

Prosecutors fail to solve biggest criminal cases

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Prosecutors in Ukraine have great powers and even greater impotence.

They can jail the powerless or innocent for months on end without trial, and keep criminal investigations hanging over the heads of the hapless for years.

But when it comes to solving any big cases, the nation's 10,000 prosecutors are no-shows.

What about investigations into the theft of billions of dollars in imported natural gas? Prosecutors can't get to the bottom of it.

Alleged misappropriations of up to billions of dollars more in central bank assistance? The culprits got away.

Who ordered the murder of Georgiy Gongadze in 2000? That's a tough one, despite hundreds of hours of incriminating audiotapes in the office of ex-President Leonid Kuchma and a reported confession from the policeman who actually strangled the journalist.

The General Prosecutors Office of Ukraine is where criminal cases go to linger and die, not get solved. And corrupt politics, like so much in the nation, is at the root of it all.

A recent example involves Ihor Bakai, the businessman and close ally of Kuchma, who fled to Moscow when investigators started several cases against him following the democratic 2004 Orange Revolution.

Kyiv's Pechersk district court on March 23 ruled that criminal investigations against Bakai, who headed the state gas and oil monopoly Naftogaz from 1998 to 2000, should be closed for lack of evidence.

Bakai, who in 2003 was appointed head of the State Management of Affairs Department, an institution that manages properties on behalf of the president and cabinet under Kuchma, fled to Russia in December 2004. He was subsequently charged with illegally privatizing state-owned stakes in the Dnipro Hotel, Ukraina Hotel and the Ukraina Exhibition complex in Kyiv.

Yuriy Boichenko, spokesman for the prosecutor's office, said on March 24 that his office may or may not appeal the court decision to throw out the



Yuriy Boichenko



Ihor Bakai

charges. "We have not received a copy of the Pechersk court ruling," Boichenko said. "By law, our office will have seven days to study it before deciding to appeal ... or not."

Boichenko said prosecutors will not follow political dictates and will, instead, follow the law in Bakai's case.

But the critics have a different view. They say dozens of high-profile cases involving former state officials have been thrown out or muzzled by current Prosecutor General Oleksandr Medvedko and his predecessors.

The fault, they say, lies with the unwritten rule of impunity that exists between the rivaling business oligarchs and parties that have all-but-monopolized the country's politics and economy. They often fight ruthlessly for power, but avoid putting opponents behind bars for fear of retribution. Instead, criminal cases are opened often just to show opponents who is in charge.

Many legal experts say a legal change in the powers of prosecutors is long overdue.

The European Commission for Democracy Through Law, also known as the Venice Commission, has over the years compared Ukraine's prosecutor's office to the Soviet (and Czarist) style "prokuratura." The general prosecutor controls a very powerful institution whose functions considerably exceed the scope of prosecutors in democratic nations.

According to the Constitution adopted in 1996, the authority of the prosecutor's office is as follows: "Prosecution in court on behalf of the state; representation of the interests of a citizen or of the state in court cases

determined by law; supervision of the observance of laws by bodies that conduct detective and search activity, inquiry and pre-trial investigation; and supervision of the observance of laws in the execution of judicial decisions in criminal cases, and also in the application of other measures of coercion related to the restraint of personal liberty of citizens."

A fifth function was added in constitutional amendments adopted in December 2004: "To supervise over the observance of humans' and citizens' rights and freedoms and the observance of laws on these matters by bodies of state power, local self-government, their officials and functionaries."

Parliament made another step to broaden the prosecutors' function through a new law adopted in first reading on March 14, 2009. The law would make it a very powerful and excessively centralized institution whose functions considerably exceed the scope of functions performed by a prosecutor in a democratic country, the Venice Commission opined in June 2009.

"The draft does not bring Ukraine any closer to complying with the commitment towards the Council of Europe that the role and functions of the Prosecutor's Office will change, transforming this institution into a body which is in accordance with Council of Europe standards," the opinion said.

In other words, don't expect any changes for the better anytime soon.

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Here's a challenge: Helping clients win in corrupt courts

BY OLGA GNATIV
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The economic downturn has contributed to rising numbers of property, financial and contract disputes, prompting lawyers to think hard about how to represent clients in a judicial system widely viewed as for sale – either to the highest bidder or to those with the most power.

However, lawyers say that success or failure in court depends on many factors, not only personal connections or the failure to meet demands for bribes. Legal competence and knowledge of how Ukraine's court system works are also vital.

"In order to have an effective litigation practice in Ukraine, you must be a master of procedural code, to demonstrate unbelievable word and procedural juggling," said Oleksandra Pavlenko, a partner with Pavlenko and Poberezhnyuk law group.

Appearance is also important, according to Pavlenko. "Judges pay attention to the way you present the case, what cases you led before, the outcome and publicity of the proceedings," Pavlenko said.

Olexandr Martinenko, head of the commercial practice at CMS Cameron McKenna, an international law firm, said litigation and dispute resolution work have increased substantially during the recession, with most of the work going to Ukrainian firms.

The reason? "Some international law firms avoid litigation in Ukraine altogether," Martinenko said. "They are concerned about their global reputation and don't want to be accused of offering bribes to obtain a favorable outcome."

Other law firms provide litigation services out of a sense of obligation. They say a clean reputation is more important for most publicly traded foreign companies than a victory in a Ukrainian court.

"When we start working on a case, we warn our clients about the risk and don't promise an outcome," Martinenko said. "[Corruption] here is something that is called a country risk."

➔ Most foreign businesses avoid taking disputes to court system riddled with bribe-taking judges

Litigating abroad

Lawyers prefer adjudicating cases with the relatively more independent judges in the nation's courts of appeals and cassation. They say another option is to litigate outside of Ukraine in international arbitration courts, although this practice is far less common.

"If one of the participants in a dispute is a company with foreign investments, then the case may be heard outside of the country," said Svilana Romanova, head of Baker & McKenzie's litigation practice. "But purely Ukrainian incorporated companies can't go to international [arbitration] courts to litigate their disputes."

Even if a foreign company wins the case outside of Ukraine against a local counter-party, it may face difficulty having the decision enforced because there are no bilateral agreements between Ukraine and Western European countries, United States or Canada on recognition of these court decisions, she said. "Ukraine has such agreements only with some former Soviet and East European countries, with some countries of the Middle East, Asia, as well as with Cyprus, Greece and Turkey," Romanova said.

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