of rights and freedoms and creating conditions for their realisation. Protection, in its turn, is an activity that occurs in case of infringement of the person's legal status and consists in restoring the former lawful state.

When applied to prosecution, safeguard implies prevention of a possible violation of the person's legal status, surveillance over the observance of rights and freedoms of man and citizen as well as readiness to respond to a possible violation. In this sense, this activity is included in the content of the prosecutor's supervision over the observance of rights and freedoms of man and citizen, though not limited to it. In its turn, protection of infringed rights and freedoms carried out through prosecutorial remedies makes the prosecutorial practice aimed at protection of human rights. It is carried out by

applying both supervisory remedies of prosecution and by implementing other restoration options.

The provision of rights and freedoms of man is an inherent element of legality, which stipulates the separation of the aforesaid prosecutorial activities at the corresponding level. In relation to the prosecutor's supervision based on the branch division, this is achieved through the formation of an independent branch. So, it is reasonable to assert that the sector-based nature of this activity is conditioned by the subjective grounds of the law-maker applied to the current national model of prosecution.

Thus, based on the branch-based division of modern prosecutorial activities and the criteria considered above, it is possible to distinguish an independent branch of the prosecutor's supervision – that is over the observance of the rights and freedoms of man and citizen.

Chapter 5

CRIMINAL PROSECUTION

Under Article 21 of the Criminal Procedure Code of the Russian Federation, the prosecutor carries out criminal prosecution on behalf of the state for public and private-public cases. In its turn, Article 37 of the same Law establishes that the prosecutor is an official authorised within the scope of competence established by the Criminal Procedure Code of the Russian Federation, to conduct on behalf of the state criminal prosecution in the course of criminal court proceedings. Besides, criminal procedure laws (Article 221, 226 of the Criminal Procedure Code of the Russian Federation and others) defines the content of this function, specifying certain powers of the prosecutor aimed at criminal prosecution.

This activity is carried out by the Prosecutor's Office and allows viewing criminal prosecution as a criterion for various models of prosecutorial activities. The Prosecutor's Office is distinguished as an institution traditionally or exclusively engaged in criminal prosecution. The statutory independence of this function along with its considerable weight in prosecutorial activities enables the assignment of the contemporary national Prosecutor's Office to a mixed type that carries out both supervision and criminal prosecution.

The complementary nature of criminal prosecution comes out of the method of legal regulation and the scope of its implementation. Nowadays all procedural questions of the prosecutor's participation in court hearings, including criminal prosecution, shall be subject exclusively to the criminal procedure legislation. The Law “On the Public Prosecution Service” has almost no rules governing the prosecutor's criminal procedural activity.

Under the current law, the prosecutor (the Prosecutor's Office) is the exclusive official (public authority) that is entrusted with criminal

prosecution on behalf of the state during the entire criminal process. In accordance with the current legislation and national legal tradition the prosecutor is the only official that imparts the character of the final criminal prosecution to the prosecutorial activities of other competent authorities and officials in pre-trial and trial proceedings. This is the fundamental difference between the criminal prosecution by the prosecutor from that carried out by other entities.

According to Paragraphs 31, 45, 47, 55 of Article 5, as well as Articles 21 and 37 of the Criminal Procedure Code of the Russian Federation, the prosecutor is the absolute legal representative of criminal prosecution who carries out this activity throughout criminal proceedings. Thus, it can be concluded that at some stages and proceedings there are different types of activities relating to criminal prosecution by the prosecutor.

The fundamental difference of criminal prosecution by the prosecutor at the pre-trial stage of the criminal process is that the prosecutor has no direct powers aimed at exposure of a guilty person. The main objective of the prosecutor is the legal assessment of a criminal case and the results of preliminary incrimination (prosecution) carried out by the competent authorities or officials within criminal prosecution. The procedural form of this assessment implies approval of the conclusion of guilt (bill of indictment). This is the main content of pre-trial criminal prosecution by the prosecutor.

With regard to the pre-trial stage of criminal proceedings, under Articles 21, 37, 221, 226, etc. of the Criminal Procedure Code of the Russian Federation, criminal prosecution by the prosecutor includes three main groups of powers.

The first group covers the implementation of the traditional powers of the prosecutor who is entitled to approve the conclusion of guilt or the bill of indictment and to direct the criminal case to the court. The approval makes them equal to the act of criminal prosecution behalf of the state. Since that moment the state represented by the Prosecutor's Office finally gives the incriminating activity of the competent authorities the status of criminal prosecution and makes it complete by the preliminary assessment of its results. The approval by its legal nature is a decision on public prosecution of the person accused of a crime. That is why the criterion for deciding on the approval is the

quality of preliminary investigation in terms of consistency of further prosecution in court. The preliminary investigation conducted prior to the approval of its results by the prosecutor should be considered as the initial stage of criminal prosecution by the prosecutor.

The second group includes the supplementary powers of the prosecutor in pre-trial criminal prosecution. A striking example is the participation of the prosecutor in judicial inquiry related to the selection of preventive measures or appeal against actions and acts of bodies and officials responsible for criminal prosecution. These powers are fully determined by the prosecutor's main function within the incriminating activity, that is, when the incriminating activity is legally shaped as criminal prosecution. They have neither legal nor practical sense without the specified function. Therefore, they are of treated as complementary and auxiliary.

The third group includes the prosecutor's powers in criminal prosecution with regard to the inquiry bodies. The objective is to compensate for the simplified nature of the inquiry. Within this sphere the prosecutor's activities serve to finally shape the simplified incriminating activity of these bodies as criminal prosecution through initiation, authorisation (affirmation) and independent execution of procedural and investigative activities, making procedural decisions on the future of the proceedings. The literature defines this activity as the procedural management of inquiry (preliminary investigation) [36, p. 109]. Leaving aside the question of its meaning, let us agree with the isolation of this activity: to ensure the procedural order of the inquiry the prosecutor exercises procedural supervision over investigators through regulatory and procedural powers in the course of proceedings for certain criminal cases. That is why procedural supervision over investigators is a part of pre-trial criminal prosecution by the prosecutor.

In addition, the prosecutor acts as the basic guarantor of legitimate and reasonable use of criminal and procedural norms throughout the inquiry. In this regard, the prosecutor has law enforcement and supervisory powers that, however, are not limited to the prosecutor's pre-trial criminal prosecution.

These activities form the procedural content of criminal prosecution by the prosecutor in the pre-trial procedure, and their regulatory consolidation determines the content of criminal

prosecution as a separate function of the Prosecutor's Office at the pre-trial stage of the criminal process.

Crucial for understanding the content of pre-trial criminal prosecution by the prosecutor is the first group of powers related to the approval of the conclusion of guilt (bill of indictment) or forwarding of the criminal case to the court. The other powers result to a greater extent from the search for the system of checks of criminal and procedural norms that would be optimal for a given level of social relations. Therefore, they are of little importance for describing criminal prosecution by the prosecutor.

During the preparation for the trial, criminal prosecution by the prosecutor is completely determined by the prosecutor's upcoming activities aimed at public prosecution. The prosecutor exercises the powers granted by the Criminal Procedure Code of the Russian Federation to ensure that the indictment brought in the course of the court review is legal and substantial, and that there are no procedural obstacles for the subsequent trial. Functionally, criminal prosecution by the prosecutor refers to the prosecutorial activity (function) that is derivative of criminal prosecution. Thus, it seems possible to share the opinion that at this stage of the proceedings the prosecutor performs the function of criminal prosecution in the form of charges, while in the trial and higher courts – in the form of supporting charges [34, p. 202].

In trial courts criminal prosecution by the prosecutor is realised through supporting charges on behalf of the state. Criminal prosecution by the prosecutor is realised through direct indictment activities in the course of which the prosecutor accuses a designated person of committing a criminal act. This conclusion comes from the analysis of the provisions of Paragraphs 22, 45 and 55 of Article 5, Part 1 Article 20 and Part 1 Articles 37, 246 of the Criminal Procedure Code of the Russian Federation. Besides, Part 2 of Article 35 of the Law on the Public Prosecution Service establishes that when conducting criminal prosecution in court, the prosecutor shall act as public prosecutor. Public prosecution functionally derives from criminal prosecution. In its logical content it merges with criminal prosecution in relation to this stage in the proceedings. In this sense, criminal prosecution by the prosecutor and public prosecution during the resolution of a criminal case on the merits can be viewed as legally identical.

During the inspection stages and criminal proceedings the prosecutor still carries out criminal prosecution. The activities performed by the prosecutor depend on the stages and proceedings. In the appeal proceedings as well as in the court of the first instance criminal prosecution is absorbed by prosecution on behalf of the state, but is not limited to the approval of committing an act prohibited by the criminal law. It also includes the activities of the prosecutor aimed at ensuring its legality and substantiation, not covered by prosecution. It implies lodging an appeal and/or written statement against the sentence of the court of the first instance and the adversary appeal.

At other inspection stages the content of criminal prosecution by the prosecutor is limited to legality and substantiation of the previously supported charges through legal powers under Articles 377, 406, 416 of the Criminal Procedure Code of the Russian Federation. In terms of procedures this function implies filing written objections and other acts to overturn or alter the previous sentence.

The content of criminal prosecution by the prosecutor at the stage of execution of the sentence is not settled in the current criminal procedure legislation. According to some scholars, criminal prosecution ends with the entry of the sentence into legal force, so it does not exist at the stage of execution of the sentence [33, p. 50]. The previous legislation treated the criminal procedure and other activities in proceedings related to the execution of the sentence as supervisory [30, p. 59]. Some scholars believe that participating in solution of the questions related to the execution of the sentence, the prosecutor does not carry out criminal prosecution, but realises the consequences of prosecution. [32, p. 205].

The participation of the prosecutor in judicial inquiry related to the execution of the sentence is a form of realisation of criminal prosecution at the stage of execution of the sentence. There is no charge as such at this stage. But prosecution on behalf of the state is just another form of realisation of criminal prosecution. As it was stated above, this activity is not confined to the prosecutor's indicting a designated person of committing a criminal act. It includes other types of activities at various stages of criminal proceedings. There is an opinion that the content of criminal prosecution at the stage of execution of the sentence implies the prosecutor's support of motion

against illegal mitigation of punishment as well as the imposition of additional restrictions on it [34, p. 277]. Sharing the author's ideas about the functional nature of this activity, I would disagree with the definition of its direction.

It seems reasonable that criminal prosecution includes measures aimed not only at exposing the person who committed a crime, but also at ensuring the inevitability of punishment. As the pre-trial and court proceedings of criminal cases mainly address the issue of criminal law enforcement that imply sanctions in the form of punishment, such an approach to clarify the content of criminal prosecution is applicable to criminal proceedings as a whole. Inevitability of punishment means the application of criminal law protection during criminal prosecution. However, at the stage of execution of the sentence the court usually decides on the application of criminal law regulation, therefore, the activity of the prosecutor who suggests its application is not always clearly prosecutorial.

Sometimes, when the question concerns changing conditions or relief from punishment and the prosecutor opposes these measures, the direction of the prosecutor's activity looks like the convict's prosecution. In other cases, when the prosecutor supports or says nothing against the early parole or mitigation of punishment, it might seem that the prosecutor protects legitimate interests and rights of the convict and performs the protective function. However, in both cases the prosecutor appeals to the criminal law during criminal prosecution at the stage of execution of the sentence. In this regard, criminal prosecution in proceedings related to execution of the sentence is defined as an activity aimed at preventing the illegal mitigation of punishment and imposition of additional restrictions, which is not the case. Nor should the activity of the prosecutor be aimed at mitigation or exemption from punishment, be defined as right protection. It is more proper to consider criminal prosecution by the prosecutor at this stage of court proceedings as an activity aimed at the application of criminal law without disclosing its nature and direction. The procedural form of criminal prosecution by the prosecutor is the opinion about possible application of a certain criminal law as well as other options granted by Article 399 of the Criminal Procedure Code of the Russian Federation.

Chapter 6

PROSECUTION IN COURT ON BEHALF OF THE STATE

Paragraph 22 Article 5 of the Criminal Procedure Code of the Russian Federation establishes that the charge is a statement about the perpetration by a definite person of an action, prohibited by criminal law, put forward in accordance with the procedure established by the present Code.

In its turn, Paragraph 6 of Article 5 of the Criminal Procedure Code of the Russian Federation provides that the public prosecutor is an official of the Prosecutor's Office acting for prosecution on behalf of the state. Part 2 of Article 35 of the Law "On the Public Prosecution Service" establishes that when prosecuting in court the prosecutor acts on behalf of the state.

Prosecution on behalf of the state, as criminal prosecution, can be considered in two ways: as a separate procedural activity carried out by the attorney for the prosecution and as an independent function of the Prosecutor's Office.

The modern science agrees that prosecution on behalf of the state is an independent type of criminal procedure activity of the prosecutor. The current criminal procedure law also contains a separate set of norms to distinguish this type of prosecutorial activities. However, not all scholars support the separation of prosecution on behalf of the state as an independent function of the Prosecutor's Office. Some scholars believe that this activity does not have an independent functional content and can be carried out as part of criminal prosecution function. Others believe that it exists within the function of participation in court hearings. This is supported by certain norms of the current legislation. For instance, the provisions of Paragraph 1 of Article 20 of the Criminal Procedure Code of the Russian Federation directly

establish that criminal prosecution includes the charge at trial. In its turn, Paragraph 2 of Article 35 of the Law “On the Public Prosecution Service” that describes the ratio of the public prosecutor and prosecution activities refers these norms to the section “Participation of the Prosecutor in Court Hearings”.

Prosecution on behalf of the state is an independent function of the Prosecutor's Office, but unlike criminal prosecution it has a derivative character. This activity, as it was stated above, satisfies the stated criteria regarding regulatory consolidation, presence in the total scope of prosecutorial activities, reflection of the social mission of the prosecution authorities as well as the national and historical traditions. Moreover, this kind of activity could be viewed as an independent criterion for differentiating types of organisation and implementation of criminal prosecution by the prosecutor distinguishing what is called nowadays *prosecution on behalf of the state*. Besides, in the Soviet science of criminal procedure the term *obvinenie* (charge) completely replaced the term *ugolovnoye presledovanie* (criminal prosecution) [43, p. 58] or, according to some scholars, was used as its synonym. [31, p. 15]. This state of things was supported by the Criminal Procedure Code of the Russian Soviet Federative Socialist Republic of 1960 that defined the criminal procedure activities of the Soviet Prosecutor's Office as the realisation of public, not criminal, prosecution.

According to international standards that determine the general principles of prosecutorial activities in criminal proceedings, the primary role of the prosecutor in the criminal process is the public (open to serve the interest of the society and the state) provision of the application of the criminal law, involving the use of criminal law sanctions. The main directions in achieving this task are criminal prosecution, prosecution on behalf of the state (public prosecution) and, in some cases, supervision over the pre-trial preparation of materials for the subsequent trial¹. The key activity is public

¹ Refer to: Recommendations of the Committee of Experts of the Committee of Ministers of member countries of the Council of Europe on the Role of the Public Prosecution in the Criminal Justice System of September 23, 1999 no. PC-PR(99); Recommendation Rec(2000)19 of the Committee of Ministers of the Council of Europe to member states on the role of public prosecution in the criminal justice system.

prosecution in courts. This activity is separated in all national models of the Prosecutor's Office and, as a result, reflected at the level of international legal principles as an immanent or universal feature of prosecutorial activities in criminal proceedings [8, p. 25, 32, 66].

The literature emphasises that public prosecution is the main prosecutor's activity in the criminal proceedings of the adversarial and mixed types. With regard to these processes, the priority of public prosecution among other prosecutorial activities comes out of the human rights mission of modern criminal justice based on separation of basic procedure functions and equal procedural opportunities. The more consistently these principles are embedded, the more separated public prosecution is from other criminal procedure activities by the prosecutor.

The historical and legal studies show that at a certain historical stage of development of criminal justice the separation of the official prosecution and laying it on the public prosecutor allowed distinguishing a separate type of public official charges – the prosecution by the public prosecutor – and considering it as the defining activity of the prosecutor in the criminal procedures of the mixed and adversarial types [20, p. 11]. Unlike others, this activity has remained unchanged despite the historical changes of processes, suggesting historical and legal prerequisites for making it a separate function of the Prosecutor's Office.

Public prosecution is a separate function of the Prosecutor's Office in all contemporary models of the Prosecutor's Office. Regardless of whether the prosecutor acts as a “law enforcement officer”, “prosecutor” or “representative of justice”, s/he carries out public prosecution, which serves as an additional basis to consider this function as a main activity.

In addition to the traditional criteria for considering activities related to public prosecution as a separate function, the separation of this activity at this level comes out of the objectives of the current judicial reform and the content of prosecution.

The increased role of criminal prosecution in the activities of the Prosecutor's Office as a result of judicial reform at the subsequent liquidation of the prosecutor's investigation (and the procedural lead of investigation) makes public prosecution independent. Separation of

investigation and prosecution determines institutional and functional separation of public prosecution in the form of a separate function. The legal basis for it is an independent institution of legal norms governing the criminal procedure of public prosecution.

Though public prosecution is carried out within general criminal prosecution by the prosecutor, it substantially differs from other prosecutorial activities. The semantics of prosecution is to expose, i.e. find and prove involvement in the act committed. In its turn, the charge is a public imputation, accusation in a detected act. The modern legislator understands these concepts in a similar way. Criminal prosecution is a procedural activity performed by the party of prosecution to expose the suspect or the accused who has committed a crime (Paragraph 55 of Article 5 of the Criminal Procedure Code of the Russian Federation), while the charge is a statement about the perpetration by a definite person of an action, prohibited by criminal law (Paragraph 22 of Article 5 of the Criminal Procedure Code of the Russian Federation).

There were conclusions drawn in the literature about the logical and legal difference between criminal prosecution and charges as separate procedural phenomena depending on the moment of their institution, subject composition and content of procedural activities.

However, not every type of prosecution is a part of criminal prosecution and prosecution on behalf of the state. It is stated in the literature that criminal prosecution includes only public prosecution, i.e. prosecution carried out by state agencies and officials. It does not cover private prosecution [16, p. 49]. In our case, the prosecutor's activities carried out by public officials include prosecution on behalf of the state.

As a separate activity public prosecution is characterised by public (official), open and legal character. These features are proper to prosecution in general. The special character of public prosecution is that it is carried out judicially, in courts and aimed at the legal assessment of the preliminary conclusions about the person's guilt in committing the alleged criminal offence. In other words, while in the course of pre-trial proceedings the prosecutor is the sole official authorised by law to impart the character of the final criminal prosecution to the activities of other authorities and officials by

approval of results of their preliminary exposing activities, in prosecution in courts on behalf of the state the prosecutor acts as a party that proves to the court the legality of statement about the person's committing the crime and requires the final application of the criminal law.

Thus, at the theoretical level there are conceptual and legal prerequisites for separation of the procedural activity related to prosecution in courts on behalf of the state from other criminal procedures that form criminal prosecution. The aforesaid arguments exclude this type of activity from the function of the prosecutor's participation in court hearings. However, this activity cannot be considered as an independent function due to the character of prosecution on behalf of the state that is derived from the nature of criminal prosecution. It is curious that in the Soviet prosecutor's supervision the prosecution in courts on behalf of the state was also considered by some scholars as a function separate, yet derivative from the prosecutor's supervision. According to the proponents of this concept, with the prosecutor's participation in court hearings on a criminal case, supervision over the execution of laws transformed into the charge function [42, p. 33]. In this regard, taking into account the requirements of the current legislation and designated legal traditions, it seems that this prosecutorial activity should be defined as an independent function of the national Prosecutor's Office derivative from criminal prosecution.

As a function of the Prosecutor's Office, public prosecution has its subject structure, content and scope.

According to the criminal procedure legislation, prosecution on behalf of the state is carried out by a special subject – the public prosecutor, who, in accordance with Paragraph 6 of Article 5 of the Criminal Procedure Code of the Russian Federation, can only be an official of the Prosecutor's Office. In this regard, there should be a critical attitude towards the extended subject composition of public prosecution by extending the powers in prosecution on behalf of the state to other officials and agencies outside the prosecutorial system.

The officials of the Prosecutor's Office who can act as public prosecutors are prosecutors and their deputies and assistants. The most controversial is the role of an assistant prosecutor. According to some

scholars, this official has all the powers of the prosecutor, including the right for prosecution in courts on behalf of the state [35, p. 31]. Others believe that assistant prosecutors are not entitled to take part in criminal proceedings and support prosecution [1, p. 45], because they do not possess the full prosecutor's power, including the right to approve the conclusion of guilt (bill of indictment). In conformity with the usual practice, the first position seems to be more preferable, though in future attention should be paid to the ideas of normative separation of powers of prosecutors and other officials of the Prosecutor's Office, including those relating to the right in question [9, p. 39].

The literature proves that due to the prevailing public principle in the national proceedings and, in particular, in public prosecution, it is impossible to treat the charge as a criminal proceeding [38, p. 21]. Organisation and implementation of public prosecution on the principles of centralisation and unity of command does not promote the development of ideas about the actional nature of prosecution. Taking into account the requirement of current legislation and existing legal traditions, the charge in the substantive sense should be understood as the statement about violation of prohibition under criminal law, while in the procedural sense it is the public statement of the authorised person according to the procedure established by the criminal procedural law about the violation by a definite person of a certain prohibition. Thus, the prosecutor's procedural activities aimed at the public statement about the perpetration by a definite person of an action prohibited by criminal law forms the criminal procedure content of prosecution on behalf of the state.

The scope of prosecution is rather controversial. According to some scholars, public prosecution manifests during the preliminary investigation when the conclusion of guilt (bill of indictment) is approved, while others believe that it appears since the moment when a person is indicted. Still others believe that the prosecutor begins carrying out public prosecution at the early stage of proceedings. There are people who believe that the starting point of public prosecution by the prosecutor is the trial on the merit in the court of the first instance.

According to the national legal traditions as well as international standards governing the criminal prosecution and indictment activities of the prosecutor, the starting point of the indictment activities of the prosecutor is the moment when the conclusion of guilt (bill of indictment) is approved. Thus, as it was discussed, during the preparation for trial the prosecutor carries out criminal prosecution in the form of indictment, while in the court of the first instance and higher courts – in the form of public prosecution. In this way, the prosecutor's approval of the preliminary results of the investigation, on the one hand, is a form of criminal prosecution, while on the other – the initial moment of indictment. In this regard, it is reasonable to consider appearance for the prosecution as a form of criminal prosecution at the trial stage of the criminal process [36, p. 29].

In their research of the functional content of prosecution in criminal proceedings some scholars have come to conclusion that it is impossible to logically separate the basic functions of the prosecutor, particularly, criminal prosecution and bringing charges as applied to the pre-trial stage of criminal proceedings. Despite supporting the idea that it is not reasonable to formally separate the aforesaid directions, I believe that these activities can be separated on the logical basis. The powers the prosecutor exercises in criminal cases that have arrived with the conclusion of guilt (bill of indictment) (under Articles 221 and 226 of the Criminal Procedure Code of the Russian Federation) can be classified as powers within criminal prosecution. Procedural powers realised when the conclusion of guilt (bill of indictment) is approved are powers aimed at bringing charges. Thus, it seems reasonable that the approval of the conclusion of guilt (bill of indictment) by the prosecutor is the final stage of pre-trial criminal prosecution [2, p. 56] and the initial stage of initiating public prosecution [10, p. 22].

According to most scholars, public prosecution ends with the entry of the sentence into legal force. This approach seems reasonable and complying with the current legislation, as, on the one hand, it allows including prosecution on behalf of the state in courts of the first instance and at the appellate review in its content and, on the other hand – excluding prosecutor's participation in other monitoring and inspection proceedings. In this regard, there should be a critical

attitude towards prosecution on behalf of the state in cassational and review proceedings as well as in judicial inquiry related to execution of the sentence. However, I can hardly agree with the opinion that the prosecutor supervises the application of criminal laws that regulate the service of sentence at the stage of execution of the sentence.

Chapter 7

PROSECUTOR'S PARTICIPATION IN COURT HEARINGS

Article 35 of the Law “On the Public Prosecution Service of the Russian Federation” rules that the prosecutor participates in court hearings in cases set by the procedural laws of the Russian Federation and other federal laws. This law has a separate section (Section IV) that defines the types of the prosecutor's participation in court hearings.

The literature describes the prosecutor's participation in court hearings as a separate function of modern Russian prosecution. The polemic is about its role and content.

Some scholars believe the prosecutor's participation in court hearings is one of the basic functions of Russian prosecution, while others think that it derives from the prosecutor's supervision.

The key argument of the proponents of the first position is that the satisfaction of the prosecutor's action can result in stopping unlawful activity and not taking legal recourse. This is the reason why the prosecutor's participation in court hearings is not always conditioned by supervisory activities and should be considered as an independent function of the Russian Prosecutor's Office that is not connected with the prosecutor's supervision. These arguments are partially justified. Still, the optional “trial” stage in prosecutor proceedings cannot serve as a ground for recognising the fallacy of conclusions on the primacy of supervisory activities in relation to participation in court hearings. In this respect the second position seems more preferable, at least, according to the provisions of Article 1 of the Law “On the Public Prosecution Service of the Russian Federation” that fix the prevailing role of the prosecutor's supervision over other types of prosecutor's activities.

The analysis of the prosecutor's activities in court hearings fixed in the Law "On the Public Prosecution Service of the Russian Federation" and the procedure of initiating court proceedings by the prosecutor set by the current procedural legislation allows concluding that the prosecutor's participation in court hearings is predominantly caused by preliminary supervision. The Concept of the Judicial Reform and the Prosecutor's Office Development for the transitional period determines the features of prosecutor's participation in court hearings. They are derivative from the prosecutor's supervision.

There is no uniform opinion on the content of the function of participation in court hearings in the literature on law. Some authors believe this activity includes all the types of procedural prosecution as well as appeals to superior courts [18, p. 9]. Others narrow it to procedural activities only [25, p. 151]. Still others assume that this function only concerns prosecutor's participation in court hearings excluding criminal procedure [12, p. 15].

The supporters of the first two opinions base on the literal content of Paragraphs 2 and 5 of Article 35 of the Law on the Public Prosecution Service that recognise these activities as part of the considered direction. According to this Article, participation of the prosecutor in court hearings has several forms:

- the prosecutor shall act as public prosecutor;
- the prosecutor shall be entitled to make an application to the court or to enter the case at any stage of the proceedings, if the protection of civil rights and lawful interests of society or the state so requires;
- the prosecutor shall take part in hearings of the Supreme Court of the Russian Federation and the Higher Arbitration Court of the Russian Federation;
- the prosecutor may apply to the Constitutional Court of the Russian Federation.

Participation in court hearings hardly includes the prosecutor's activities in sessions of superior courts. Firstly, this term implies the prosecutor's direct participation in court proceedings on a certain case as a party or in any other procedural status, while participation in superior court sessions does not assume implementation of legal powers. Secondly, in comparison with procedural activities, this type has smaller scope and thus can hardly describe the essence of the

studied function. Finally, officials other than the prosecutor can participate in superior court sessions. They have the right to speak and express opinions, thus it cannot be considered as a separate direction within this function. In this respect, participation of the prosecutor in court hearings should be restricted to court practices.

Prosecution of the case on behalf of the state is justly excluded from the function of the prosecutor's participation in court hearings. Despite the fact that this type of activity has procedural content and is carried out in court proceedings, it cannot be classified as prosecutor's participation in court hearings by the following reasons:

As it was stated above, due to its role, scope, and content it forms a separate function of modern Russian prosecution. Indictment activities are an essential feature of prosecution in general, which allows distinguishing them from other law enforcement procedures and modelling various types of prosecution structures on their basis. Thus, it is methodologically incorrect to make it part of any other function. Moreover, prosecution of the case on behalf of the state differs from other prosecutor's court practices. Its subject is criminal law protection that implies sentencing.

The subject of other prosecutor's procedural activities is implementation of regulatory and non-mandatory provisions in order to restore the infringed law or ensure public interest. It is inadmissible to unite these directions within one function for their aims as well as the law enforcement procedure differ significantly. Finally, prosecution of the case on behalf of the state cannot be part of the prosecutor's participation in court hearings as the latter derives from the prosecutor's supervision. According to the current legislation, prosecution of a criminal case on behalf of the state cannot derive from prosecutor's supervisory activities. Thus, indictment activities should be excluded from the prosecutor's participation in court hearings.

It also seems logical that the content of the function discussed should not include prosecutor's court practices in criminal proceedings when they serve to implement any norms of criminal law (both protection and regulation), of criminal procedure, and penal norms as well as to perform procedural activities closely related or caused by implementation of these norms (e.g., participation of the prosecutor in

a court appeal against disciplinary measures imposed on a person secluded from society). In my opinion, the prosecutor's participation in criminal trials should be classified as a special form of prosecution of the case on behalf of the state (criminal prosecution) or, at least, as a way to secure rights in criminal procedure.

Thus, the actual content of the prosecutor's participation in court hearings forms the following types of prosecutor's court practices:

- participation in court hearings in the Constitutional Court of the Russian Federation (constitutional proceedings);
- participation in court hearings in regional constitutional (statutory) courts;
- participation in civil proceedings;
- participation in arbitration proceedings;
- participation in administrative proceedings.

Part 6 of Article 35 of the Law "On the Public Prosecution Service" rules that the Prosecutor General of the Russian Federation is entitled to go to the Constitutional Court of the Russian Federation in matters concerning a violation of constitutional rights and civil freedoms by the law applied, or which is to be applied, in a particular case. The Law "On the Public Prosecution Service" contains this norm as ruled by the provisions of Part 4 of Article 125 of the RF Constitution. Yet, experience has proven that these provisions do not provide sufficient grounds for prosecutor's full participation in court hearings in the Constitutional Court of the Russian Federation. There are several reasons to it.

Firstly, it is the limited right of prosecutor's access to the Constitutional Court of the Russian Federation. The Law on the Public Prosecution Service does not authorise the Prosecutor General to go to the Constitutional Court in order to check the constitutionality of legal acts and international treaties by an inquiry. Provided that these legal issues make up at least half of the Constitutional Court activities, the prosecutor's participation in constitutional proceedings is objectively limited.

Secondly, the Federal Constitutional Law on the Constitutional Court of the Russian Federation does not have a ruling that directly states the Prosecutor General's right to go to the Constitutional Court of the Russian Federation regarding violations of the constitutional

rights and freedoms of citizens that are or to be applied in a particular case. As this law regulates the constitutional proceedings in this Court, there are no procedures to register and initiate proceedings by an appeal of the Prosecutor General of the RF. As a result, the Constitutional Court of the Russian Federation is not responsible for registering the Prosecutor General's appeal filed under Part 6 of Article 35 of the Law on the Public Prosecution Service'. Moreover, neither the Law on the Public Prosecution Service, nor the Federal Constitutional Law on the Constitutional Court of the Russian Federation contains provisions that allow the Prosecutor General of the Russian Federation to participate in sessions of the Constitutional Court of the Russian Federation.

Thirdly, neither the Law on the Public Prosecution Service, nor the Federal Constitutional Law on the Constitutional Court of the Russian Federation define the legal (procedural) nature of the Prosecutor General's appeal. Yet, under Part 4 of Article 125 of the RF Constitution the constitutionality of a law applied or to be applied in a particular case is checked by the Court's inquiry or by a complaint of other authorised persons. In this respect the only possible form of prosecutor's going to court is a complaint, though, as the literature justly notes, it would be more appropriate to authorise the Prosecutor General to make an inquiry or, at least, an application or a statement.

These features of legal regulation of the prosecutor's participation in court hearings in the Constitutional Court of the Russian Federation do not only result from shortcomings in legislation, but are also a direct consequence of prosecutor's court practices (as a function derived from the prosecutor's supervision) or, rather, legal consequences of the prosecutor's supervision limits. Excluding the higher officials and bodies of the Russian Federation (the President, the Federal Assembly, the Government) as well as courts from the subjects of the prosecutor's supervision, Part 6 of Article 35 of the Law on the Public Prosecution Service gives the Prosecutor General a limited right of access to the Constitutional Court of the Russian Federation. Thus, accounting for the features of constitutional proceedings the Prosecutor General of the Russian Federation only has the right to go to the Constitutional Court of the Russian Federation regarding violations of the constitutional rights and freedoms of

citizens that are or to be applied in a particular case. This legal regulation proves that the aim of the prosecutor's participation in constitutional proceedings is to ensure legality, i.e. to monitor the observance of the legal status of the citizen by supervised persons and bodies. That is why suggestions to extend the prosecutor's powers in constitutional proceedings without altering the content, subject, and scope of the prosecutor's supervision on the whole should be considered critically.

Despite all the mentioned drawbacks the Prosecutor General participates in proceedings of the Constitutional Court of the Russian Federation. The current law has two forms of the prosecutor's participation in constitutional proceedings: "active", when the prosecutor announces and supports demands stated in a complaint or an application; and "passive", when the Prosecutor's Office representatives participate in sessions of the Constitutional Court of the Russian Federation and give their opinions on issues under consideration [21, p. 582].

Article 27 of the Federal Constitutional Law of December 31, 1996 No. 1-FKZ "On the Judicial System of the Russian Federation" provides for the establishment of constitutional (statutory) courts that consider the issues of conformity of regional laws, legal acts of the RF subject bodies, and local authorities with the Constitution (Charter) of the RF subject, and interpret this Constitution (Charter). If the subject of the Russian Federation does not have such a court, issues under its jurisdiction are considered by regular courts that function in the territory of the subject. Exceptions to this rule can be made by agreements signed under Article 11 of the RF Constitution on subjects of jurisdiction and power distribution between the regional and federal bodies of state authority. In the latter case the issues are considered in the Constitutional Court of the Russian Federation.

Prosecutor's participation in court hearings in constitutional (statutory) courts is regulated by relevant regional laws that state the prosecutor's right to apply to courts and participate in proceedings to voice an opinion on issues under consideration. The character of legal regulation allows concluding that the prosecutor joins proceedings in order to ensure the rule of law, which is compliance with standards fixed in the Constitution of the Russian Federation and regional laws.

Besides, basing on the general purposes of the Prosecutor's Office fixed in Article 1 of the Law on the Public Prosecution Service, some authors have an interesting opinion on the prosecutor's role in constitutional (statutory) courts. The prosecutor ensures the legality of activities of these courts as of regional bodies of state authority [44, p. 58].

The prosecutor most actively participates in civil, arbitration, and administrative proceedings. This work is the essence of the prosecutor's participation in court hearings. The analysis of the provisions of Article 35 of the Law on the Public Prosecution Service, Article 45 of the Civil Procedure Code of the Russian Federation, Article 52 of the Arbitration Procedure Code of the Russian Federation, Article 25.11 of the Code of Administrative Offences of the Russian Federation allows concluding that the prosecutor participates in court hearings in order to ensure the rule of law and (or) public interest. The literature fails to answer the question on the correlation of these concepts, while the answer is essential for a precise definition of the function under study as well as the legal powers of the prosecutor when performing duties.

The rule of law is a legitimate state of the regulated environment achieved by the exceptional role of the RF Constitution and laws in force that regulate key public relations. In this sense it is the injunctions, permissions, and requests fixed in laws and aimed to regulate certain benefits, values or public relations. In its turn, ensuring the rule of law as an objective of the Prosecutor's Office implies prosecutor's mandatory participation in court hearings in cases directly listed in laws. The prosecutor's participation serves to secure and protect benefits, values or public relations fixed by laws in procedural forms set by the current procedural law. The analysis of the current legislation allows classifying the prosecutor's procedural participation in court hearings in order to ensure the rule of law into three directions.

The first direction is an alternative to the traditional supervisory procedure to restore the infringed law. An example is the prosecutor's request to the court to annul an illegal act. The prosecutor voluntarily chooses this type of action instead of a protest, the law providing options for such a restorative action. The second direction is when obstacles to the traditional procedure of restoration of the rule of law

appear, and (or) when public enforcement is required, and (or) when law violators must be brought to account (e.g., in case of ignoring the prosecutor's legal request to restore the infringed law). The third direction is when the prosecutor's participation in court hearings is provided by laws, and the prosecutor enters proceedings without preliminary supervisory activities.

At first thought, the latter case does not properly correspond to the prosecutor's participation in court hearings in order to ensure the rule of law, but it is not so. The significance of public relations, benefits and values affected by law enforcement sets a more complex – procedural – form of law application, yet preserving the prosecutor's participation. In this case the prosecutor's supervisory activities become judicial activities that are a more complex way of law enforcement. It is quite incorrect to believe that the prosecutor supervises the court in this situation as well. The prosecutor supervises over the legality of a certain legal norm. Ordinarily, the prosecutor would supervise over its legality using traditional supervisory remedies of prosecution (most likely, over the supervised persons that would use the regulatory form of the norm). But, due to a particular significance of public relations, legislation has set a judicial procedure of its application, thus complicating law enforcement – procedural proceedings with the prosecutor's mandatory participation have been introduced. The prosecutor cannot supervise over judicial activities, according to the Constitution, yet remains a guarantor of the rule of law and participates in proceedings as the subject giving opinions on a case or initiating court proceedings. In these circumstances, the prosecutor's participation in a court hearing is an additional guarantee of lawful decision making.

The public interest is a benefit fixed in the Constitution. It is a fundamental value for the society and the state. Its essential difference from the rule of law consists in a lesser degree of legal regulation. The law does not always list particular benefits that make up the public interest. It covers not only legal, but also economic, aesthetic, moral and other notions. Moreover, particular benefits constituting the public interest can change their roles in certain legal conditions, e.g., due to their greater axiology when becoming the rule of law. This explains the scarcity of normative particular actions (injunctions, permissions,

requests) aimed to ensure or implement the public interest. In other words, this category does not have a clear definition in terms of law. As a result, the prosecutor must first assess the legal value of the public interest in each particular case and only then ensure it, even by initiating or participating in court proceedings. Thus, ensuring the rule of law implies prosecutor's enforcement activities, including their procedural forms, while ensuring public interests assumes preliminary assessment of grounds for participation in a proceeding. The grounds are assessed twice: first, by the prosecutor when making a decision to ensure a particular public interest, second, by the court (judge) when making a decision to provide for this interest in the procedural order. In the first case the prosecutor's assessment of a particular public interest to be protected by law does not exclude the expediency of the procedural order of defence. In the second case the judge (court) assesses not only the public value of the ensured interest, but also its ensuring by the prosecutor.

This procedural order is fixed in the current legislation and court practice. For instance, Part 3 of Article 131 of the Civil Procedure Code of the Russian Federation rules that the prosecutor's statement of claim is to contain the definitions of public interests in question for the court to make a decision on whether to register the statement or not. It is obvious that this order assumes the optional or initiating the prosecutor's participation in court proceedings. This is the fundamental difference between the prosecutor's ensuring of the public interest and an analogous mechanism of ensuring the rule of law. Another difference is that due to its specific normative content ensuring the rule of law assumes clear grounds for participation in court proceedings in forms strictly prescribed by law, while ensuring the public interest does not specify these grounds and establishes the claim as the only form of participation. In this respect the scientific literature justly states that Article 45 of the Civil Procedure Code of the Russian Federation grants an unrestricted right to the prosecutor of bringing action to protect the public interest.

This special character actualises the problem of the prosecutor's supervision as the grounds for the prosecutor's participation in court hearings in order to ensure the public interest. As it was stated above, the current legislation does not employ the concept "public interest" as

a legal term. The concept was used back in pre-revolutionary literature when defining the aims and bases of prosecution, yet it became a scientific category after the adoption of the Federal Law on the Public Prosecution Service of the Russian Federation in 1992.

The 1992 Law on the Public Prosecution Service in Article 2 ruled that the prosecutor's supervision is carried out in order to ensure the supremacy of law, unity and promotion of the rule of law, socio-economic, political and other rights and freedoms of citizens, sovereign rights of the Russian Federation and other republics, constituents of the Russian Federation, other national state entities and administrative-territorial formations, local representative bodies, executive and local authorities, enterprises, institutions, public and political organisations and movements. Ensuring all these values (benefits) with the exception of the supremacy of law and promotion of the rule of law is classified as the public interest in the literature. Later, the 1995 Law on the Public Prosecution Service united the benefits constituting the public interest into the category "legally protected interests of the society and the state". Thus since the adoption of the 1992 Law on the Public Prosecution Service ensuring the public interest has been the objective of the prosecutor's supervision as well as ensuring the rule of law.

Ensuring the public interest separated as an independent objective of prosecution is an additional argument in favour of delimitation of this concept and the rule of law. Thus, ensuring the rule of law should be defined as the main purpose of the prosecutor's supervision, while ensuring the public interest – the additional one. Therefore, the prosecutor's participation in court hearings to ensure the public interest should be considered as a special case of prosecutor's court practices derived from the prosecutor's supervision.

The prosecutor most frequently ensures the rule of law and the public interest in civil proceedings. Part 1 of Article 45 of the Civil Procedure Code of the Russian Federation provides for the prosecutor's appeal to the court or intervention to give an opinion. The procedural literature on this topic distinguishes between initiating and giving an opinion as forms of prosecutor's appeal to the court. In the first case the prosecutor is thought to participate in a proceeding on his or her own behalf and procedurally acts as the plaintiff. In the second

case the prosecutor is neither a substantive nor a procedural party to a case, but an independent observer – an expert in law authorised to give opinions on the merits of the case.

The current civil procedure law assumes an opportunity for the prosecutor to participate in all types of proceedings: actional, special, mandatory, as well as in cases arising out of public relations.

The actional (initiating) participation consists in the prosecutor's initiation of a civil proceeding by filing a statement of claim on his or her own behalf in favour of:

- 1) the rights, freedoms and legitimate interests of citizens;
- 2) the rights, freedoms and legitimate interests of non-established persons;
- 3) the interests of public entities (the Russian Federation, the subjects of the Russian Federation, municipalities, etc.).

According to the provisions of Part 1 of Article 45 of the Civil Procedure Code of the Russian Federation the prosecutor can file a statement of claim in order to protect the rights, freedoms and legitimate interests of the citizen only if by the state of health, age, incapacity and other valid reasons the citizen is not able to go to court in person. This limitation does not extend to the prosecutor's statement of claim if it based on citizens' petitions that require protection of violated or contested social rights, freedoms and legitimate interests in the sphere of labour (service) relations; protection of the family, motherhood, fatherhood and childhood; social protection including welfare; ensuring of the right to housing in the state and municipal housing funds; health protection including medical care; ensuring of the right to a healthy environment and education. Furthermore, current laws indicate cases when the prosecutor is defined as a person entitled to go to court in order to protect the rights, freedoms and legitimate interests of citizens. Thus, the prosecutor makes a decision on whether to file a statement of claim in order to protect the rights, freedoms and legitimate interests or not in such cases, for instance, as protection of the right to vote and participate in a referendum (Part 1 of Article 259 of the Civil Procedure Code of the Russian Federation); deprivation of parental rights (Paragraph 1 of Article 70 of the Family Code of the Russian Federation); cancellation of adoption (Article 142 of the Family Code of the Russian Federation), etc. The analysis of the

topics of claims that the prosecutor is entitled to file in order to protect the rights, freedoms and legitimate interests of citizens shows that the prosecutor's participation in court hearings is primarily aimed to ensure the rule of law, as the grounds, types of proceedings and forms of the prosecutor's participation are clearly defined in current laws.

In its turn, the prosecutor's claim to protect the rights, freedoms and legitimate interests of non-established persons can aim to ensure both public interest and the rule of law. Firstly, the range of such cases is not clearly determined by the law. Secondly, it is impossible to identify the plaintiff in each particular case, consequently, the public role of legal relations to be protected should be assessed. The same applies to the prosecutor's claim in the protection of the interests of the Russian Federation, its subjects and municipalities. A single difference between the two situations is that in the first case ensuring the public interest is based on the protection of the legal status of the person, while in the second – of public-law entities. Thus, current civil procedure law formally sets an unlimited list of grounds for the prosecutor's participation in court hearings in the actional (initiating) form in order to protect the rights, freedoms and legitimate interests of non-established persons as well as the interests of the Russian Federation, its subjects and municipalities.

The fundamental distinction of the prosecutor's participation in arbitration proceedings consists in its sole purpose – ensuring the rule of law. The current Arbitration Procedure Code of the Russian Federation does not entitle the prosecutor to claim protection of public interests. This conclusion is based on Article 52, Parts 1 and 2 of Article 53 of the Arbitration Procedure Code of the Russian Federation that determine the grounds for the prosecutor's intervention. Thus, the prosecutor is entitled to participate in arbitration proceedings in cases explicitly stated in the RF Arbitration Procedure Code, Administrative Offences Code and Law on the Public Prosecution Service.

Part 1 of Article 52 of the Arbitration Procedure Code of the Russian Federation rules that the prosecutor shall be entitled to file with an arbitration court the following:

- applications for disputing normative legal acts, non-normative legal acts of state power bodies of the Russian Federation, state power

bodies of the subjects of the Russian Federation and bodies of local self-government which concern the rights and legitimate interests of organisations and citizens in entrepreneurial and other economic activities;

- claims for invalidating transactions made by state power bodies of the Russian Federation, state power bodies of the subjects of the Russian Federation, bodies of local self-government, state and municipal unitary enterprises, government organisations, as well as by legal entities, provided that the Russian Federation, its subjects and municipalities have a share in their authorised capital;

- claims for applying the effects of invalidity of a void transaction made by state power bodies of the Russian Federation, state power bodies of the subjects of the Russian Federation, bodies of local self-government, state and municipal unitary enterprises, governmental organisations, as well as by legal entities provided that the Russian Federation, its subjects and municipalities have a share in their authorised capital.

In such cases the Arbitration Procedure Code of the Russian Federation entitles the prosecutor to intervene at any stage of arbitration proceedings.

Moreover, Part 2 of Article 198 of the Arbitration Procedure Code of the Russian Federation rules that the prosecutor is entitled to go to an arbitration court with claims for annulment of non-regulatory acts, invalidation of decisions and actions (omissions) made by public authorities and officials, if s/he presumes that the contested act, decision and action (omission) do not comply with the law or any other regulatory act, violate the rights and legitimate interests of citizens, organisations, other persons in entrepreneurial and other economic activities, illegally impose duties on them and undermine their entrepreneurial and other economic activities.

The literature notes that the prosecutor goes to an arbitration court provided that:

- a) there is no other remedy for the violation of law;
- b) legal entities and individual entrepreneurs that caused damage to state and public interests refuse from full and voluntary compensation for it;

c) repression of an offence and aversion of severe economic damage to state and public interests require an arbitration court to take steps to secure a claim by the prosecutor's statement;

d) there are grounds to presume that a different form of the prosecutor's participation will not result in a timely and proper correction of law violations;

e) the prosecutor's participation will be most efficient [21, p. 610].

The current legislation restricts the prosecutor's legal powers in an arbitration court to the initiating form of participation. The prosecutor is not entitled to give opinions in this type of proceedings. The prosecutor has powers to go to an arbitration court with a statement of claim in case of a substantive dispute (in action proceedings) and with a statement in case of *ex parte* proceedings (summons, special proceedings, cases on legal and administrative relations), i.e. in the absence of the dispute of right.

Another form of the prosecutor's participation in court hearings is participation in judicial examination of cases on administrative relations. While Part 2 of Article 118 of the RF Constitution classifies administrative proceedings as a separate form of justice, the literature does not always define the prosecutor's participation in them as an independent type due to the lack of a uniform resolution policy for such cases. This viewpoint is partially justified as most cases on administrative relations are solved through civil and arbitration proceedings (Chapter 25 of the Civil Procedure Code of the Russian Federation, Chapter 24 of the Arbitration Procedure Code of the Russian Federation). Yet, there is a category of administrative cases with the prosecutor's participation and the Code of Administrative Offences of the Russian Federation and regional administrative laws establish the procedure for them. Therefore, it is more correct to talk about the formation of a separate independent direction of prosecutor's participation in administrative proceedings in the future, or about the prosecutor's participation in the trial of cases arising from administrative offences (misdemeanours).

The analysis of the relevant provisions of the Code of Administrative Offences of the Russian Federation and regional administrative laws (e.g., the Code of Administrative Offences of Tomsk Oblast) allows concluding that the sole purpose of prosecutor's

participation in administrative proceedings is to ensure the rule of law. Unlike other procedural laws, the Code of Administrative Offences of the Russian Federation preserved the prosecutor's right to a supervisory response by lodging a protest, irrespective of his/her participation in a court hearing, even against decisions made by court (Articles 25.11 and 30.1 of the Code of Administrative Offences of the Russian Federation). This situation is explained by the simplified nature of administrative proceedings as well as a need to additionally guarantee legal, reasonable and fair decision making by competent authorities (including the court) through setting this form of prosecutor's participation in court hearings.

Chapter 8

OTHER TYPES OF PROSECUTION

Other types of prosecutor's activities include: coordination of other law enforcement agencies for crime prevention, the prosecutor's participation in administrative jurisdiction, prevention and lawmaking.

As it has been noted, coordination of other law enforcement agencies for crime prevention does not possess a clear legal content. Essentially, it is an organisational activity or a specific interaction with other law enforcement agencies. Taking into account the character of legal regulation, it should be classified as a type of prosecution derived from the prosecutor's supervision. This conclusion is based on the fact that all the bodies the prosecutor coordinates are subjects of the prosecutor's supervision.

Recently, suggestions have been made to abolish coordination as part of the Prosecutor's Office. The principles of organisation and functioning of modern prosecution bodies hardly allow accepting them. These suggestions would be reasonable in case of a radical change in the role of the Prosecutor's Office, for instance, restricting it to indictment or right-securing types. At present, while the Russian Prosecutor's Office is still a multi-functional law enforcement agency, the suggestions should not be supported.

The prosecutor's participation in administration is a direction stipulated by the supervisory function of the Prosecutor's Office. It includes authorisation of inspectional and jurisdictional activities as well as the implementation of administrative proceedings by the prosecutor (initiating a case on administrative violations and administrative investigation).

The prosecutor's approval of administrative norm application includes sanctioning the application of administrative action measures aimed to constrain the constitutional rights of persons in the

extrajudicial procedure. The current legislation prescribes to receive the prosecutor's approval for the following actions: arrest of the property of a customs duty payer in the execution of a customs body judgement on duty collection (Article 156 of the Federal law "On the Customs Regulation in the Russian Federation"); arrest of the property of a tax paying organisation in the execution of a tax or customs body judgement on tax and fine collection (Article 77 of the Tax Code of the Russian Federation); administrative detention of persons who violated the State Border, boundary or border checkpoint regimes for up to ten days in cases when violators do not have identification documents in order to identify them and clarify the circumstances of the offence (Article 30 of the RF Law "On the State Border of the Russian Federation"). The Federal law "On the Protection of Rights of Legal Entities and Individual Entrepreneurs in the Process of State Control (Supervision) and Municipal Control" rules that administrative and regulatory agencies are to receive the prosecutor's or assistant prosecutor's consent to conduct unscheduled on-site inspections. A significant number of state and municipal regulatory bodies make this prosecutor's activity a separate independent direction. Some authors classify it as supervision over the execution of laws and the legality of laws. This opinion is quite justified taking into account the fact that regulatory agencies in the system of state and municipal control are the subject of the prosecutor's supervision.

According to Article 25 of the Federal Law "On the Public Prosecution Service of the Russian Federation", Articles 25.11, 28.1, 28.4 and other of the Code of Administrative Offences of the Russian Federation, the prosecutor is entitled to initiate administrative proceedings by a ruling. Under Article 28.4 of the Code of Administrative Offences of the Russian Federation, this ruling is equivalent to the protocol on administrative violation. Thus, it is to contain information provided by Part 2 of Article 28.2 of the Code of Administrative Offences of the Russian Federation, namely: date and place of its drawing up, surname and initials of the person accused of the administrative offence; surnames, first names, patronymics and addresses of witnesses and victims, if any; place and time of committing the offence, the event of the offence; the article of the Code of Administrative Offences of the Russian Federation or the law

of a subject of the RF that provide administrative responsibility for the administrative offence; explanations of the accused natural person or a legal representative of the accused legal entity; other relevant information.

Article 28.4 of the Code of Administrative Offences of the Russian Federation rules that cases on administrative violations provided by Articles 5.1, 5.7, 5.21, 5.23 – 5.25, 5.45, 5.46, 5.48, 5.52, 7.24, 12.35, 12.36, 13.11, 13.14, Parts 1 and 2 of Article 14.25, Article 15.10, Part 3 of Article 19.4, Articles 19.9, 20.26 of the Code of Administrative Offences of the Russian Federation are to be initiated by the prosecutor. When supervising over compliance with the Constitution of the Russian Federation and execution of laws in force within the territory of the Russian Federation the prosecutor is entitled to initiate a case on any administrative offence the responsibility for which is provided by the current Code of Administrative Offences of the Russian Federation or law of a subject of the RF.

This norm establishes two categories of cases: a) cases on administrative violations under exclusive prosecutor's jurisdiction that can be initiated only by the prosecutor; b) other cases initiated by the prosecutor when supervising over the execution of laws and legality of judgements made.

The literature expresses no uniform opinion on when the prosecutor is entitled to initiate cases on administrative violations. As most authors agree that the law indicates any offence, they assume that the prosecutor is authorised to exercise administrative prosecution of any known offence. Some authors note that the prosecutor is authorised to exercise administrative prosecution of offences detected during inspections [21, p. 630]. Others believe the prosecutor is authorised to exercise administrative prosecution of offences detected during supervision provided that the actions of the person to be administratively liable are subjects of the prosecutor's supervision [5, p. 34]. The latter opinion seems most reasonable due to the following.

Firstly, the provision “when supervising over compliance with the Constitution of the Russian Federation and execution of the laws in force within the territory of the Russian Federation” means that the prosecutor is to take into account the requirements of the Law on the Public Prosecution Service to the subject and limits of supervision

over the execution of laws when considering the initiation of an administrative proceeding. In other words, the prosecutor is not to hold the person administratively liable if his/her activities are not subjects of the prosecutor's supervision.

For instance, the prosecutor is not to impose administrative liability on separate persons, committers of an administrative offence, or on a legal person as a whole (not on its Heads).

Secondly, Article 21 of the Law on the Public Prosecution Service rules that when supervising over the execution of laws the prosecutor is not entitled to substitute for other administrative or regulatory bodies. In this respect the prosecutor is not to initiate cases on administrative violations that are under the jurisdiction of certain administrative bodies. In such circumstances the prosecutor is to direct the materials of the case to competent authorities and supervise over the due performance of their responsibilities connected with administrative proceedings.

Unlike others, the prosecutor's preventive activities are not explicitly regulated by the Law on the Public Prosecution Service. The preventive powers of the prosecutor are fixed in other federal laws, for instance, in the Federal Laws "On Countering Extremist Activities", "On Combating Corruption", "On Anti-Corruption Expertise of Legal Acts and Draft Laws and Regulations". These duties are imposed on the prosecution service due to its supervisory function.

Modern preventive activities of the prosecutor include combating corruption and countering extremism.

This means prevention of negative actions that do not form elements of crime by persons – subjects of the prosecutor's supervision. Prevention and supervision are closely connected due to the common subject, structure and prosecution remedies. In this regard, the literature does not classify prevention as a separate activity and considers it as a form of supervision over the execution of laws and legality of legal acts. This approach is based on the opinion that one of the main objectives of the prosecutor's supervision is prevention of negative actions by supervised persons. Without casting doubt on the purpose of prosecution, I would disagree with this opinion. Corruption and extremism are not only types of crime, but also a complex negative phenomenon that manifests itself both in

unlawful and any other socially dangerous behaviour. Traditional legal means of the prosecutor's supervision may not be sufficient in this case, thus, new preventive and correctional activities are required. Numerous bodies and establishments carry out preventive measures. But taking into account the long experience of supervision and coordination, inclusion of other prevention bodies in the subject of the prosecutor's supervision, today the Prosecutor's Office is an optimal body of preventing non-criminal forms of corruption and extremism on the part of the supervised persons, as well as coordinating the activities of other law enforcement agencies in this sphere.

Part 4 of the Law on the Public Prosecution Service rules that the Prosecutor's Office is to participate in law-making.

Some scholars assume that it performs the law-making function, which is most obvious at the regional level. Their assumption is based on the argument that the laws of the subjects of the Russian Federation give their prosecutors the right to initiate laws. Indeed, according to Paragraph 4 of Article 1 and Article 9 of the Law on the Public Prosecution Service, regional laws in some subjects of the Russian Federation give this right to their regional prosecutors, yet, in my opinion, this is not the case of elimination of the legislative gap at the regional level, and this form should be excluded from the list of functions of the prosecution service by the following reasons.

According to the principles of centralisation and unity (Part 1 of Article 129 of the Constitution of the Russian Federation) the legal powers of any subordinate prosecutors are determined by the powers of the Prosecutor General of the Russian Federation. The Prosecutor General of the Russian Federation does not have the right to initiate laws, therefore the subordinate prosecutors are not to have this right either. Granting this right to prosecutors at the regional level despite the lack of direct reference to it in the Law on the Public Prosecution Service leads to derogation of the provisions of Paragraph O of Article 71 of the RF Constitution, according to which the Prosecutor's Office is under exclusive jurisdiction of the Russian Federation. Therefore, by defining (or, rather, specifying) the scope of prosecution, laws of the RF subjects violate the exclusive jurisdiction of the state thus becoming void in the relevant part.

Article 9 of the Law on the Public Prosecution Service explains the prosecutor's participation in law-making by the supervisory function the prosecutor performs (“in the exercise of their powers”). Therefore, this activity should be considered as a specific form of supervision over the regional and local legislative bodies rather than as a separate activity. This form is fixed by law due to the specific activities these bodies perform.

CONCLUSION

The genesis of the national Prosecutor's Office suggests that it functioned in almost all known historical forms of organisation of prosecution. Successively employing various types of organisation – fiscal, judicial magistrate, supervisory and mixed – it continued to evolve in the general outline of historical development of prosecutorial systems, although with significant national features determined by the specifics of the national government and criminal justice of corresponding historical periods.

The current legislation ensured a multifunctional model of the Prosecutor's Office in Russia. Despite the nominal priority of supervision over other functions, there is a tendency to reduce the supervisory function of modern Prosecutor's Office in Russia. Besides, one of the consequences of the judicial reform is further development of law enforcement direction to ensure (secure and protect) the legal status of the individual in all kinds of law enforcement, including criminal proceedings. The greater role of the prosecutor's law enforcement resulted from the changed content of supervisory activities during the reforms in the supervised environment. Law enforcement by the prosecutor is gradually gaining an independent role making such basic prosecutor's functions as the prosecutor's supervision (in its traditional sense) and criminal prosecution go by the wayside.

The organisation of prosecution is a system of functions and directions of the Prosecutor's Office. The functions are the basic directions in realisation of duties performed by the prosecutor. This is a theoretical construct that reflects the scope of the prosecutor's activities, expresses the essence of the Prosecutor's Office determined by the national and historical traditions and current political priorities in legal regulation of social relations. The modern national Prosecutor's Office carries out four functions: the prosecutor's supervision, criminal prosecution, participation in court hearings and

prosecution on behalf of the state. The prosecutor's supervision and criminal prosecution are independent functions, the former being basic and the latter – supplementary. The other two functions – the participation of the prosecutor in court hearings and prosecution on behalf of the state – are to be considered as determined by the prosecutor's supervision or criminal prosecution, i.e. derivative functions of the national Prosecutor's Office.

The prosecutor's supervision is an independent legal phenomenon distinct from other types of control activities. It is the only public activity with a special content that forms the rule of law as the purpose, means and principle of prosecution. An essential element of the modern content of the rule of law is ensuring the rights and freedoms of man and citizen. The main way to implement the prosecutor's supervision is surveillance that includes identification and response to violations. Response is provided by restoring the impaired legality through elimination of negative effects and return of violated social relations to their former lawful state. Restoration of the infringed law is carried out by means of supervision and by initiating a more complex form of law enforcement – institution of administrative, judicial and other proceedings. Restoration of the infringed law in the complex form is an individual case of the prosecutor's response.

The prosecutor's supervision is divided into branches. Each branch has its own subject of the prosecutor's supervision which is acts and actions of supervised bodies, institutions and officials as explication of their activities. The subjects are determined for each branch by specifying the scope of supervision: for groups of people subject to supervision; for acts execution of which is supervised by the prosecutor; for legal relations that serve as the basis for the activities of the supervised people.

The basic is the scope of supervision for groups of people. It implies restriction of supervision by monitoring activities of the autonomous set of agencies, institutions and officials with similar objectives and functions as well as legal regulation. The scope of acts is independent, though not as universal as the previous one. It is determined by the legal acts supervised by the prosecutor within a certain branch. This scope is specified for each branch. The scope of legal relations is determined by direct reference to the law or by

specifying the nature of legal relations. In the latter case the subject of supervision includes legal relations arising in the course of activities of supervised persons, which implies the possibility to considerably restrict the legal status of the dependent participants, or the participants' being dependent on supervised persons. The specified criteria divide the prosecutor's supervision into the following branches: supervision over the execution of laws and legality of legal acts; supervision over the observance of the rights and freedoms of man and citizen; supervision over the execution of laws by bodies of interrogation, preliminary investigation and operative investigation; supervision over the observance of laws in places of isolation from society and at execution of punishments and other compulsory measures imposed by courts; supervision over the execution of laws by court bailiffs.

Criminal prosecution is an independent supplementary function of the national Prosecutor's Office. Its independent character is determined by its significant role in prosecution and reflection of the nature of the prosecutorial bodies.

Its supplementary character is determined by its realisation in criminal proceedings only (unlike the prosecutor's supervision) and regulated by criminal procedure legislation exclusively. As a function of the Prosecutor's Office, criminal prosecution is carried out by the prosecutor at all the stages of criminal proceedings. The content of criminal prosecution by the prosecutor forms certain types of criminal procedure within certain stages of the criminal process. Each of them has its own features.

The content of criminal prosecution by the prosecutor includes activities, not only related to the exposure the person who committed a crime, but also aimed at ensuring application of criminal law in the prosecutor's activity at various stages of the criminal process. The basic types of criminal procedure to implement criminal prosecution by the prosecutor are the approval of the conclusion of guilt (bill of indictment), forwarding of the criminal case to the court and prosecution on behalf of the state. Criminal prosecution by the prosecutor implies neither supervision over the procedural activity nor right protection.

In its turn, prosecution on behalf of the state is an independent function of the Prosecutor's Office derivative from criminal prosecution. This activity is carried out within the general criminal prosecution by the prosecutor. However, prosecution on behalf of the state as a separate activity of the Prosecutor's Office has its independent content, scope and subjects.

The functional content of prosecution on behalf of the state forms the activity of the public prosecutor aimed at the public statement about the perpetration by a definite person of an action prohibited by criminal law. As an independent procedural activity it emerges when the conclusion of guilt (bill of indictment) is approved by the prosecutor and ends with the entry of sentence into legal force. The subject of prosecution on behalf of the state is prosecutors, their deputies and assistants who are entitled to exercise the aforesaid powers in compliance with the current criminal procedure law.

Taking into account the requirements of the current legislation and designated legal traditions, the prosecutor's participation in court hearings derives from the prosecutor's supervision. Despite the rather broad interpretation of directions of the prosecutor's participation in court hearings under Article 35 of the Law on the Public Prosecution Service, the actual content of the function in question is the prosecutor's participation in court hearings in the Constitutional Court of the Russian Federation, constitutional (statutory) courts of the subjects of the Russian Federation as well as in administrative, arbitration and civil proceedings. The prosecutor most actively participates in civil, arbitration, and administrative proceedings.

The functional content and activity of the prosecutor at the trial stage of the criminal process does not allow including this type of activity in the content of the prosecutor's participation in court hearings. The prosecutor's participation at the trial stage of criminal proceedings is absorbed by criminal prosecution and prosecution on behalf of the state.

The purpose of the prosecutor's participation in civil proceedings is ensuring the rule of law and public interest. The Civil Procedure Code of the Russian Federation establishes a limited list of grounds for the prosecutor's participation to ensure the rule of law and an unlimited list – for ensuring public interest. The Civil Procedure Code of the

Russian Federation establishes two forms of the prosecutor's mandatory participation to ensure the rule of law: actional and opinion-giving, while to ensure public interest it offers the optional actional form only. The objective of the prosecutor's participation in constitutional (both federal and regional), arbitration and administrative proceedings is to ensure the rule of law. The current legislation does not provide for the prosecutor's participation in court hearings to ensure public interest.

Coordination of other law enforcement agencies for crime prevention, the prosecutor's participation in administrative jurisdiction, prevention, and lawmaking are not functions of the national Prosecutor's Office, because they do not fully reflect the social purpose of the prosecutorial bodies and do not play a significant role in the prosecutorial activities. These duties are imposed on the Prosecutor's Office due to its supervisory function. The above stated activities are either derivative from supervision (coordination, participation in administrative proceedings, prevention) or separate (special) forms of the prosecutor's supervision (law-making).

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PROSECUTION SERVICE IN RUSSIA

Translated by *Valentina N. Gorenintseva*
and *Valeria V. Kashpur*

Technical editor *T.S. Portnova*

Designer *D.V. Fortes*

Scientific Technology Publishing House Co. Ltd,
Sq. Novosobornaya, 1, Tomsk, Russian Federation, 634050
ph. +7 (3822) 533-335