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## The Independence of Prosecutors and Government Accountability

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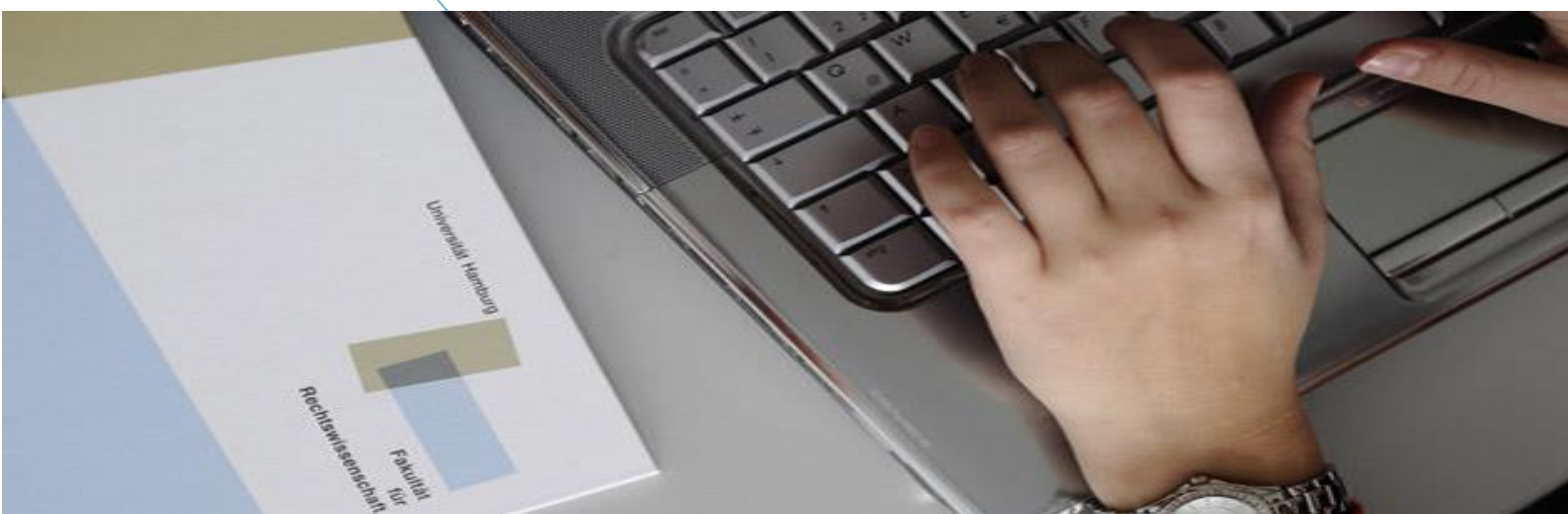
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# The Independence of Prosecutors and Government Accountability

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# The Independence of Prosecutors and Government Accountability<sup>1</sup>

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## *Abstract:*

*Prosecutors are immensely influential in every judicial system, yet very little is known about the impact of their organization. Here we ask two questions: (1) whether crimes committed by public officials are more likely to be prosecuted when prosecutors are independent, and (2) whether this effect depends on the integrity of the prosecutors themselves. We employ a novel indicator for prosecutorial independence based on data from the World Justice Project to answer these questions. We find that prosecutorial independence favors the prosecution of different types of public officials and this effect is conditional on the level of prosecutorial corruption. For police officers, we find that prosecutorial independence is not decisive, but prosecutorial corruption matters for whether suspected misconduct is likely to be prosecuted.*

JEL-codes: D73, H11, K40, K42

Key words: Prosecutorial Independence, Prosecutorial Corruption, Government Accountability

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*“The economics of prosecutors is largely underdeveloped.”  
(Garoupa 2012:239)*

## **1. Introduction**

It is generally agreed that prosecutors possess sweeping powers and abundant discretion regarding the use of these powers (see, e.g., Tonry 2012 or Weigend 2012). If anything, their powers have increased in recent years, as governments have attempted to reduce the workload of judges by shifting additional competencies to prosecutors.

Given the powers of prosecutors, it is amazing how little research has been devoted to them. Whereas research on both the efficiency of court systems and the economic effects of independent judges has made substantial progress over the last ten years (Voigt 2016 is a survey of the former, Voigt et al. 2015 a contribution to the latter), no similar progress can be reported regarding the efficiency of prosecutorial agencies or the effects of prosecutorial independence (PI).

In this article, we contribute to changing that. Specifically, we use a novel indicator of PI to evaluate the effects of PI on the accountability of government officials in terms of being prosecuted when suspected of a crime. PI is a crucial precondition for realizing the rule of law. If the most important single trait of the rule of law is that everybody, regardless of their position in society, is treated equally under the law, and yet prosecutors are not independent from the government, then the rule of men will prevail over the rule of law, because the government can influence who is and who is not prosecuted.

It has even been argued that for politicians who are interested in reaching political goals via the judiciary, putting pressure on prosecutors – and, thus, tinkering with their independence – could be more attractive than trying to influence judges, simply because the latter would arouse a lot more opposition (Voigt and Wulf 2017). It has further been argued that the prosecution of political figures may depend critically on the independence of prosecutors (Aaken et al. 2004).

Here, we are interested in two questions. First, is PI an important determinant of the actual prosecution of public officials in case of misconduct? If public officials are suspected of having committed a crime, such as having accepted bribes, we would expect higher prosecution rates for such cases in countries where prosecutors are independent. Our second question is, what happens if prosecutors are independent from government, but are themselves corrupt? If prosecutors accept bribes, for

instance, for not prosecuting specific cases or for recommending inappropriate indictments, then the prosecution of cases against public officials might suffer, even when there are high levels of PI. Thus, we inquire into whether the effect of PI on the prosecution of public officials is conditional on the level of prosecutorial corruption (PC).

What follows in Section 2 is a brief summary of the available literature that deals with PI and its effects. In Section 3, we introduce two new indicators based on data from the World Justice Project, one for PI and the other one for PC. In Section 4, these new indicators are used to answer our research questions. Section 5 concludes, and sketches a number of possible follow-up projects that could help improve our understanding of a powerful, yet under-researched, part of the justice system.

## **2. Brief Literature Survey**

Following Aaken et al. (2010), we speak of prosecutors if they have the following competencies: (1) to gather information on the behavior of criminal suspects, or to instruct the police to gather information, (2) to indict a suspect, and (3) to represent the interests of the public during a trial.

Next, we propose to think of PI as a state in which prosecutors have no reason to expect that their lawful professional activities will result in negative consequences for themselves, such as being expelled, being transferred to another position or location, or being paid less. PI, thus, refers to the relationship between prosecutors and the government, and is logically distinct from the presence or absence of corruption. Clearly, prosecutors could be independent from governmental interference and still lack impartiality if they are willing to accept bribes or behave in other corrupt ways.

The only inquiry into the effects of PI on public-sector corruption in the extant literature is Aaken et al. (2010). They argue that crimes committed by government officials are more likely to be prosecuted if the prosecutors enjoy independence from influence by the government. The non-prosecution of crimes increases the attractiveness of committing them, which is why Aaken et al. (2010) expect a clear association between high levels of PI and low levels of public-sector corruption. They construct two measures of PI, one *de jure* and the other one *de facto*, and show that only higher levels of *de facto* PI are robustly associated with lower levels of perceived public-sector corruption.

Here, we add to the literature in various ways. First, by using, for the first time, an indicator for PI based on data from the World Justice Project. Second, by explaining the likelihood that corrupt public officials will be prosecuted based on characteristics of prosecution agencies. As argued in the introductory section, the non-prosecution of corrupt officials is not necessarily a consequence of a lack of PI, but could also be the consequence of PC. In our analysis, we distinguish five types of officials and their respective likelihood to be prosecuted if they are suspected of having committed a crime.

### **3. Measuring Prosecutorial Independence and Prosecutorial Corruption**

The two indicators used in our empirical analysis come from the World Justice Project (WJP). This project was founded in 2006 and, since 2008, produces an annual rule of law index. This index is made up of eight categories (such as “absence of corruption” or “criminal justice”) and it is based on surveys drawn from both general population and experts (see Botero et al. 2011).

The two measures proposed here make PI and PC comparable across countries. Each measure is based on one specific question in the WJP’s general population survey. The questions aim at identifying to what extent the “lack of independence of prosecutors” or the “corruption of prosecutors” constitute a problem for the criminal investigation system in the city in which the respondent lives. To indicate the significance of the problem, the respondent can choose an integer value between 1 and 10 from a scale. The WJP then aggregates all responses at the country level, such that 0 indicates the absence of PI or a very high level of PC, whereas 1 indicates a very high level of PI or the absence of PC. In other words, higher values on WJP-indicators reflect a better quality of governance. All indicator values for 99 countries are documented in Appendix A.

The bivariate correlation between PI and PC of 0.89 suggests that corruption and nonindependence of prosecutors are relatively closely aligned. Nevertheless, there are a number of countries where one of the two indicators points to a bigger problem than the other. This is visualized in Figure 1. Some countries do a lot better regarding the independence of their prosecutors than regarding their integrity. Kyrgyzstan, Panama, Tanzania, and Uganda are the most obvious examples covered by WJP data. Prime examples of the exact opposite case are Georgia, Iran, Sri Lanka, and Turkey, these countries, perform better in terms of corruption than in having independent prosecutors.

<< Figure 1 about here >>

#### 4. Effects of PI on the Prosecution of Public Officials

We use the two measures introduced in the last section to answer the two main questions of this article. Namely, can PI explain the actual prosecution of public officials deemed corrupt, and is this effect conditional on PC? Equation (1) depicts the expected utility from accepting bribes based on Becker's (1968) seminal economic model of crime. If  $p$  is the likelihood that criminal behavior is not detected, then the first term depicts the potential utility from being corrupt, whereas the second term deals with the disutility if the corrupt practice is detected, which occurs with probability  $(1 - p)$ .

$$EU = U(p \times \textit{benefit} - (1 - p) \times q \times \textit{sanction}) \quad (1)$$

To date, studies working with the expected utility framework of crime calculate the expected cost of criminal behavior by multiplying the likelihood of being detected with the size of the sanction. Implicitly, it is assumed that detected crime is always punished. But criminal justice systems are not perfect, and to make this explicit we add the probability  $q$  to the equation. This variable expresses the probability of a discovered criminal being prosecuted, sentenced, and punished. Since our focus is on both the independence as well as the corruption of prosecutors,  $q$  is interpreted here as the probability that criminal behavior will be prosecuted after it has been discovered. Our empirical analysis aims at measuring the importance of PI for the level of  $q$ . It can be expected that  $q$  is larger when prosecutors are independent, at least if prosecutorial corruption is low. This would imply that increasing the independence of prosecutors and fighting corruption among prosecutors are important instruments to deter crime.

The WJP also produces indicators for the probability that criminal acts of various government officials are prosecuted. These indicators reflect the prosecution of: (1) high government officials, (2) legislators, (3) police officers, (4) local government officials, and (5) mayors. This means that we have five different indicators for  $q$ . The WJP survey questions underlying these indicators are listed in Appendix B. In cases where more than one variable is available per category, for example to measure the propensity that police officers are prosecuted, we simply take the mean value of these variables.

To inquire into the relevance of PI and PC for the level of  $q$ , we estimate the following model, once for each category of public officials:

$$q_i = \alpha + \beta \times PI_i + \gamma \times PC_i + \delta \times PI_i \times PC_i + \theta \times X_i + \varepsilon_i \quad (2)$$

Our vector of control variables  $X$  follows Aaken et al. (2010) and includes a country's log-income per capita, trade openness, log-population size, share of Protestants in the population, and a dummy indicating whether the country was a British colony. Table 1 shows a correlation matrix based on these control variables and our two indicators of interest. Countries with higher income per capita and a larger share of Protestants in the population show higher levels of PI and less PC.

Table 1: Correlation Matrix

	PI	PC	Income	Openness	Population	Protestants	Colony
PI	1						
PC	0.89*	1					
Income	0.27*	0.28*	1				
Openness	0.21*	0.17	-0.28*	1			
Population	-0.18	-0.20	0.78*	-0.49*	1		
Protestants	0.50*	0.42*	-0.02	0.03	-0.21*	1	
British Colony	-0.09	-0.11	-0.10	0.04	0.11	0.05	1

Note: N=95, \*: 5%-significant.

Aside from the main effects of PI and PC, we also include an interaction term. This allows us to estimate the conditional effect of PI on the prosecution of public officials, depending on the level of PC. We expect that PI will only display an effect when PC is sufficiently low (i.e., when the indicator for the absence of PC takes high values). Table 2 shows the regression results. It is well-known that the interpretation of coefficient estimates for a conditional effect can be complicated (as illustrated by Brambor et al. 2006). Thus, Figure 2 plots the marginal effects of PI on the propensity that public officials are being prosecuted conditional on the level of PC, including 95%-confidence intervals.

<< Figure 2 >>



Table 2: Regression Results for the Propensity to Prosecute Public Officials

	[1]	[2]	[3]	[4]	[5]
PI	-0.32 (0.20)	0.12 (0.21)	0.21 (0.17)	-0.15 (0.15)	-0.07 (0.23)
(Absence of) PC	0.03 (0.12)	0.06 (0.14)	0.35* (0.12)	0.11 (0.13)	0.05 (0.21)
PI*PC	0.42 (0.24)	0.25 (0.25)	-0.03 (0.19)	0.44* (0.18)	0.58 (0.29)
Control variables	YES	YES	YES	YES	YES
N	94	95	94	95	95
R <sup>2</sup>	0.38	0.60	0.75	0.60	0.58

Note: OLS regression coefficients with robust standard errors in parentheses based on the sandwich estimator of variance, coefficient estimates for a constant and the set of control variables are omitted, dependent variables reflect the propensity that [1] high-ranking government officers, [2] members of the legislature, [3] police officers, [4] local government officers, and [5] small town mayors are successfully prosecuted and punished, \*: 5%-significant.

The results for members of parliament, local government officers and mayors are in line with our theoretical predictions. PI increases the likelihood that these public officials are prosecuted in case they are suspected of criminal behavior, but only if prosecutors are largely free from corruption. In other words, where prosecutors are corrupt, the accountability of government officials cannot be increased by merely enhancing the independence of prosecutors.

We find no significant effect of PI on the prosecution of high-ranking government officers. Moreover, our empirical model has far less explanatory power for this indicator than for any of the other dependent variables. A possible interpretation is that the prosecution of such high-ranking government officers depends on factors other than the general level of PI.

We also find no significant effect of PI on the prosecution of police officers, although our model can explain a large share of the variation in this indicator. We find that PC matters for the prosecution of police officers, independent of the level of PI (see Model [3] in Table 2). This means that police officers are prosecuted equally by dependent and independent public prosecutors, but they are less likely to be prosecuted whenever prosecutors are corrupt. This result makes intuitive sense, as police officers typically lack the necessary political influence to benefit from the nonindependence of prosecutors.

Overall, these results suggest that PI is important for the prosecution of public officials suspected of criminal behavior and, hence, for the accountability of the

government. Yet, not all public employees are sufficiently influential to pressure dependent prosecutors, and specifically the prosecution of police officers depends on the level of PC rather than on PI. Also, some high-ranking public employees might be sufficiently influential to get away with criminal behavior, even if prosecutors are formally independent. Our simple empirical model largely fails to predict the likelihood that these high-ranking government officers are prosecuted.

## **5. Conclusions and Next Steps**

A few years back, Garoupa (2012) claimed that the economics of prosecutors is underdeveloped. It is about time to change this, because prosecutors enjoy a large degree of discretion and play an important part in establishing the rule of law.

One interesting question that directly follows from our analysis concerns the determinants of prosecutorial corruption. What factors cause the substantial differences in prosecutorial corruption between countries such as Kyrgyzstan, Afghanistan, or Venezuela on the one hand and Australia, Denmark, Finland, Norway or Singapore on the other?

In terms of theory, the relationship between prosecutors and police can be analyzed as a principal-agent relationship. What are some possible solutions if the agent (the police) is corrupt? Perhaps, setting up competing police organizations would have a positive impact on levels of corruption? If so, should they be based on geographical and/or functional criteria? What are some possible solutions if prosecutors are corrupt? And so on.

Prosecutorial independence is no panacea. Prosecutors might misuse their independence to prosecute crimes that have never been committed, or not prosecute crimes that have been committed. They might do so to pursue their own political agenda. For example, prosecutors might choose the timing of their prosecutorial action strategically, as some have claimed regarding the announcement of then FBI Director Comey shortly before the U.S. presidential elections of 2016 that he would look into Hillary Clinton's past behavior (Silver 2017). Hence, research should pay more attention to instruments that hold independent prosecutors accountable without undermining their independence (see, e.g., Di Federico 1998, Michel 2017 or Rios-Figueroa 2012).

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**Appendix A: PI and PC Indicator Values**

Country	PI	PC	Country	PI	PC	Country	PI	PC
Afghanistan	0.177	0.011	Germany	0.830	0.909	Norway	0.992	1.000
Albania	0.090	0.031	Ghana	0.306	0.288	Pakistan	0.291	0.375
Argentina	0.372	0.608	Greece	0.717	0.781	Panama	0.563	0.377
Australia	1.000	1.000	Guatemala	0.263	0.263	Peru	0.531	0.357
Austria	0.831	0.913	Hong Kong	0.789	0.896	Philippines	0.295	0.219
Bangladesh	0.163	0.128	Hungary	0.479	0.481	Poland	0.648	0.856
Belarus	0.207	0.500	India	0.338	0.302	Portugal	0.726	0.821
Belgium	0.930	0.957	Indonesia	0.213	0.051	Romania	0.537	0.511
Bolivia	0.000	0.077	Iran	0.113	0.466	Russia	0.155	0.091
Bosnia and Herzegovina	0.376	0.513	Italy	0.826	0.877	Senegal	0.293	0.331
Botswana	0.704	0.712	Jamaica	0.563	0.712	Serbia	0.338	0.407
Brazil	0.756	0.817	Japan	0.757	0.819	Sierra Leone	0.150	0.308
Bulgaria	0.438	0.321	Jordan	0.451	0.712	Singapore	0.942	1.000
Burkina Faso	0.085	0.308	Kazakhstan	0.282	0.163	Slovenia	0.361	0.608
Cambodia	0.113	0.065	Kenya	0.193	0.110	South Africa	0.454	0.515
Cameroon	0.082	0.146	Korea, South	0.699	0.977	Spain	0.608	0.843
Canada	0.880	0.986	Kyrgyzstan	0.300	0.000	Sri Lanka	0.535	0.856
Chile	0.783	0.879	Lebanon	0.638	0.615	Sweden	0.901	0.906
China	0.085	0.221	Liberia	0.225	0.308	Tanzania	0.432	0.154
Colombia	0.313	0.423	Macedonia	0.268	0.423	Thailand	0.000	0.077
Cote d'Ivoire	0.338	0.423	Madagascar	0.150	0.077	Tunisia	0.297	0.486
Croatia	0.526	0.788	Malawi	0.249	0.365	Turkey	0.150	0.670
Czech Republic	0.761	0.753	Malaysia	0.282	0.308	Uganda	0.380	0.192
Denmark	0.939	1.000	Mexico	0.095	0.104	Ukraine	0.101	0.042
Dominican Republic	0.102	0.318	Moldova	0.056	0.042	United Arab Emirates	0.724	0.868
Ecuador	0.088	0.282	Mongolia	0.193	0.225	United Kingdom	0.856	0.900
Egypt	0.268	0.452	Morocco	0.048	0.077	United States	0.748	0.810
El Salvador	0.413	0.385	Myanmar	0.141	0.163	Uruguay	0.657	0.712
Estonia	0.885	0.901	Nepal	0.408	0.293	Uzbekistan	0.451	0.365
Ethiopia	0.195	0.182	Netherlands	0.914	0.974	Venezuela	0.000	0.027
Finland	0.977	1.000	New Zealand	0.827	0.867	Vietnam	0.423	0.337
France	0.628	0.852	Nicaragua	0.244	0.250	Zambia	0.383	0.469
Georgia	0.150	0.731	Nigeria	0.153	0.110	Zimbabwe	0.127	0.077

Note: PI=prosecutorial independence, PC=prosecutorial corruption, higher values indicate higher governance quality.

## Appendix B: Description of Variables

PI	WJP-expert survey: The following question aims at identifying the main problems faced by the criminal investigation system in your country. Please tell us how significant are the following problems for the criminal investigative services in the city where you live: Lack of independence of prosecutors.
PC	WJP- expert survey: The following question aims at identifying the main problems faced by the criminal investigation system in your country. Please tell us how significant are the following problems for the criminal investigative services in the city where you live: Corruption of prosecutors.
Prosecution: high-ranking government officer	WJP-population survey: Please assume that a high-ranking government officer is taking government money for personal benefit. Please also assume that one of his employees witnesses this conduct, reports it to the relevant authority, and provides sufficient evidence to prove it. Please assume that the press obtains the information and publishes the story. Which one of the following outcomes is most likely? (a) The accusation is completely ignored by the authorities; (b) an investigation is opened, but it never reaches any conclusions; or (c) the high-ranking government officer is prosecuted and punished.
Prosecution: member of legislature	WJP-expert survey: In practice, members of the legislature who commit crimes are prosecuted and punished.
Prosecution: police officer (I)	WJP-expert survey: Assume that a high-ranking police officer is found by a newspaper reporter to be taking money from a criminal organization. Assume that there is enough evidence to prosecute and convict. Which of the following outcomes is most likely? (a) The accusation is completely ignored by the authorities; (b) an investigation is opened, but it never reaches any conclusions; (c) the high-ranking police officer is prosecuted and punished; or (d) D/K.
Prosecution: police officer (II)	WJP-expert survey: Assume that a police officer inflicts severe physical harm on a criminal suspect to obtain a confession. Assume that the criminal suspect files a formal complaint with the competent authority (prosecutor, judge, ombudsman, etc.), and provides sufficient evidence to prove his/her case. Which one of the following outcomes is most likely? (a) The accusation is completely ignored by the authorities; (b) an investigation is opened, but it never reaches any conclusions; (c) the police officer is prosecuted and punished; or (d) D/K.
Prosecution: police officer (III)	WJP-expert survey: In practice, police officers who commit crimes are prosecuted and punished.
Prosecution: local government officer (I+II)	WJP-expert survey & WJP-population survey: Assume that, as a result of an audit, a local government officer is found to be unlawfully issuing a government license for personal benefit, for example, to a construction company owned by a family member. Which one of the following outcomes is most likely? (a) The accusation is completely ignored by the authorities; (b) an investigation is opened, but it never reaches any conclusions; (c) the local government officer is prosecuted and punished; or (d) D/K.
Prosecution: small town mayor	WJP-expert survey: Assume that the Mayor of a small town in your country is taking government money for personal benefit. Please also assume that one of his employees witnesses this conduct, reports it to the relevant authority, and provides sufficient evidence to prove it. Assume that the press obtains the information and publishes the story. Which one of the following outcomes is most likely? (a) The accusation is completely ignored by the authorities; (b) an investigation is opened, but it never reaches any conclusions; (c) the Mayor is prosecuted and punished; or (d) D/K.
Income	Log-income per capita. Source: Feenstra et al. (2015).
Openness	Sum of exports and imports of goods and services measured as a share of GDP. Source: World Development Indicators.
Population	Log-population size. Source: Feenstra et al. (2015).
Protestants	Protestants as share of the population in 1980. Source: La Porta et al. (1999).
British Colony	British colonial origin. In cases of several colonial powers, the last one is counted, if it lasted for 10 years or longer. Source: Hadenius and Teorell (2007).

Figure 1: Scatter Plot

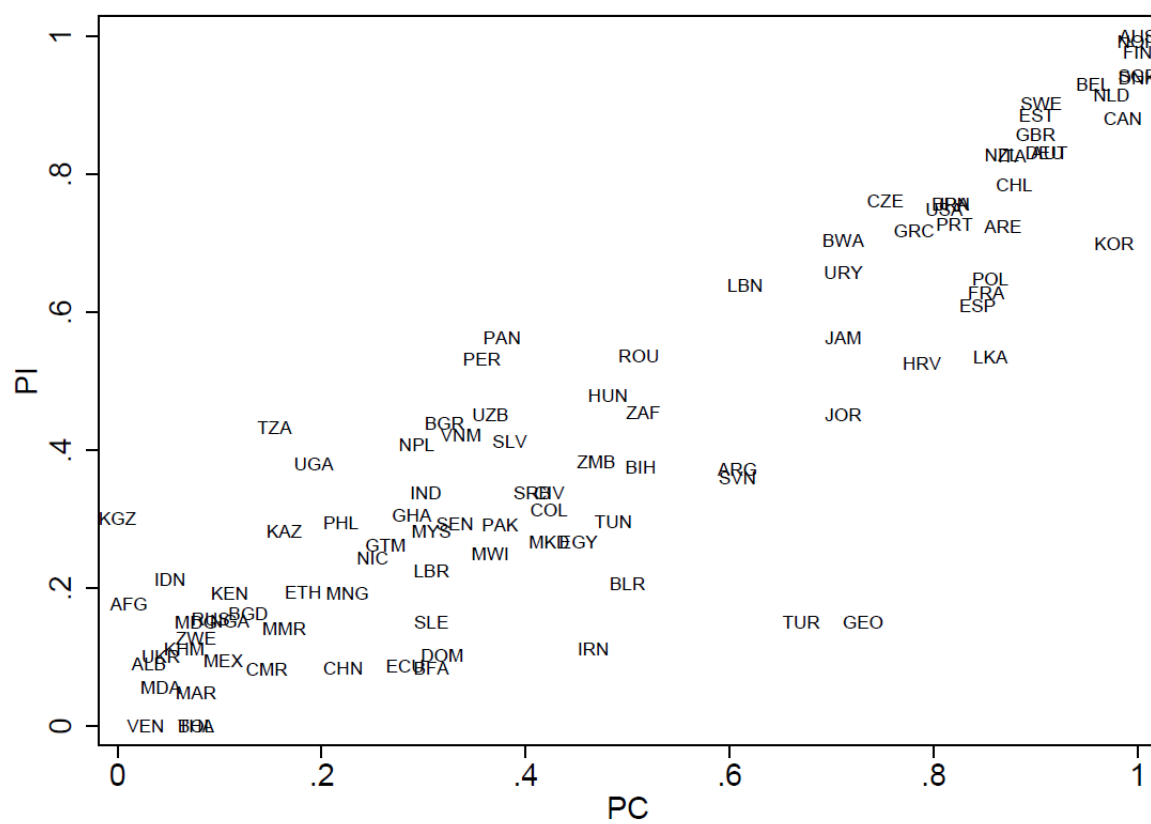


Figure 2: Marginal Effects of PI on the Prosecution of Government Officials

