The Prosecution of Public Figures and the Separation of Powers: Confusion within the Executive Branch – A Conceptual Framework[1]

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Abstract:

Criminal investigation and prosecution of politicians, top civil servants and other public figures are topics frequently discussed in the media. The nature of the investigating or prosecuting authority varies between countries – from the general public prosecutor, through magistrates to independent counsels or parliamentary investigation commissions. This paper analyzes the role and status of public prosecutors within the separation of powers-concept. Prosecutors are usually part of the executive and not the judicial branch, which implies that they do not enjoy the same degree of independence as judges, and are ultimately subordinated to the directives of the minister of justice or the government. Conflicts of interest may hence arise if members of government can use the criminal process for their own or partisan interests. The incentives of public prosecutors in different jurisdictions are compared.

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1 Introduction

Germany's reputation as a country with a low degree of corruption and bribery experienced a severe blow over the last couple of years. The party financing scandal in which former chancellor Kohl was heavily involved and the sale of a former state-owned refinery to the French conglomerate Elf-Aquitaine are only the two best-known examples. The degree to which the executive has put pressure on the prosecutors investigating these cases can be considered as scandalous as the cases themselves (Goetz et al. 2000). But Germany is not the only country in which crimes committed by public figures have come to the fore and in which attempts are being made to influence the conduct of the prosecution services. Italy's Prime Minister Berlusconi is currently undertaking to make the Italian prosecutors more dependent on the executive, arguing that many prosecutors are driven by political reasons. In Israel there is a battle around the appointment of a new Attorney General, in the shadow of various investigations against several top politicians including Prime Minister Sharon. Similar cases can be quoted with regard to many other governments, including member states of the OECD such as France and Japan, which has a reputation as a country with a high degree of corrupt government officials.

The institutional design of the procuracy is currently discussed in a number of countries including not only Germany and Italy, but also Switzerland and Mexico. One reason for the interest in the institutional structure of the procuracy is that it has become publicly known that members of the executive have frequently put pressure on prosecutors to investigate cases according to the wishes of the executive. In this paper we argue that the pressure put on prosecutors is a function of the institutional set-up of the procuracy. We further argue that a high degree of government influence on prosecutors will, *c.p.*, lead to higher levels of crimes committed by public figures, including corruption. A procuracy depending on the executive can not only lead to higher levels of crimes but can have far-reaching effects on the legitimacy as well as on the stability of the state.

The rule of law, implying equal treatment of persons under the law, and the separation of powers are celebrated as hallmarks of Western legal and philosophical thought. They are meant to guarantee individual freedom and political equality. Separation of powers implies a functional division of labor between the legislature, the executive and the judiciary. This division is to be

backed by an institutional separation with some overlapping powers to check and balance the other branches in order to prevent cartelization of government power (Brennan and Hamlin, 2000). Within the framework of public law, one can portray the judiciary as having two important functions: (1) to decide whether actions carried out by members of the other two branches are within the legal frame, and (2) to decide whether individuals ought to be sanctioned because they violated the law. This paper focuses on the intersection of these two functions, namely criminal acts committed by members of the other branches of government (including public figures who have strong connections to the government).

In order to fulfill its role as the guardian of the rule of law, the judiciary has to be independent from the other branches of government. An impressive body of literature addresses normative and positive questions regarding the independence of the judiciary. But in most systems, the judiciary cannot initiate proceedings and decisions. This feature is especially significant with regard to its role to sanction violations of criminal law, as access to the courts is often a monopoly held by the prosecution authorities. They act as gatekeepers to the judiciary. If the institutional set-up of the prosecuting agencies enables the members of the executive to influence the probability with which certain persons will be prosecuted – or not prosecuted – this can thus be interpreted as an aberration from the rule of law.

In most legal systems, the prosecution authorities are part of the executive branch. Hence, conflicts of interest are expected to arise if members of the executive (or the legislature, or those in close contact with them) try to use the procuracy for their own interests. Misuse can manifest itself not only by non-prosecuted crimes committed by public figures, but also by the way politicians use the criminal system to their own advantage, such as fighting the opposition.

The notion of the separation of powers would seem to stipulate that crimes committed by members of the government should be investigated and prosecuted by persons that are not dependent on government personnel. Nevertheless, the independence of state prosecutors is rarely ever mentioned, neither in the context of separation of powers nor in the context of fighting corruption. In this paper, it is argued that the independence of the judiciary can only be expected to unfold its beneficial functions if the procuracy enjoys at least some degree of independence

from executive organs such as the minister of justice or the prime minister of a country, *on a personal as well as a functional level*.[2]

The paper connects two strands in the economic analysis of law: the economic analysis of crime and enforcement on the one hand, and the economics of corruption, on the other. In the next section, these two strands are introduced and some gaps that we intend to start filling are identified. Section three contains a number of variables determining possibilities and incentives of prosecutors to prosecute certain crimes. A hypothesis concerning the expected effects of the respective institutional arrangements will be attached to every variable. In section four, the possibility that the variables introduced in section three display interaction effects on each other is explicitly recognized by introducing "conditional hypotheses". Section five presents some preliminary conclusions but also some ideas of how the outline developed in this paper could be put to an empirical test.

2 Literature Survey and Definition of the Key-Concepts

2.1 Definition of Key-Concepts

Corruption and Other Crimes Committed by Public Figures

Corruption has been defined as "the misuse of entrusted power for private benefit" (Transparency International 2000, 1). We interpret "private benefit" as not confined to individual benefit. Thus, corruption includes, for example, the possibility that entrusted power is misused for entities such as political parties. In an early treatment of corruption, Rose-Ackerman (1978) proposed to distinguish between legislative and bureaucratic corruption, thus separating corruption committed by elected politicians and by non-elected functionaries. The primary focus of this paper is on criminal acts committed by members of the executive, the legislature or other public figures in close contact with them. It is thus both narrower and broader than the scope reflected in Rose-Ackerman's approach. It is narrower in that acts committed by low-level bureaucrats are not taken into account.[3] This narrower delineation was chosen because we are interested in the

2 With regard to de facto judicial independence, Feld and Voigt (2003) find that it positively influences real GDP growth per capita in a sample of 57 countries.

3 As we assume that the interest of members of the government in preventing the prosecution of low-level bureaucrats is small.

possibility of government members to prevent their own prosecution or the prosecution of their friends and encourage the prosecution of the opposition.

Our interest is broader than that of Rose-Ackerman as we are interested in every kind of crime committed by political figures or by those closely related to them. Two levels of behavior have to be distinguished: the first level consists of crimes committed by public figures. This may be fraud, tax evasion, rape and also taking bribes and other forms of corruption. These will henceforth be called EXECRIMES. The second level is the action taken to prevent the first level crimes to be prosecuted. The primary focus of this paper is on behavior of the second level. Generally speaking, legal errors can be divided into two categories. The first category of error is called type I error, or the "false positive", where meritless prosecutions are allowed to be commenced, i.e. a supposedly committed crime is prosecuted even though it was not committed. That may be the case if the procuracy is used to prosecute members of the opposition. Type II errors, or “false negatives”, keep legitimate indictments out of court. This might be the case if a crime, although having been committed is not prosecuted.

More specifically, we are interested in the institutional constraints channeling the behavior of the procuracy. If the probability of being prosecuted for first-level crimes is low due to the institutional set-up, then the expected utility of committing them is correspondingly high.

We assume that members of government have a central interest of not being investigated, prosecuted, indicted, or convicted of a crime. In the case of public figures and especially politicians, public investigations as such may already reduce (expected) utility, as investigations may already provoke an intense public debate and pre-condemnation in the media. Public figures therefore have a great interest in suppressing any investigation. The analysis is confined to influence within the legal framework. More heinous illegal forms such as threatening the life of prosecutors or their families are not explicitly analyzed, even though they may in fact be extremely relevant.

Prosecution Agencies

Next, we need to define prosecution agencies. The public prosecutor’s office takes on different names in different countries. Just to name a few: Crown Prosecution Service, Public Attorney's Office, Department of Public Prosecution, Public Prosecution Authority, Attorney General Office, State Attorney Office etc. For simplicity, the generic term “procuracy” is used to include all of these. If one thinks in terms of a value chain, the procuracy can be separated from the police,

which is part of the executive, on the one hand, and from the judiciary, on the other. The following criteria should all be fulfilled in order to qualify as a procuracy: (i) it has the competence to gather information on the behavior of criminal suspects, or to instruct the police to gather more information; (ii) on the basis of that information it has the competence to indict a suspect; (iii) during a trial it represents the interests of the public.[4]

2.2 Corruption as Independent and Dependent Variable

The possible consequences of crimes committed by government members and other public figures have only recently attracted the attention of economists. Quite generally, one can point at two avenues dealing with the topic. The major avenue is the inquiry into the consequences of corruption (corruption as *explanans*), its impact on economic growth, and on the legitimacy of government and the state as a whole (see, e.g., Mauro 1995). The other avenue is the inquiry into the possible incentives that induce politicians to commit more or less crimes (corruption as *explanandum*). In recent years, several papers have dealt with the latter question. For example, based on a cross-national study using two different data sets as a proxy for corruption, Ades and di Tella (1999) find that countries in which firms enjoy higher rents suffer higher levels of corruption. Additionally, the level of corruption was found to be higher where domestic firms are protected from foreign competition either by natural barriers or by politically erected barriers to trade.

A broader approach is taken by Treisman (2000), who explains the level of corruption as being determined by a host of variables. According to him, countries with protestant traditions, countries that used to be ruled by the British, and countries that enjoy a higher per capita income were less corrupt. Federal states were, *c.p.*, more corrupt. Persson, Tabellini and Trebbi (2003) find that lower barriers to entry into the legislators' market are correlated with less corruption, whereas a larger proportion of candidates elected from party lists – rather than directly – is connected with more corruption. Their explanation for the second

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4 Empirically, investigative committees that are part of the legislature often inquire into executive crimes during the course of duties. Their competences widely differ. In this paper, we refrain from considering them because they are not part of the permanently established prosecution agency. Their action depends on discretionary acts of parliament. Additionally, their focus is often restricted to crimes committed during the course of office or even more narrowly to breach of duty of office, whereas our focus is, as just spelled out, broader.

finding is that a lower degree of individual accountability of politicians vis-à-vis their voters contributes to higher corruption.[5] The authors believe that the effects of the electoral system dominate over the effects attributed to the size of the voting district. A focus on political institutions has recently also been chosen by Golden and Chang (2001), who argue, somewhat in contrast to Persson, Tabellini and Trebbi, that an intense amount of intra-party competition increases the necessity of politicians to accept bribes in order to finance their election campaigns within their respective parties. They claim to have evidence with regard to Italy's *Democrazia Christiania* in support of their hypothesis.

In this paper, we advance the hypothesis that the structure of the legal institutions of a country can also be important determinants of the amount of crimes committed by politicians. Corruption is thus endogenized. It can therefore be interpreted as complementing the papers just cited rather than as disputing their findings. We thus argue that criminal behavior by politicians and other public figures cannot only be explained by drawing on regulatory policies (Ades and di Tella), on the level of economic development more generally, on historical and cultural factors (Treisman), or on political institutions – more precisely electoral institutions – (Persson et al., Golden and Chang). The amount of corruption – or more broadly: criminal behavior – to be expected is conjectured to depend on the way it is investigated and prosecuted. It is thus hypothesized that the probability of prosecution of crimes committed by government officials is an important determinant of the amount of crimes committed by government officials. The expected utility of committing a crime is assumed to depend on the probability of being punished as well as on the severity of the punishment. Other factors determining the expected utility of committing a crime are the probability of being investigated, publicized and prosecuted.

After having dealt with our key-terms, we now turn to present a number of variables that determine possibilities and incentives of prosecutors to prosecute crimes committed by public figures. Attached to every variable is a hypothesis on

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5 Persson, Tabbelini and Trebbi (2003) do not mention a crucial precondition for their results to hold, namely that citizen-voters do not only care to have "corruption-free" politicians but that corruption constitutes an issue important enough to determine voting behavior. They use the so-called "Corruption Perception Index" developed by Transparency International as the left-hand variable, which is somehow problematic, as this index is constructed on the bases of foreign experts like investors. As long as they cannot vote, they shouldn't enter into the index and it is not the "perception" of corruption that ought to be inquired into but rather the "evaluation" or "importance" that individual (and domestic) respondents to the survey attach to it.

the effects a particular institutional arrangement is expected to have on the probability of EXECRIMES being prosecuted.

3. Criteria for Comparing the Institutional Set up of Prosecution Agencies

3.1 Introductory Remarks

The main argument of this paper is that the institutional set up of prosecution agencies is one central determinant for the probability of public figures being prosecuted and, by derivation, for the level of corruption and thus the quality of the rule of law. We try to identify the crucial institutional variables, which determine the incentives of the procuracy regarding the indictment of public figures.

In most countries prosecution agencies are regarded as part of the executive branch of government. This implies that they are part of a hierarchical organization. As our interests lie with the *de facto* independence of prosecutors vis-à-vis the handling of files of public figures we will bypass the purely legal or constitutional debate as to the institutional classification of the prosecution agencies and rather focus on the structural variables relevant to prosecution of public figures and their diversity among different countries.

One can distinguish between two main categories of these structural variables. The first is connected to the rules governing the independence of individual decisions of prosecutors and their scope of discretion (sections 3.3 through 3.7 below); the other is connected to the personal independence of the prosecutors themselves (section 3.2 below).[6]

Institutional arrangements regarding six different issues are considered: how influential members of the executive are in appointing, promoting, and dismissing prosecutors (3.2), whether the prosecution agency is subject to orders by members of the executive (3.3), whether the prosecution agency enjoys the monopoly to indict (3.4), how the discretion concerning the decision to prosecute is institutionalized (3.5), whether the decisions of the prosecutors are subject to judicial review (3.6), and finally, whether criminal charges can be brought against prosecutors who do not follow the law in their prosecutorial activities (3.7).

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6 For a similar dichotomy with regard to judges see Salzberger 1993. For a more general framework for defining the independence of adminstrative authorities van Aaken 2004.

3.2 Personal Independence of Prosecutors

The probability of EXECRIMES being prosecuted is contingent upon the personal independence of prosecutors vis-à-vis the government. The personal independence of prosecutors can be the result of various institutional arrangements concerning the nomination, election and appointment procedures of prosecutors as well as promotion and removal from office. We distinguish between high-level prosecutors, such as the state prosecutor, or general prosecutor / attorney general, and other prosecutors as appointment/election procedures may differ substantially between the low-level prosecutors and the high level ones. The appointment of high-level prosecutors is assumed to be decisive as they usually have an internal right of instruction.[7]

Appointment

In determining the personal independence of the procuracy from the executive and the legislature, three aspects will be distinguished, namely (i) term length (ii) renewability, and (iii) appointing organ. Life tenure and appointment by others than politicians will guarantee the greatest personal independence, while appointment by politicians for a renewable term generates the lowest independence, as it can be expected to motivate prosecutors to cater to the interests of the organ that has the power to re-elect them. Appointment for a non-renewable fixed term will generate more personal independence than appointment for a renewable term. Hence (hypothesis 1a), life-long tenure will increase the independence of prosecutors, which should increase the probability of EXECRIMES being prosecuted.

Five basic modes of appointing high-level prosecutors can be distinguished. They are ordered from the mode, which generates the lowest degree of personal independence to the mode, which is hypothesized to generate the highest level of personal independence:

(i) Appointment by members of executive;
(ii) Election by the legislature or its subset;
(iii) Direct election by citizen voters;
(iv) Appointment by members of the procuracy;

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7 Appointment of low-level prosecutors is usually done by the high level prosecutor or the minister of justice. The decision is usually based on merits or grades. Due to the hierarchical structure of the procuracy, the appointment of low-level prosecutors is of little influence for the probability of EXECRIMES to be prosecuted, which allows us to neglect this point.

(v) Appointment by members of the judiciary.[8]

(i) Appointment by members of the executive is probably the most common system of appointment.[9] It is expected to lead to a low propensity to prosecute EXECRIMES - and a high probability of misusing the procuracy against the opposition. This is especially the case if the government is unlikely to change frequently (as is the case in, for example, Japan, or in non-democratic regimes).

(ii) The consequences of having prosecutors appointed by the legislature depend on the political institutions of a country. In parliamentary systems with plurality voting (such as the British), it would not seem to make much of a difference if it is the executive or the legislature that appoints. Both cases generate low personal independence. In contrast, in systems with proportional representation and/or presidential systems, it might very well make a difference, and appointment by the legislature will not significantly lower the probability of EXECRIMES. In addition, appointment by the legislature is usually more transparent than by the executive and can entail public debate, which can be seen as an obstacle for the appointment of persons who are expected to be too loyal to the appointing government.

(iii) Direct election by the populace (as is the case in some States in the US and in some of the Swiss Cantons) will most likely be connected with a limited term.[10]

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8 In addition, there might be different methods of nominating prosecutors independently from the appointing power, which leads to more than a dozen different possibilities.

9 In France, prosecutors are appointed by decree of the President of the Republic on proposal of the Ministry of Justice (without involvement of the Conseil Supérieur de la Magistrature). A similar system exists in Germany but with the specialty that the legislative also has a say. The federal prosecutors are nominated by the minister of justice and approved by the Bundesrat (Chamber of states). In the German Länder the regime varies a bit, but the high level prosecutors are still political appointees.
In Brazil, where the chief public prosecutor is also a political appointee, opponents have criticized him for shelving cases involving government allies (Economist, Sept 14th 2000).
In Israel it is the government that appoints the Attorney General. The tradition is that candidates for this post are distinguished academics, senior judges or other top jurists. When PM Netanyahu attempted to appoint to the office a mediocre lawyer who was his political allie, a public outcry and criminal investigation for breach of trust frustrated this attempt. Criminal prosecution, however, has not materialized.

10 In Switzerland, prosecutors are elected, but never for a life term. The electorate varies across the cantons: either the citizenry, the government, the parliament, or some kind of mixed system. Prosecutors are seen to have a politically important job.

The threat of being voted out of office is to give the directly elected prosecutors incentives to cater to the preferences of the populace at large.[11] Whether this enhances the probability of EXECRIMES being prosecuted depends on the importance that the populace at large attributes to these issues. The prosecution of political corruption often enhances the popularity of prosecutors.[12] However, direct elections of prosecutors entail the danger of giving them incentives to prosecute only those crimes that enhance their popularity and to invest a disproportionately high amount of resources on them.[13]

(iv) Appointment by a body of prosecutors or a combined body of judges and prosecutors represents a classical system of co-optation.[14] Co-optation is expected to lead to a high degree of independence from the executive.

(v) Appointment by the judiciary will lead to comparatively more independence than appointment by the executive or the legislature. Other effects, such as the propensity of the judiciary to appoint prosecutors that have a good reputation of preparing excellent files will not be taken up here.

Simplification of the complex comparative survey of various methods of appointing high level prosecutors results with two working hypotheses: (1a) life-long tenure will increase the independence of prosecutors, which should increase the probability of EXECRIMES being prosecuted; (1b) appointment of prosecutors by the judiciary, by the procuracy itself or by the populace is expected

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11 This is the case in the US, where a great majority of State prosecutors is elected and thus responsible to the people. This is widely regarded as sufficient to control their power (Weigend 2001).

12 As seems to be the case in the US (Weigend 1979, 592).

13 The question of election campaign contributions is also relevant, as these might be crucial for the incentives of the directly elected prosecutors. Being a prosecutor in the US is often the stepping stone for taking a political job, such as governor. Prosecutors are normally party members and the party organizes and finances the election campaign for the prosecutor, especially on the east coast and in the cities. Political loyalties – and their consequences on prosecution of party members – are therefore assumed to be a prerequisite of being reelected (Weigend 1979, 593).

14 This is the case in Italy, where the „Consiglio Superiore della Magistratura“ acts as self-governing body of the (criminal court) judiciary and the prosecutors. For the ongoing and much politicized debate on Berlusconi's attempts to the reform of the procuracy, see The Economist, May 18th, 2002. The government of Berlusconi perceives the magistrates as left wing and investigations of the government are deemed politically motivated. The magistrates complain against political interference following a law suit of the interior minister against Milan's Chief prosecutor, (The Economist, Feb. 14th 2002).

to lead to a higher chance of EXECRIMES being prosecuted than appointment by the executive itself. Although it is difficult to establish a rank-order of prosecution probabilities for all remaining institutional arrangements, it seems safe to argue that determination of career prospects by fellow prosecutors or by the judiciary is more merit-based than the other options.

Promotion/Transfer of Prosecutors /Removal from Office

The behavior of prosecutors towards members of the executive will be influenced by the degree to which members of the executive determine a prosecutor's career. Relevant aspects include (i) promotion, (ii) removal from office, and (iii) transfer.

(i) Even if prosecutors enjoy tenure, a procedure of promotion monopolized by politicians can decrease structural independence. Hence, if representatives of the public prosecutors participate in this process (as is the case in France, Portugal and Spain), political influence via the promotion process is expected to be lower than in countries where (representatives of) prosecutors are not asked. Self-governing bodies of the procuracy, which can decide on promotions (as the case in Italy) are supposed to lead to the highest degree of independence.

(ii) The same argument applies to removal from office. If prosecutors may be removed at will by the executive (as is, for example, the case in France), the incentive to resist political pressure will be reduced. However, if there is a high mobility between the prosecutor's job and other jobs, we will expect the prosecutor to be more independent because she can be expected to have at her disposition a number of (well-paid) outside options which would make her less dependent on remaining in the job even though there is a high degree of pressure on her. If there is high mobility with the position of judge, the appointment process for this position needs to be taken into account.[15]

(iii) Transfers to other offices (including in other cities) might be a device for heavy pressure if they can be carried out against the will of the prosecutor. This is the reason why the principle of non-transferal against the will is often named as

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15 This is, for example, the case in France, where the career paths of judges and prosecutors are intertwined. But the decision on the promotion of prosecutors lies with the minister of justice, who is the superior of all prosecutors. This was the reason, why, following a 1994 reform, the minister of Justice in France was prevented from adopting any decision concerning the status of public prosecutors without an ad hoc advisory opinion, expressed by a newly instituted section of the Higher Council of the Magistracy. See di Federico (1998, 374). As the council has a high standing, it is difficult for the minister to ignore its opinion.

part of the concept of judicial independence. Application of this principle to the procuracy will make it less dependent on others. However, since in most countries prosecutors are perceived as part of the executive they are subject to transfers against their will as other civil servants.[16]

Hypothesis 1c: the larger the influence of members of the executive on promotion, removal and transfer of prosecutors, the lower the probability that EXECRIMES would be prosecuted, other variables being equal.

3.3 Restrictions on Prosecution Due to Possible Government Interference (Formal Independence)

Prosecutors may be subjected to orders regarding individual cases they handle. We propose to distinguish between instructions given by superiors within the prosecution agency (internal orders) and instructions given by officials outside the procuracy, e.g., by the minister of justice (external orders). The possibility of external instructions is assumed to be more important for the probability of EXECRIMES being prosecuted than the possibility of the head of the procuracy to give orders to low level prosecutors because it allocates ultimate decision-making with regard to the prosecution of EXECRIMES to the executive. If no external instructions may be given, prosecutors will be called formally independent. This variable is widely seen as the crucial variable for determining if the procuracy is part of the executive power or independent.

In many countries, external instructions are not allowed (e.g. Israel, Italy, Switzerland, and the U.S.). In other countries, instructions by the minister of justice are allowed (e.g. Germany and France)[17]. In some countries (e.g. France again), external instructions can be given only to prosecute; instructions not to prosecute are not allowed. This allows for fighting the opposition but does not allow for obstructing the prosecution of EXECRIMES.

Hypothesis 2a: If the legal system provides for the possibility that members of the executive can give direct orders to prosecutors, the probability of EXECRIMES being prosecuted should be lower than otherwise, other variables being equal.

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16 Again, Italy is an exception, see di Federico (1998, 377).

17 However, in France a 1993 amendment of the law requires such instruction to be written to provide more transparency.

The Power to Substitute a Prosecutor in Handling a Specific Case

A functional equivalent of the right to give orders is the right to substitute prosecutors working on a specific case. This is functionally equivalent because it endows the hierarchical superior giving orders to have his line of prosecution carried out (or else having the case taken away). The combination of the power to give external orders to the high prosecutor and his or her authority to give internal instructions or to substitute the prosecutor working on the case, amounts to a rather direct way of influencing the investigation. Nevertheless, substituting the prosecutor might attract more public attention and criticism than instructions given in camera to the prosecutor handling an investigation.

Hypothesis 2b: If the legal system provides for the possibility that members of the executive (directly or through the chief prosecutor) have the right to reallocate prosecutors to specific cases, the probability of EXECRIMES being prosecuted should be lower than otherwise, other variables being equal.

3.4 Monopoly to Indict

If the procuracy enjoys a monopoly to prosecute crimes, economists would expect a lower total number of prosecutions compared to institutional arrangements in which prosecutorial activities are not confined to the procuracy. Such a monopoly, even when politicians cannot formally instruct or interfere with the prosecution's decision, provides incentives for politicians who are in risk of being prosecuted to influence the procuracy by, for example, intervening in their appointment process or offering bribes. If other actors can also initiate a trial, it will be more difficult to prevent being prosecuted through such means.

There are various possibilities to institutionalize competition in prosecution: the competence to indict can also be given to the police (as is, for example, the case in England and Norway), to interested private parties, e.g. the victim (or her family) who might have the right to force public prosecution or to initiate proceedings independently[18], or to certain interest groups, such as child protection groups, environmental groups, or tax payer associations. The latter avenue might be more effective in combating corruption, since many corruption cases are so-called victimless crimes in which there is no individual victim; the victim is the public at

18 Such a possibility exists, for example, in Israel and Germany with regard to a limited number of offences.

large.[19] Taking a case to court thus amounts to the production of a public good. Interest groups can be assumed to be more likely to contribute to its production than individuals.

It is thus hypothesized (hypothesis 3) that the chances of EXECRIMES being prosecuted are lower in systems in which the procuracy enjoys a monopoly of prosecution, other variables being equal.

3.5 Legal Limitations on the Discretion of Prosecutors

The existence of discretion in individual decisions regarding prosecution is likely to have an impact on the chances of public figures being prosecuted. The degree of discretion is influenced by the adoption of the mandatory principle, but also by "hidden" components of discretion, such as the ability to drop a case due to insufficient evidence or not concentrating enough efforts to conduct serious investigations. We elaborate on some of these variables below:

Mandatory versus Opportunity Principle

The legality principle – sometimes also called the principle of mandatory prosecution - commands that every case in which there is enough evidence of an offence having been committed has to be brought to court. The opportunity principle, in contrast, grants a prosecutor some discretion concerning the indictment decision given the same amount of evidence. The opportunity principle confers more discretion to the procuracy than the legality principle, as it allows broader justifications for non-prosecution of cases.[20] From this, hypothesis 4a is

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19 A similar solution is judicial review of the prosecutor's decision (not) to indict in which standing in such proceeding is granted to interest groups. Such is the case in Israel, where even an NGO whose purpose is to maintain the rule of law is granted standing in challenges to the prosecutorial decisions. In Germany, such a possibility does not exist. An investigation of the disappearance of government papers after the change of government from Kohl to Schröder in 1998 was stopped due to insufficient evidence by the prosecutors but taken up again only after immense public pressure. It was again stopped in spite of evidence gathered by an investigative committee of parliament. There is no legal means of having the case cleared up in court now.

20 Although this conceptual distinction is watertight, empirically one can observe that prosecutors almost anywhere enjoy some degree of explicit discretion in their decision to indict (or not to indict). In most legal systems, charges can be dismissed by the prosecutor on the basis of policy considerations. Lack of public interest in prosecution is a prominent example.

derived: Other things being equal, prosecution of EXECRIMES is expected to be higher under the mandatory principle than the opportunity principle.

The Authority to Offer New Interpretation

Another variable, which differs across legal systems, affecting the option space of the procuracy, is the degree to which prosecutors are legally bound by past courts' rulings regarding the interpretation of particular articles in the penal code and whether certain conducts are legally punishable.[21] Suppose the courts have established by precedent that a certain behavior β is punishable but that a prosecutor believes this to be wrong. If the procuracy has discretion on legal interpretation and is not forced to follow the interpretation of the court, we expect a lower rate of prosecution of EXECRIMES.[22] However, the opposite can also occur, namely cases in which the prosecutor believes that a certain act is punishable despite court rulings to the contrary.[23] If the procuracy does have discretion on this issue, a higher prosecution rate of EXECRIMES would be expected (given that the procuracy enjoys some independence from the executive (hypothesis 4b)).

Indeterminate Legal Terms

De facto discretion also originates from the use of indeterminate legal terms such as "sufficient evidence", "initial evidence" or "convictability" as a prerequisite for indictment or investigation. There clearly is a subjective element when the chances of conviction by the court (or the jury) are the basis for pursuing a case. The prosecutor may conceal what is in effect a discretionary dismissal behind the label of insufficient evidence. She may argue that it would be impossible to prove the suspect's intent in court or to find sufficient evidence to convict the suspect. The prediction of convictability in a jury system contains even more discretion as it may depend on the perceived opinion of the jury on the case. In systems based on a jury, the public opinion on EXECRIMES might be an important variable.

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21 For a recent and fierce debate on this issue in Germany, see Roxin (1997).

22 To illustrate: Imagine that the law names „private gain" as a prerequisite for convicting a crime under the notion of corruption and the court interprets this wording broughtly, i.e. includes advantages received e.g. by the business of the wife of an accused person. In case the prosecutor has the authority to offer a deviating interpretation, she might decide not include the gains received by the wife of the accused and thus not prosecute the case.

23 This has characterized the scene in Israel in recent years where the procuracy is trying to indict in order to induce the courts to change their interpretation and set tougher standards for behavior of public figures.

Since discretion based on indeterminate legal terms is ubiquitous and cannot be eliminated, we refrain from deriving an additional hypothesis on this source of prosecutorial discretion.

Summing up, the existence and scope of prosecutorial discretion can play to opposite directions vis-à-vis the prosecution of public figures. While the opportunity principle, as opposed to the mandatory principle, may lead to a lower rate of EXECRIMES being prosecuted, the legitimacy to offer new interpretation may work in the opposite direction. Indeterminate legal terms might have an additional effect. They will, however, not be taken up again, as it is almost impossible to assess them empirically.

3.6 Judicial Review of Prosecution Decision

If the indictment decision of the procuracy is subject to judicial review, this can have an effect on the probability of EXECRIMES being prosecuted given that the judiciary is more independent than the procuracy. If this is the case, judicial review is expected to decrease prosecutorial discretion, which, in turn, is expected to increase the probability of EXECRIMES being prosecuted, other variables being equal (hypothesis 5). It might make a difference whether the judiciary has the competence to review decisions not to prosecute or whether its competence is confined to decisions to prosecute a case.

Judicial Review of the Decision Not to Prosecute

In many countries, the prosecutor's decision (not) to start an investigation is not subject to judicial review. The decision whether to investigate, therefore, remains within the procuracy. The same might also apply to the decision not to indict. [24] After indictment, the decision to stop the trial necessitates the consent of a judge and/or of the accused in many countries. If there is no judicial review of the decision not to indict, we expect the probability of EXECRIMES being prosecuted to be lower than if there is judicial review (hypothesis 5a).

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24 If the case was dismissed due to insufficient evidence, there is in some countries, e.g. Germany, the Netherlands and Switzerland, the possibility of an external request for judicial review, e.g. by the victim.

Judicial Review of the Decision to Prosecute

In our context, judicial review of the decision to prosecute can play an important role in cases where the prosecution went ahead with indictment, but is pushed by political bodies to do so for fighting the opposition. If there is judicial review before a trial is opened, the judge might act as a filter and thus dismiss cases that do not have legal or factual merits (hypothesis 5b).

Judicial Power to Review the Charges

Some penal codes endow the procuracy with the competence to make a binding decision as to the specific legal charges brought against a suspect. This competence enhances prosecutorial discretion. It is the precondition for plea-bargaining as practiced in the US[25] and prohibited in many other states. We hypothesize that in countries in which the procuracy has such a monopoly, governments have MORE incentives to exert pressure before formal procedures are begun (hypothesis 5c).

3.7 Restrictions on Prosecutors' Discretion through their exposure to Criminal Charges

Making the prosecution of innocents, on the one hand, and the thwart/frustration of prosecution, on the other, a punishable act raises the cost of unlawful behavior of prosecutors. Possible exposure to prosecution or disciplinary proceedings or, indeed, civil suit may counterbalance the right of instruction in specific cases as the prosecutor will have incentives to resist orders which would make himself subject to criminal prosecution (hypothesis 6). Generally, criminal provisions can be found in the criminal codes and those restrictions are widely seen as sufficient to make prosecutors behave legally. We doubt the sufficiency of those provisions but expect that they prevent the most egregious cases of illegal behavior by prosecutors.

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25 The bargain consisting in the suspect pleading guilty and in exchange being charged a less severe crime.

4 Some Hypotheses Concerning the Interrelationships between the Institutional Variables

4.1 Introductory Remarks

The last section contained a number of isolated hypotheses concerning the likely effects of different institutional arrangements of the six variables discussed relating to the independence of prosecutors and the independence of their decisions. Institutional arrangements do, however, never work in isolation. Their impacts also depend on the institutional arrangements with regard to other variables. This is the topic of this section. It is thus concerned with possible interaction effects across different variables.

If each of the six variables discussed could only take on one of two forms, this would already lead to 64 (2^6) possible combinations. It is impossible to discuss all of them here. It is hence necessary to choose a subset. We believe that the first two variables discussed, namely the degree of personal independence and whether representatives of the executive have the right to give instructions to the procuracy, i.e. formal independence, are of particular importance. We will thus discuss (i) possible interaction effects between them, and (ii) possible interaction effects with the other four variables. For reasons of illustration, we will, however, begin by spelling out the institutional mix that is conjectured to lead to the lowest probability of EXECRIMES being prosecuted.

We assume this probability to be lowest if (1) the executive has the right to give instructions on individual cases (directly) and (2) personal independence in appointment and career issues is low and (3) the procuracy enjoys the monopoly of indictment and (4) the procuracy follows the opportunity (rather than the mandatory) principle and (5) there is no judicial review of prosecutorial decisions, and (6) no criminal or other charges can be brought against prosecutors in case they do not act according to the law.

4.2 On the Relationship Between Formal and Personal Independence

If the formal right to give instructions were combined with a low degree of personal independence, we would expect a low probability of EXECRIMES being prosecuted. The opposite also holds: if there is no right of instruction and the procuracy enjoys a high degree of personal independence, a high probability of EXECRIMES being prosecuted is to be expected. But what about the cases in

which personal independence and the right to give instructions point in different directions?

If prosecutors are personally independent, the effect of the right of members of the executive to give instructions to prosecutors is expected to be less pronounced. It is, of course, not expected to disappear entirely as non-compliance with instructions will still have some negative effect on the utility of the prosecutor. But the less severe the sanctions for non-compliance with an external instruction, the more pronounced is the counterbalancing effect of personal independence expected to be.

The opposite would be that prosecutors enjoy only a low degree of personal independence but that members of the executive do not have the (formal) right to give instructions. In such a case, the influence of the executive on particular cases and their ability to reach specific results will supposedly not be as high as in the reverse case. Yet, the general influence of the executive on the procuracy can be expected to be even higher as the procuracy is only granted low levels of personal independence and pressures in specific cases can be manifested by threats of removal or transfer or inappropriate appointments. We thus hypothesized that personal independence is the dominant factor affecting the chances of EXECRIMES being prosecuted.

4.3 On Interdependencies Between Formal Independence and Other Variables

We now shortly present some hypotheses regarding the interaction of the right to give instructions with the other variables:

Hypothesis 7: A combination of the right to give instructions with a monopoly to indict will reduce the probability of EXECRIMES being prosecuted even further because this combination ensures that nobody can get a court case against the will of the procuracy – and the executive itself.

Hypothesis 8: A combination of the right to give instructions with a low amount of discretion (i.e. the mandatory principle) can be expected to reduce the under-prosecution of EXECRIMES. The duty to pursue a case can be interpreted as a cost component to the prosecutor, which will make it less likely that she follows the instructions received from the executive if those are against the law.

Hypothesis 9: A combination of the right to give instructions with judicial review would mitigate the negative effects on the probability of prosecution if the

judiciary has the competence to act on cases in which the procuracy decided not to prosecute.

Hypothesis 10: A combination of the right to give instructions with the possibility of bringing criminal charges against prosecutors is supposed to have effects similar to those spelled out in the last hypothesis. It can be expected to be less influential as only very substantial misbehavior will be punishable.

Put differently, the negative effect of the right to give instructions can be mitigated by giving other organs the competence to take cases to court, by having the mandatory principle of prosecution, by granting judicial review even in cases in which the prosecutors decide not to investigate further, and by making the prosecutors responsible on a personal basis for inaction in cases that prosecutorial action should have taken place.

4.4 On Interdependencies Between Personal Independence and Other Variables

We now turn to hypotheses regarding the interaction of personal independence with the other variables.

Hypothesis 11: If the monopoly to indict is combined with a high degree of personal independence, the probability of EXECRIMES being prosecuted is predicted to be lower than if there were no such monopoly, other things being equal, because the gate-keeping function of the procuracy is reduced.

Hypothesis 12: A high degree of personal independence can lead to very different outcomes: for some prosecutors, utility-maximization might consist in enjoying life, for others in maximizing the number of cases prosecuted. If personal independence is combined with the mandatory principle of prosecution, this does not only decrease discretion, but it also increases accountability and predictability. The mandatory principle, therefore, is expected to increase the chances of EXECRIMES being prosecuted.

Hypothesis 13: Much of what was just said with regard to mandatory prosecution also applies to judicial review: it also increases accountability and predictability, and thus the chances of prosecution of public figures.

Hypothesis 14: The same can be expected if a high degree of personal independence is combined with the possibility that prosecutors who do not follow the rules can be charged with criminal penalties or other sanctions.

The four possible combinations shortly discussed give a very similar picture as that discussed in 4.3: the (positive) effect of granting personal independence can be further improved by giving other organs the competence to take cases to court, by having the mandatory principle of prosecution, by granting judicial review even in cases in which the prosecutors decide not to investigate further, and by making the prosecutors responsible on a personal basis on the level of criminal law.

4.5 Additional Variables of Potential Relevance

All the variables presented hitherto focused on the institutional structure of the procuracy. We now turn to some more general variables, which might also affect the degree to which EXECRIMES are prosecuted.

Presidential systems often experience a legislative majority by a party that is not identical to that of the President. In such cases, the likelihood of EXECRIMES being prosecuted is higher, other factors being equal, for several reasons. First, the legislative majority can be expected to have strong incentives to prosecute crimes committed by the President or his administration and vice versa. In order to do so, they will tend to establish a special prosecutor or the like or rely on the regular prosecution service. Second, when the governing powers are divided between the legislature and a President, the dependence of the prosecution service on each of these powers is lower than when the executive and legislature speak in one voice. This will enable the procuracy more leverage in the prosecution of public figures. We therefore expect EXECRIMES being prosecuted to a higher degree in presidential than in parliamentary systems. More generally, in stronger forms of separation of powers, the likelihood of EXECRIMES being prosecuted is higher, other factors being equal.

Treisman (2000) finds that federal states have, c.p., higher corruption levels than unitary states. We hypothesize that this finding does not only apply to corruption but can be extended to the prosecution of EXECRIMES given that the procuracy is organized on federal lines, as is the case, for example, in Germany and Switzerland. If our general argument is correct, many prosecutors have incentives not to indict a member of the executive. Such behavior might, however, be countered by the principle of mandatory prosecution and the like. If, under these conditions, there is more than one state procuracy which could potentially pick up the case, we are essentially dealing with the volunteer's dilemma: every prosecutor hopes that someone else in another state will pick up the case. At the end, the case might no be picked up at all. At first, this seems to contradict the

monopoly hypothesis developed in 3.4 above. Yet, it appears possible that the volunteer's dilemma applies to state prosecutors while the beneficial effects of competition could result if others who have more personal interest in prosecutorial action like NGOs can kick it off.

The rate of prosecution of EXECRIMES might also be linked to the stability of the government. This factor is thus not an institutional variable itself, but a consequence of institutional variables. The more stable a government in a system with a procuracy being part of the executive, the more we expect the procuracy to be an instrument of fighting opposition, on the one hand, and we can expect a lower rate of prosecution of EXECRIMES, on the other hand, in comparison to countries in which there is a frequent change of government (all other components being equal).

5 Conclusions and Outlook

This paper constitutes a first step towards analyzing the incentives - and the ensuing effects – generated by alternative institutional arrangements concerning the set-up of prosecutorial agencies within the framework of constitutional political economy. It is a rather conceptual paper and much of the empirical work concerning prosecutors remains to be done.

In this paper, we have generated more than a dozen hypotheses concerning the relationship between the institutional structure of the procuracy as independent variables and the probability of EXECRIMES being prosecuted as the dependent variable. The probability of EXECRIMES being prosecuted is not measurable as such. But if the probability is low, then the expected utility of committing such crimes is correspondingly high. It would thus seem to make sense to regress the amount of criminal acts committed by government members on the institutional structure of the procuracy. Yet, measures for government crimes that would lend themselves to international comparisons are not readily available. Empirical tests of the hypotheses will thus most likely have to resort to corruption measures, which are readily available such as the corruption perception index as published by Transparency International.

At the beginning of the paper, it was pointed out that there is not only the possibility of the procuracy being not active enough with regard to the prosecution of crimes committed by the members of the executive but also the possibility of being too active regarding the prosecution of members of the opposition. This issue was not dealt with in any detail in the paper but certainly deserves more

careful treatment in the future. One could even draw some remote analogy with the judicial branch: with regard to the judiciary, the danger of its becoming too eager has been discussed under the heading of "judicial activism". In analogy, the danger mentioned here could be discussed under the heading of "prosecutorial activism".

We have argued that the level of EXECRIMES being committed has repercussions on the degree of the rule of law realized. If equality under the law is one crucial component of the rule of law, then it is obviously in danger if the criminal acts committed by members of the executive are less likely to be prosecuted than those committed by ordinary citizens. This could have far-reaching effects: it could undermine the trust of the population in government. Low levels of trust could, in turn, lead to a lower propensity to invest and thus to negative economic consequences. But low levels of trust might also decrease regime stability and lead to an increase in the resources that need to be spent on police forces etc. In the future, it will thus not only be of interest to estimate some of the effects of alternative institutional arrangements concerning the procuracy but also to reveal the transmission mechanisms through which these effects are brought about.

It has also been mentioned that the procuracy is only one element in the value chain producing justice and security; the police and the courts are two other such elements. It could be of interest to delve a little deeper into possible interrelationships between these three actors. This same topic could also be analyzed from a slightly different angle, namely that of the delegation of competence to independent agencies (Voigt and Salzberger 2002).

Until now, we have assumed that the institutional structure of the prosecuting organs was exogenously determined. An analysis within the framework of constitutional political economy would, however, be incomplete if the possibility to endogenize the institutional structure were not mentioned. Given that the institutional structure has relevant economic effects, it would indeed be interesting to enquire for the reasons that determine the various structures.

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