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The Prosecution of Public Figures and the Separation of Powers: Confusion within the Executive Branch

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1 Introduction

The rule of law and the separation of powers are celebrated as hallmarks of Western legal and philosophical thought. They are supposed 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 this framework one can portray the judiciary as having two main functions: (1) to decide whether actions carried out by members of the other two branches are within the legal frame or the rule of law, and (2) to adjudicate disputes between individuals and to decide whether individuals ought to be sanctioned because they violated the law. This paper focuses on the intersection of these two sub-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 the judiciary cannot initiate proceedings and decisions. This feature is especially significant with regard to its role to sanction violations of the law, as access to the courts is often a monopoly held by the prosecution authorities. In most legal systems, the prosecution authorities are part of the executive branch of government. Hence, specific problems are expected to arise when members of the executive (or the legislature) commit the alleged crimes. Our paper focuses on prosecution in such cases.

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. The independence of the judiciary is a key element in Western legal and philosophical thought, but the independence of state prosecutors is rarely ever mentioned. 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, *in a personal as well as in a functional respect*.[2] It is further argued that the misuse of the procuracy can not only lead to higher levels of corruption but can have far-reaching effects on the legitimacy of the democratic state as well as on its stability.

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 3 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 Corruption as Independent and Dependent Variable

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 French conglomerate Elf-Aquitaine are only the two best-known examples. But Germany is not the only country in which crimes committed by public figures have come to the fore. Similar cases can be quoted with regard to many other governments, including member states of the OECD such as France, Italy, and Japan, which has a reputation as a country with a high degree of corrupt government officials. Corruption 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.

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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.

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, 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. 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 (2001) 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 finding is that a lower degree of individual accountability of politicians vis-à-vis their voters contributes to higher corruption.[3] 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.

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3 Persson, Tabbelini and Trebbi (2001) 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.

In this paper, we advance the hypothesis that the structure of legal institutions of a country can also be important determinants of the amount of crimes committed by politicians. It can therefore be interpreted as complementing the papers just cited rather than as criticizing them. 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 by public figures – 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. In the case of public figures and especially politicians, public investigations as such may already reduce (expected) utility.

2.2 Definition of Key-Concepts

Corruption

The international NGO “Transparency International” defines corruption as “the misuse of entrusted power for private benefit” (Transparency International 2000, 1). In this paper, 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 the chances of criminal acts committed by members of the executive, the legislature or other public figures being prosecuted. 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.[4] This narrower delineation was chosen because we are interested in the possibility of

[4] As we assume that the interest of members of the executive in preventing the prosecution of low-level bureaucrats is small.

government members to prevent their own prosecution. Our interest is broader than that of Rose-Ackerman as we are interested in every kind of crime.[5]

We assume that members of government have a central interest of not being investigated, prosecuted, indicted, or convicted of a crime. 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.

Logically, influence on a single case can only be taken if there is some kind of option space or discretion for the investigators and the procuracy. Even if there is no such overt discretion, e.g. because the "mandatory principle" applies, there may be "hidden" discretion, such as finding insufficient evidence or not concentrating enough efforts to conduct serious investigations. Additionally, influence may also be taken on individual members of the procuracy, e.g. by taking away a case from a certain prosecutor.

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, 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.[6]

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5 Our delineation further includes high party officials belonging to parties currently forming government. For the moment, we exclude the possibility of an all party-cartel.

6 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

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. These will henceforth be called EXECRIMES. Attached to every variable is a hypothesis on 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. We try to identify the crucial institutional variables, which determine the incentives of the procuracy concerning the question of indictment.

Institutional arrangements regarding six different issues are considered: the issue whether the prosecution agency is subject to orders by members of the executive (3.2), how influential members of the executive are in appointing, promoting, and dismissing prosecutors (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).

3.2 Restrictions on Prosecution Due to Possible Government Interference

Prosecutors may be subjected to orders regarding individual cases they handle which can be either internal or external. Whereas internal orders are instructions by superiors within the prosecution agency, external orders include instructions given by officials outside the procuracy, e.g., by the minister of justice. Theoretically, a prosecution system can be structured such that each single prosecutor enjoys the same kind of independence as a judge, who is not bound to orders concerning factual or legal questions.

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to crimes committed during the course of office or even more narrowly to breach of duty of office, e.g. corruption, whereas our focus is, as just spelled out, broader.

Hypothesis 1a: If the legal system provides for the possibility that members of the executive can give direct orders to individual prosecutors, the probability of EXECRIMES being prosecuted should be lower than otherwise, other variables being equal.

Hypothesis 1b: If orders by members of the executive have to pass through the head of the procuracy the effect is expected to be mitigated.[7]

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). Nevertheless, substituting the prosecutor might attract more public attention and criticism than instructions given in camera to the prosecutor handling an investigation.

Hypothesis 1c: If the legal system provides for the possibility that members of the executive have the right to reallocate prosecutors to specific cases, the probability of EXECRIMES being prosecuted should be lower than otherwise, other variables being equal..

3.3 Structural Restrictions on Prosecutorial Independence

If the career prospects of a prosecutor depend on the government, this might have an impact on the probability of EXECRIMES being prosecuted. The 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 will distinguish between the high level prosecutors, such as the state prosecutor, or general prosecutor / attorney general, and the normal prosecutor as appointment/election procedures may differ widely between the low-level prosecutors and the high level ones. The appointment of the high level prosecutor is assumed to be decisive as she normally disposes of an internal right of instruction.[8]

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7 In some countries, external instructions can be given only to prosecute; instructions not to prosecute are not allowed.

8 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

Appointment

In determining the independence of the procuracy from the executive and legislature, three aspects will be distinguished, namely (i) term length (ii) renewability, and (iii) appointing organ. If terms are renewable, prosecutors can be expected to cater to the interests of the organ that has the power to re-elect (or to promote them to higher positions). Hence (hypothesis 2a), 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:

(i) Direct election by citizen voters;
(ii) Election by the legislature or its subset;
(iii) Appointment by members of executive;
(iv) Appointment by members of the judiciary; and
(v) Appointment by members of the procuracy.[9]

(i) Direct election by the populace will most likely be connected with a limited term.[10] 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. If the populace elects prosecutors on the communal, regional and/or state level, the prosecution of political corruption would seem to enhance 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 too many resources on them.[13]

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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.

9 In addition there might be different methods of nominating prosecutors independently from the appointing power, which may result with more than dozen combinations.

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.

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

12 This is the case in the US, see 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

(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 will result with low rates of EXECRIMES. 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.

(iii) Appointment by members of the executive is expected to lead to a low propensity to prosecute EXECRIMES - and a high probability of misusing the procuracy against the opposition.

(iv) 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.

(v) Appointment by a body of prosecutors represents a classical system of co-optation. Co-optation is expected to lead to a high degree of independence from the executive.

Let us sum up in hypothesis 2b: appointment of prosecutors by the legislature, the judiciary or the populace is expected 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 the 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. We would expect it to lead to quasi-optimal prosecution levels.

Promotion/Transfer of Prosecutors /Removal from Office

If members of the executive largely determine a prosecutor's career, the behavior of prosecutors towards members of the executive will be influenced due to this institutional arrangement. Relevant aspects include (i) promotion, (ii) transfer, and (iii) removal from office.

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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. See Weigend (1979, 593).

(i) If representatives of public prosecutors need to consent to promotion, 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 are supposed to lead to the highest independence.

(ii) The same argument applies to removal from office.[14]

(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 part of the concept of judicial independence. Application of this principle to the procuracy will make it less dependent on others.

Hypothesis 2c: the larger the influence of members of the executive on promotion, removal and transfer of prosecutors, the lower the probability that EXECRIMES will be prosecuted, 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. If there is a monopoly, a politician who could be prosecuted has incentives to influence the procuracy such that it refrains from prosecuting him, e.g. by offering bribes. If other actors can also initiate a trial, it will be more difficult to prevent being prosecuted. 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.

There are various possibilities to institutionalize competition in prosecution: the competence to indict can also be given to the police[15], to interested private parties[16], 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 in many corruption cases there is no individual

14 If there is a high mobility between the prosecutor's job and other jobs, such as the judiciary, we will expect the prosecutor to be more independent.

15 As is, for example, the case in England and Norway.

16 E.g. to the victim (or her family) who might have the right to force public prosecution.

victim; the victim is the public at large.[17] 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.

3.5 Legal Limitations on the Discretion of Prosecutors

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. We assume that the opportunity principle confers more discretion to the procuracy than the legality principle, as it allows broader justifications for non-prosecution of cases.[18] From this, hypothesis 4 is derived: Other things equal, prosecution of EXECRIMES is expected to be higher under the mandatory principle than the opportunity principle.

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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17 A similar solution is judicial review of the prosecutor’s decision 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.

18 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.

The Discretion to Offer New Interpretation

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 does have discretion on this issue, lower prosecution rate of EXECRIMES would be expected given that the procuracy is not independent from the executive.

Summing up, prosecutors have most discretion if the opportunity principle is combined with the possibility to re-interpret precedent. Given such a combination, we would expect a low probability of EXECRIMES to be prosecuted if the procuracy is part of the executive. 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 factually 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 prosecute, therefore, remains within the procuracy. The same might also apply to the decision not to indict. After indictment, the decision to stop the trial necessitates the consent of a judge and/or of the accused in many countries.[19] 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.

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19 In those countries where private prosecution may take place the prosecutor often has to end the prosecution through a simple decision not to prosecute further which is usually not subject to judicial review. Israel is one of the few exceptions where judicial review of decisions not to prosecute (for any reason) is possible. If the case was dismissed due to insufficient evidence, there is in some countries 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, which do not have legal or factual merits.

Judicial Power to Review the Charges

Some penal codes endow the procuracy with the competence to make a binding decision on the charges brought against a suspect. This competence enhances prosecuted discretion. It is the precondition for plea-bargaining as practiced in the US.[20] 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.

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 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).

4 Some Hypotheses Concerning Interrelationships between 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. 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 between different variables.

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20 The bargain consisting in the suspect pleading guilty and in exchange being charged less.

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 whether representatives of the executive have the right to give instructions to the procuracy and the degree of 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) formal 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 charges can be brought against prosecutors in case they do not act according to the law.

4.2 On the Relationship Between Right of Instructions and Formal Independence

If the right to give instructions is combined with a low degree of formal 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 independence, a high probability of EXECRIMES being prosecuted is to be expected. But what about the cases in which right to give instructions and formal independence point in different directions?

If prosecutors are formally 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 example because transferal against a prosecutor’s will is impossible), the more pronounced is the counterbalancing effect of formal independence expected to be.

The opposite would be that prosecutors enjoy only a low degree of formal 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 formal independence.

4.3 On Interdependencies Between Rights to Instruct 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 insures 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.

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 the level of criminal law.

4.4 On Interdependencies Between Formal Independence and Other Variables

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

Hypothesis 11: If the monopoly to indict is combined with a high degree of formal independence, the probability of EXECRIMES being prosecuted is predicted to be lower than if there were no such monopoly, other things being equal.

Hypothesis 12: A high degree of formal 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 formal independence is combined with the mandatory principle of prosecution, this does not only decrease discretion, but it increases accountability and predictability.

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

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

The four possible combinations shortly discussed give a very similar picture as that discussed in 4.3: the (positive) effect of granting formal 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

The variables hitherto presented all 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 legislative majority can be expected to have strong incentives to prosecute crimes committed by the President or his men. In order to do so, they will tend to establish a special prosecutor or the like. We therefore expect EXECRIMES being prosecuted to a higher degree in presidential than in parliamentary systems.

Treisman (2000) finds that federal states have, c.p., higher corruption levels than unitary states. We hypothesize that this does not only apply to corruption but can be generalized to EXECRIMES given that the procuracy is organized on federal lines, as is, e.g., the case 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.

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 next steps

In this paper, we have generated some 20 hypotheses concerning the relationship between the institutional structure of the procuracy in the system of separation of powers 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. Yet, measures for government crimes that would lend themselves for international comparison are not readily available. In empirically testing the hypotheses, we will thus resort to corruption perception indices as published by Transparency International. Although they are not exactly congruent with our notion of EXECRIMES, they seem to be the best we can do.

It has been argued that high levels of corruption could undermine the trust of the population in government. Low levels of trust could 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. These conjectures should also be tested empirically.

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