



Breaking the Ukrainian Procuracy

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Securing the gains of revolution is often more difficult than the act of insurrection itself. The 2014 Maidan uprising has proven to be no exception to this rule, and despite notable achievements over the past two years, a growing consensus now exists that the reform process has hit a considerable, and potentially fatal roadblock: the prosecutor's office.

Numerous outsiders – including Vice President Joseph Biden¹ – have highlighted the deficiencies within the procuracy [*prokuratura*], particular its lackluster fight against corruption. Other commentators have called for a clean sweep and

the replacement of all prosecutors. Yet on closer examination, the issue is not just one of personnel; it is structural, and indeed, goes to the heart of Ukraine's political and legal inheritance from the Soviet Union and Imperial Russia. For almost 300 years, the procuracy has served as the "eyes of the sovereign," and even President Petro Poroshenko, as it turns out, is reluctant to lose control of the one institution that secures his power, and the overarching power of the state, over the other branches of government.

The procuracy stands at the nexus of three ongoing and interrelated reform processes in

Ukraine: anti-corruption, the division of powers, and the rule of law. Real change requires that Ukraine confront the procuracy's historical legacy - and decisively break from it.

The Roots of the Ukrainian Procuracy

The procuracy holds the distinction of being the longest serving legal institution in Russian history. Founded by Peter the Great in 1722, its initial responsibilities primarily were administrative and executive: it oversaw the Ruling Senate, Russia's highest governing body, with responsibility for reporting any failure to follow existing laws directly to the emperor.

The designation given to the procuracy's powers was "supervision (*nadzor*)," i.e. the power to ensure that government ministers—and the agencies that they presided over—obeyed the law. As noted above, this function was primarily administrative, not legal; it was only in the aftermath of the Judicial Reforms of 1864 that 'procurators' became 'prosecutors' in the true sense of the word and began representing the state's interests in court.

The procuracy was well on its way to becoming a more conventional – if still highly politicized – legal institution by the end of the tsarist period. It had been subsumed within the Ministry of Justice and primarily was responsible for conducting criminal prosecutions. The Bolsheviks, however, restored the procuracy's major supervisory powers, so that it eventually oversaw virtually all government activities. By the time of the Soviet Union's demise in 1991, the procuracy possessed the power to prosecute, to propose legislation, to oversee, and to

micromanage, thereby granting it a unique capacity to shape Soviet law and society.

Whether intentional or not, the Soviet procuracy served as the model for the new Ukrainian procuracy that was articulated in the 1996 and 2004 constitutions. That the Ukrainian constitution included a special chapter heading for the procuracy was itself a holdover from the Soviet era.

The procuracy does not constitute an independent branch of government (executive, legislative, judicial) that normally

merits its own distinct constitutional category. Nevertheless, the Ukrainian constitution contains just such a designation, reinforcing the procuracy's central position in Ukraine's administrative and legal hierarchy. Moreover, under the current 2004 Ukrainian constitution, as amended, the president retains the right to nominate and fire the head of the procuracy, the procurator-general, with the consent of the Verkhovna Rada.

On close examination, the right to appoint the procurator-general represents one of the few substantive perks assigned to the Ukrainian president outside the area of foreign affairs. As a result, the procuracy technically is not part of the executive branch, which under Ukrainian law is headed by the prime minister. Instead, the procuracy answers directly to the president and represents one of Poroshenko's main sources of domestic power. And this is how it always has

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been under Russian and Soviet legal theory: the procuracy serves the sovereign as opposed to broader principles of the rule of law.

Ukraine's Cancer of Corruption

Significant changes have been introduced since the Maidan to reform the procuracy. Its broadest power, that of general supervision, has been eliminated by the 2014 law on the procuracy, thereby reducing much of its administrative and oversight authority. Therefore, the procuracy has been re-constituted as an institution that primarily focuses on representing the state's interests in court. In addition, the procuracy's endemic corruption has prompted a major bypass operation to create new cadres of prosecutors untainted by the negative practices of the past.

In particular, the National Anti-Corruption Bureau (NABU) was established in May 2015 to investigate corrupt government officials, to be staffed by attorneys from a new specialized anti-corruption prosecutor's office. Yet NABU had no prosecutors when it started functioning, thereby rendering it toothless, and the head of the anti-corruption prosecutor's office was only named on November 30, 2015.

The appointment of the anti-corruption prosecutor highlights Poroshenko's seemingly ambivalent attitude to reform. The composition of the selection committee for the anti-corruption prosecutor's office became a struggle between civil society and the president's primary representative in the process: Procurator-General Viktor Shokhin. Shokhin put forward nominees for the selection committee with clear allegiance to the procuracy – and the corrupt status quo – apparently prompting Jan Tombinski,

the head of the EU Delegation to Ukraine, to demand their removal from the committee.² The composition of the selection committee was revised. Nevertheless, it was Viktor Shokhin who ultimately selected Nazar Holodnitsky as the new head of the anti-corruption prosecutor's office. Holodnitskiy appears to have been a compromise choice, and he still must prove his independence from Shokhin and presidential control.

The failure to swiftly empower new prosecutors – and to leave virtually all of Ukraine's 18,000 prosecutors in their current jobs – naturally calls into question President Poroshenko's commitment to fighting corruption. Some commentators insist that only a massive firing of all Ukrainian prosecutors and their replacement with outside lawyers can resolve the problem. Yet while this may sound appealing, such wholesale dismissals have a way of backfiring, sometimes catastrophically. In 1917, one of the Provisional Government's first actions was to fire all the police, an action that led to the collapse of law and order and ultimately paved the way for Lenin and the Bolsheviks.

Major turnover is still expected within the procuracy. However, since lustration appears to be off the table, public attention now has turned to Procurator General Viktor Shokhin as the prime culprit in Ukraine's stalled anti-corruption campaign. Domestic critics highlight the fact that he has not brought an indictment against a major government official. Furthermore, as indicated above, Shokhin has used his internal appointment powers to influence the vetting process for new managerial positions within the procuracy to ensure that his supporters remain in positions of authority. As a result, no one believes that Shokhin supports change within the procuracy,

but that instead, he will use his bureaucratic powers to defend its established interests.

Yet it is not just Ukrainians who have settled on the procuracy as one of the major obstacles in the struggle against corruption. Vice President Biden, in his December 9, 2015 address to the Verkhovna Rada, announced that the “Office of General Procurator desperately needs reform” if Ukraine is to overcome its entrenched corrupt practices. Despite the growing calls for new leadership, however, Shokhin remains in his position, raising difficult questions both about Poroshenko’s possible ulterior motives and Ukraine’s prevailing system of governance. Is Poroshenko all talk but no action in his fight against corruption? Alternatively, did he make deals with Ukraine’s oligarchs at the height of the war in the eastern provinces that he cannot now change? Can Poroshenko maintain his political viability if he does not have the procuracy – and the threat of prosecution – to keep his opponents and purported allies in line?

The Procuracy and the Prospects for Ukraine’s Reform Agenda

Two years into the Ukrainian revolution, civil society remains determined to hold the country’s elected officials accountable. Yet doubts about civil society’s ability to maintain this pressure also are growing because of a combination of political fatigue, disillusionment, and the genuine fear that the major players may start turning against each other. There is little doubt that the procuracy would serve as the key institution in any internecine struggle, since its historical creators – in Imperial Russia and the Soviet Union – always envisioned the procuracy as an arm of the state.

Thus, the procuracy needs more than a thorough housecleaning; it needs to be depoliticized. The 2014 law on the procuracy has already taken a major step in that direction by getting rid of the procuracy’s longstanding powers of general supervision and converting it into a more traditional prosecutorial agency. This law now must be fully implemented. The Ukrainian constitution also must be brought into accordance with this legislation and stripped of out-of-date references to the procuracy’s supervisory powers.

Other constitutional amendment’s must be adopted to complete the procuracy’s transformation. The president has proposed to remove the procuracy from the Ukrainian constitution as

a separate legal institution possessing its own constitutional heading and unique grant of authority. Instead, the procuracy, with significantly reduced powers, would be moved to Chapter VIII (Justice) of the constitution, which deals with the courts.

The Venice Commission has endorsed this change, yet the above re-shuffling raises the question as to whether the procuracy needs to be included in the constitution in the first place. In any system of division of powers, justice is rendered by the judiciary, with the procuracy merely serving as a participant – albeit, a critical one – in the process of adjudication. Thus, if Ukraine truly wants to

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break with the past, it should consider placing the procuracy within the Ministry of Justice and the executive branch (which in the Ukrainian context means the prime minister, not the president) while ensuring that the procuracy retains sufficient independence – and impartiality – in order to conduct its assigned judicial tasks. As Deputy Procurator–General Vitaliy Kasko noted, as long as the procurator-general remains “in the Presidential Administration, we will not be able to build a European model of the procuracy.”³

Much now depends on the speed of which constitutional reform takes place in Ukraine. Poroshenko is on record for supporting the reform of the procuracy, but in the interim, he evidently feels the need to retain Shokhin and keep the procuracy under presidential control, since it represents one of the few sources of domestic power (and leverage) at his immediate disposal. Indeed, even in his package of constitutional reforms, Poroshenko proposed stripping the Ukrainian parliament of its current constitutional right to initiate a vote of no-confidence and remove the procurator general without the president’s approval.

Conclusion

The sovereign’s need for direct control over the procuracy remains one of the underlying constants in Imperial, Soviet, and post-Soviet history. Russia is still intricately connected to this tradition. Over the past two years, President Vladimir Putin has raised the importance of the Russian procuracy by giving it a distinct subheading within the Russian constitution and by increasing the president’s authority to appoint regional prosecutors. Moreover, the Russian procuracy continues to exercise broad supervisory powers while remaining highly politicized, a central component of Putin’s “power vertical” and authoritarian rule.

Ukraine shares this autocratic legacy even as the country seeks to combat corruption and introduce the rule of law. It now has become apparent, however, that in order for Ukraine to break with its recent and distant past, Ukraine must now break the procuracy. The procuracy has existed for almost 300 years as the eyes of the sovereign, with a unique combination of legal, administrative and coercive powers. It now must be transformed into a more narrow institution that serves the rule of law. Otherwise, the fight against corruption – and Ukraine’s democratic transformation — will inevitably grind to a halt.

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

Endnotes

- 1 "Remarks by Vice President Joe Biden to the Ukrainian Rada," The White House, Office of the Vice President, December 9, 2015. (<https://www.whitehouse.gov/the-press-office/2015/12/09/remarks-vice-president-joe-biden-ukrainian-rada>)
- 2 "EU requires replacing the Quartet was killed in the Commission on the choice of the anti-corruption prosecutors," *News from Ukraine*, October 27, 2015. (<http://en.reporter-ua.ru/eu-requires-replacing-the-quartet-was-killed-in-the-commission-on-the-choice-of-the-anti-corruption-prosecutors.html>)
- 3 "Vitaliy Kasko: As long as the procurator-general remains in the Presidential Administration, we will not be able to build a European model of the procuracy." Ukrainian Pravda. November 17, 2015. <http://www.pravda.com.ua/rus/articles/2015/11/17/7089117/> (in Russian/Ukrainian)



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