



ГЕНЕРАЛЬНАЯ ПРОКУРАТУРА РОССИЙСКОЙ ФЕДЕРАЦИИ

General Procuracy of the Russian Federation office (photo by belnovosti.by)

Russia's Resilient Legal Powerhouse: The Procuracy Enters the 21st Century

William E. Pomeranz

On March 18, 2019, President Vladimir Putin signed into law two new restrictions on freedom of speech. One law levied administrative fines on so-called “fake news” while the other imposed penalties for information deemed insulting to human dignity, public morality, or otherwise expressing disrespect to state symbols and institutions.¹ The above laws lacked precise standards, thereby requiring interpretation. What was particularly revealing, however, was that the law on fake news empowered the *prokuratura* (procuracy), and not the courts, to make the initial ruling to block any offending materials.

Such recognition underscores the procuracy's incremental yet steady resurgence in the aftermath of the Soviet Union's collapse. Since 1991, it has moved into new areas of regulation such as business, anti-corruption, NGOs, and the internet, while remaining true to its historical mission of defending the state. Western prosecutors serve as the obvious source of comparison for the *prokuratura*, but in reality, the procuracy's jurisdiction and powers far exceed the responsibilities of prosecutors in other common law and civil law countries, respectively. Here I analyze the procuracy's post-Soviet transition, highlighting

how its pro-statist agenda and institutional coherence have led to its reemergence as the most influential legal institution in Russia.

The Roots of the Procuracy's Power

Vladimir Lenin initially saw no need for preserving the prevailing legal order after the October 1917 revolution. Therefore, he abolished the tsarist court system, including the procuracy, within a month of taking power. The procuracy, however, returned in 1922 when Lenin and the Bolshevik Party realized that they needed the stability that only a functioning legal system could provide. As part of this restoration, Lenin endowed the procuracy with broad supervisory powers over state administrative structures, government officials, and Soviet citizens. Such sweeping responsibilities had their historical antecedents; the power of "supervision" dated back to Peter the Great's founding of the procuracy in 1722 to oversee the Ruling Senate. Ironically, Lenin reversed a 19th century trend toward the gradual decrease in the procuracy's oversight functions, especially after the judicial reforms of 1864, when its main charge largely was reduced to representing the state in court.

The procuracy's power only expanded under Stalin as it became one of the essential institutions in overseeing industrialization, collectivization, and the Great Terror. Khrushchev reined in the terror, but retained the procuracy's supreme supervisory powers to the point that it oversaw all executive and administrative bodies. The historian Harold Berman referred to the procuracy as a "fourth branch of government in the Soviet system, independent of the executive, legislative, and judicial branches."²

The 1977 Brezhnev constitution further enshrined

into law the legal and administrative supremacy of the procuracy. Article 164 granted the procuracy the supreme power of supervision over the strict and uniform observance of all laws. In practice, the procuracy oversaw virtually every institution

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in the Soviet Union: ministries, state committees and departments, executive-administrative bodies of local soviets of people's deputies, enterprises, cooperatives, and collective farms. In addition, the procuracy was assigned specific supervisory powers over the judiciary and civil and criminal cases while independently reviewing large numbers of citizen complaints. It further, along with other state and judicial actors, received the constitutional right to initiate legislation.

From Soviet to Post-Soviet

The formal and informal powers assigned to the procuracy made it the most influential and prestigious branch of the Soviet legal profession. Yet in the aftermath of the Soviet Union's collapse, the procuracy suffered a string of institutional defeats. In particular, the 1993 constitution clearly envisioned a diminished procuracy. The new constitution contained no overt recognition of its supervisory powers. On the contrary, it crammed the procuracy into the chapter on judicial power

as an apparent afterthought, with its powers to be defined by future legislation. The procuracy was not included in the constitution's list of state institutions granted the right of legislative initiative. It also was not designated as one of the privileged bodies that could make immediate appeals to the Constitutional Court; instead, the procuracy could only pursue the constitutional review of laws (and not normative acts) in the same manner as everyday citizens, i.e., through the normal appeals process. Finally, starting in 2007, the procuracy lost practical supervisory control over the criminal investigation process. This change culminated in 2011 with the creation of the Investigative Committee as an independent organization.

Yet despite all of the above setbacks, the procuracy has proved to be highly resilient institution. While its supervisory powers were reduced in specific areas (the courts and criminal investigation), the 1995 Law on the Procuracy retained the notion of supervision as one of institution's core functions.

On its broadest level, the procuracy remains responsible for ensuring the observance of the Russian constitution and its laws. Its general supervision activities include oversight for the fulfillment of laws by all federal executive bodies of state power, all regional executive bodies and legislatures, local self-government, and local regulatory agencies (*organy kontrolya*). General supervision further extends to the Investigative Committee and criminal investigators, although as noted above, this power is now limited by the 2011 law that separated investigative and prosecutorial responsibilities. While the procuracy can (and often does) use its legal discretion to object to individual criminal detentions and indictments, in practical terms, it has lost its institutional leverage

over Russia's criminal investigators. However, the procuracy's general supervisory powers extend to other parts of the criminal justice system, such as prisons and bailiffs. Finally, the procuracy's reach theoretically extends to the corporate and non-profit sectors through its supervision of state bodies responsible for the administration of commercial and non-commercial organizations.

The retention of general supervision represented the first critical step in the procuracy's road to political recovery. The procuracy received greater legal recognition in Putin's 2014 constitutional amendments, notably its explicit inclusion in the revised Chapter 7 heading on the judicial system, which now reads "Judicial Power and the Procuracy." Moreover, the residual powers in Article 9 of the Law on the Procuracy, dealing with its law-creating (*pravotvorchestvo*) activities have developed into established areas of responsibility, particularly on the regional level. For example, while the 1993 constitution deprived the procuracy of the right of legislative initiative in federal matters, this right has now been recognized in several regions, thereby enabling the procuracy to propose legislation.³ The regional procuracy further reviews local draft laws and normative acts, often addressing their agreement with federal legislation.⁴ According to Procurator-General Iurii Chaika, the procuracy disputed 5,000 regional acts and 170,000 municipal acts in 2018 alone, bringing virtually all of them into compliance with federal legislation.⁵

Thus, since its 1993 low point, the procuracy has reemerged as arguably the most powerful legal institution in Russia. It defends legality in all branches of government while acting as a critical link in the power vertical. Moreover, it remains outside traditional notions of separation



Prosecutor General Iurii Chaika (en.kremlin.ru)

of powers and instead directly serves the state. Putin emphasized this point in a January 12, 2016 statement marking the day of the procuracy. On the latter's persistence and thoroughness, Putin noted, depends "the unity of Russian statehood, the defense of the legal rights and interests of citizens, the effectiveness of the struggle against organized crime, corruption, and other challenges."⁶

A Growing Portfolio

The procuracy has maintained its relevance by expanding into new areas of oversight and control during the Putin era. For example, although Putin appointed an ombudsman to defend business interests in 2012, the procuracy has aggressively moved into this space as well. In 2017, the procuracy identified 169,000 violations of laws concerning the rights of business people and investors. Such a

significant number of abuses reflects long-running biases against the business community within the criminal justice system.⁷ The procuracy itself is not without fault in this regard. In a speech before the Eastern Economic Forum in September 2018, Procurator-General Chaika spoke of how the procuracy needed to shed "the presumption of guilt of business" from its notion of supervision.⁸ The procuracy, however, generally has tried to point the finger at other regulatory bodies as the main culprits. In particular, it has highlighted the burden that excessive inspections by various government agencies place on honest business activity. The primary abusers here include the Ministry of Internal Affairs, the Tax Inspectorate, the Federal Service for Consumer Rights Protection (*Rospotrebnadzor*), the Federal Service for Veterinary and Phytosanitary Surveillance (*Rosselkhozadzor*), and the Federal Labor Service. The procuracy has talked about

increasing its role in overseeing the inspection process, although the government's most recent proposal takes a different approach; it seeks to decrease the administrative burdens on business by dramatically cutting the number of applicable rules (the so-called regulatory guillotine).⁹

An important corollary in the procuracy's defense of legitimate business is its prominent role in the fight against corruption. President Putin has named anti-corruption as one of the procuracy's top priorities. As a result, it investigates the income, expenses, and property reports of both current and former government officials. It further reviews state procurement activities and major construction projects, two notorious areas of corruption. The procuracy regularly protests regional legislation passed in violation of Russia's anti-corruption laws. It also initiates legal action against corrupt officials. During the first nine months of 2018, for example, the procuracy obtained 7,800 convictions, including guilty verdicts against 837 law enforcement officials, 63 regional deputies, and 606 persons serving in regional bodies or local self-government institutions.¹⁰ But while the procuracy touts such statistics and the billions of rubles returned to the treasury in the process, the Russian people remain much more circumspect. They often see such prosecutions as examples of internal bureaucratic infighting—of which the procuracy is both a participant and a crucial enabler—as opposed to a principled stand against corruption.¹¹

A third area of supervisory activity concerns the enforcement of the rights and freedoms of citizens, albeit with a particular Russian twist. Putin repeatedly has highlighted the procuracy's advocacy responsibilities, although he does so within the

context of defending citizens' labor and social rights, not their civil and political rights. For example, at the height of the 2014–16 recession, Putin emphasized the need for the procuracy to address the problem of wage arrears.¹² The procuracy also intervened during the recession to crack down on retailers who precipitously raised food prices to the detriment of consumers.¹³ The procuracy, one must add, is not the only present-day legal institution that still stresses the old Soviet preference for social over political rights. Valerii Zorkin, the chairman of the Constitutional Court, recently emphasized that the greatest deficiency of the 1993 constitution was its failure to address social-economic problems and live up to the requirement of Article 7, i.e., that Russia was a "social state."¹⁴

Finally, since Putin's return to power in 2012, the procuracy has moved front and center in Russia's fight against extremism, terrorism, and foreign attempts to influence Russia. The procuracy has demonstrated initiative in asserting jurisdiction over these matters, but it also has benefited from being the default choice of an increasingly controlling Russian state. For instance, when the Ministry of Justice first shied away from implementing the foreign agents law, the procuracy stepped in and began actively pursuing Russian NGOs with foreign funding, in the process defining the key term ("political activity") within the legislation. The procuracy's loyalty subsequently was rewarded with the right (along with the Ministry of Foreign Affairs) to designate certain foreign groups as undesirable organizations, potentially leading to significant criminal penalties on Russian NGOs that received funding from such groups.

Other discretionary powers have flowed to

the procuracy as well, especially in regards to suspected extremist activity on the internet. In 2014, the procuracy received the authority to block extremist websites calling for mass disorder, extremist activities, or mass public events without ever defining what constituted “extremist” activities under the law.¹⁵ The reposting of alleged extremist articles on social media prompted the procuracy in September 2018 to issue a self-executing order expanding its control over the investigation of all extremism cases.¹⁶ Lastly, the procuracy, and not the judiciary, recently was entrusted with greater oversight over the internet as a result of the new laws on fake news and showing disrespect to the state.

Part of the Solution or Part of the Problem?

The procuracy has not always emerged victorious in its efforts to protect its authority. Most notably, in 2015 the Constitutional Court reviewed the controversial foreign agents law, and although it ultimately upheld the law as constitutional, it concluded that greater procedural regularity was required in requests for documents and other activities associated with an inspection (*proverka*) by prosecutors. Yet the procuracy’s supervisory functions continue to grow, not only in the priority areas enumerated above but seemingly in every aspect of Russian life. For example, at President Putin’s request, in 2017 the procuracy conducted a survey of regional language laws, identifying how certain ethnic regions in Russia promoted the study of national languages to the alleged detriment of the Russian language.¹⁷ The procuracy has been pulled into ongoing disputes over garbage and

waste disposal.¹⁸ It prepared a report in March 2018 that called for the control of forests to be transferred from the regional to the national level. This recommendation was based in part on the procuracy’s finding of 39,000 violations of forest legislation.¹⁹

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It appears that no issue is too small to escape the scrutiny of the procuracy. In August 2017, the procurator-general’s office blamed the weather service for failing to predict a deadly summer storm.²⁰ Regional procurators regularly sanction local schools for failing to install the appropriate content filters that limit access to alleged racist and extremist materials on the internet.²¹ And in Perm, the procuracy used its supervisory powers in 2018 to protest a decision to suspend a 15-year old student for pink hair, ultimately concluding that the principal’s action violated existing administrative regulations.²²

The sheer breadth of the procuracy’s supervisory powers makes it an essential player in current legal and public policy debates as well as in Russia’s long-term, and more elusive, search for the rule of law. Some commentators question whether any organization can perform such a vast set of responsibilities. As Kirill Titaev noted in a February 2016 editorial in the business newspaper *Vedomosti*, supervision covers the observance of

all federal laws by all legal entities, not only state bodies but also (indirectly) private companies. According to Titaev, such an assignment—which requires a grasp of virtually every regulation—is beyond the capabilities of a single organization.²³

Many doubts and controversies surround the procuracy's ability to deliver legal reform and the rule of law as well. While the procuracy portrays itself as a key player in the fight against corruption and the protection of private business, others identify it as part of the problem. Aleksei Navalny produced a devastating video in 2016 outlining the alleged corrupt business endeavors of Chaika's sons, all seemingly protected by their extensive contacts within the procuracy.²⁴ And while the procuracy upholds itself as the defender of private business from the intrusive actions of state regulatory agencies, no public records apparently exist regarding the number of inspections instigated by regional prosecutors.²⁵ Clearly some members of the procuracy have been co-opted into the assault on private business, since the criminalization of everyday commercial disputes could not occur without the explicit and implicit cooperation of individual prosecutors.

And yet despite such accusations, opinion polls indicate that the procuracy remains the first institution that Russian citizens turn to when they believe that their rights have been violated.²⁶ Procurator-General Chaika reported in January 2019 that his office had handled more than 4.5 million appeals the previous year, dealing with labor, health, housing, pensions, and other issues.²⁷ Whether such petitions reflect a heightened status for the procuracy or simply the persistence of old Soviet norms and practices remains difficult to assess. One *duma* deputy cited the procuracy's

work in the regions—where it is more active and has successfully regained some of its old Soviet powers—as the reason why the institution still enjoys residual but significant levels of trust.²⁸

In reality, the procuracy never resigned itself to its post-Soviet demotion. It successfully elevated its status within the Russian constitution while engaging in a persistent rearguard action to return some of its lost supervisory authority, most notably over criminal investigations. Chaika regularly criticizes the Investigative Committee by highlighting the number of arrests and criminal indictments that have been subsequently rejected by the procuracy.²⁹ And at the June 2019 St. Petersburg Economic Forum, Chaika proposed returning to the Soviet practice of having the procuracy issue arrest warrants.³⁰ The procuracy's spirited defense has resonated among top politicians and business leaders. Both Valentina Matvienko, the head of the Federation Council, and Boris Titov, the ombudsman for business, have called for the return of greater prosecutorial supervision over the criminal investigation process.³¹

The Procuracy's Enduring Mission

In January 2019, on the eve of the procuracy's 297th anniversary, Procurator-General Chaika identified its core responsibilities. For almost three centuries, he exclaimed, the procuracy had served as a "reliable support of state power, the critical link in the system of law enforcement, and an organ, possessing powerful human rights potential."³² The first two attributes reflect longstanding Russian legal practices and traditions. The procuracy has always been a staunch defender of state power, reporting directly to the nation's ruler without being subordinated to any branch of government. The procuracy also continues to rely on a Soviet-era

understanding of supervision that goes beyond representing the state in criminal proceedings and allows the procuracy to hear citizen complaints and to intervene in most areas of public life and administration.

Its potential as a promoter of human rights, however, remains limited by a particularly Soviet understanding of the rights and freedoms of citizens. Indeed, the procuracy still emphasizes the defense of social rights over civil rights while serving as the “go to” institution in Putin’s crackdown on freedom of speech, the internet, and civil society. The procuracy must deal with other major challenges as well, particularly in terms of overcoming its past and presenting a more modern and enlightened public face. Its high-profile fight against corruption has not produced the promised results nor convinced the general population of the procuracy’s anti-corruption credentials. Moreover, its increased oversight authority in extremism cases, fake news, and displays of disrespect toward the

state introduce new sources of arbitrariness into the legal system while simultaneously undermining the judiciary.

Chaika’s statement reflects the longstanding professional ethos of the procuracy. It continues to defend traditional state powers and practices even as it confronts new 21st century problems. Attempts to upgrade the procuracy’s image as human rights defender, protector of private business, and anti-corruption leader have not fundamentally transformed the institution, especially given its fealty to an increasingly illiberal and punitive regime. Nevertheless, thanks to its underlying resilience and service to the state, the procuracy remains firmly entrenched at the top of Russia’s legal hierarchy. Such an exclusive position has profound consequences for Russia’s overall legal development. Any future attempt at legal reform depends not only on promoting judicial independence but also re-conceptualizing and reining in the procuracy.

The opinions expressed in this article are those solely of the author.

Endnotes





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William E. Pomeranz is the Deputy Director of the Wilson Center's Kennan Institute. His book, *Law and the Russian State: Russia's Legal Evolution from Peter the Great to Vladimir Putin*, was published by Bloomsbury Academic Press in December 2018.