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Prosecutors´ Discretionary Authority in Efficient Law Enforcement Systems

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PROSECUTORS' DISCRETIONARY AUTHORITY IN EFFICIENT LAW ENFORCEMENT SYSTEMS

Tina Søreide and Kasper Vagle[1]

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Abstract: Prosecutors cannot end corporate bribery cases with a negotiated settlement unless they have the discretionary authority to do so, and this authority varies across countries. For this chapter, we developed a measure of prosecutorial discretion that allows for cross-country comparison, and used this measure to study relationships between the freedoms granted to the prosecutor and countries' notions of criminal law efficiency, as well as their political and economic context. For alleged offenders, freedom for prosecutors to settle bribery cases does not appear to signify an easy way out of the law enforcement situation. Jurisdictions that use settlements will often experience a lower extent of corruption and higher trust in their court systems. Settlement-friendly jurisdictions are not associated with lower budget for law enforcement, even if the use of settlements tend to reduce enforcement expenses per case. While there are few clear trends with respect to governance, strict constraints on the prosecutor are associated with undemocratic (authoritarian) regimes. More democracy means more freedoms for the prosecutor, yet several of the jurisdictions most associated with criminal justice values, legitimacy and democracy have introduced new principles that constrain prosecutors' freedoms when they offer settlements.

Contents

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1. Introduction

A glance at the geographic map of corporate liability enforcement practices quickly reveals substantial variation in enforcement activity.[2] A deeper look at underlying regulations also exposes differences when it comes to the values attached to enforcement activities and to the countries' criminal justice systems more generally. For example, in the United States, the jurisdiction with the highest number of corporate liability cases, deterring crime appears to be the only aim; even though the US criminal justice system developed mainly from adversarial concerns, with conflict resolution as its core purpose. In Germany, where the system's ability to deter crime is not at all taken for granted, it is considered equally important to assign culpability correctly, and as part of that, to determine the truth of the case.[3] In some other countries, such as the Nordics, additional aspects beyond moral guidance are added weight. For example, individuals' autonomy is a central criminal justice ambition,[4] and this implies strong safeguards against unfair treatment. In these countries, at least formally, plea bargain is not an option, given the high risk of self-incrimination.

Individual criminal responsibility is more important in some societies than in others. Some countries have refused to introduce corporate liability into their criminal law, although most countries make it possible to sanction firms for bribery.[5] The greater the emphasis on personal liability, the fewer regulations there seem to be for the enforcement of corporate liability, including the use of non-trial resolutions. Across Central Europe and Latin America in particular, we see broad variation in the ways in which enforcement systems pragmatically – and sometimes with significant resistance – put corporate liability into practice. This pragmatism is clearly expressed in the largely unregulated yet creative use of non-trial resolutions.

A recent International Bar Association (IBA) survey of settlement regulations and practices in 66 countries[6] confirms that settlements happen in corporate liability cases with increasing frequency in all regions. The survey report concludes by calling for more principled and harmonized regulations. However, what those principles should be is not clear.[7] Countries with different regulatory space for settlements operate under different judicial paradigms. As noted above, they emphasize different values and have different historical reasons for their choices, and their scholars defend judicial legitimacy and efficiency in different ways.

In this chapter we explore how these variations are reflected in the discretionary authority of prosecutors, by studying their opportunity to settle corporate bribery cases at the pre-trial stage. Based on the results of the IBA survey of settlement regulations, we develop an index in order to systematically measure and understand patterns of prosecutorial discretion around the globe, and to learn how these patterns are associated with different government systems. Finally, inspired by economic reasoning, we discuss efficiency trade-offs associated with different criminal justice paradigms.

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[2] TRACE, *International Global Enforcement Report 2017* (2018), https://traceinternational.org/Uploads/PublicationFiles/GER2017.pdf

[3] SHAWN MARIE BOYNE, COMPARATIVE CRIMINAL PROCEDURE 219-257 (Jacqueline E. Ross and Stephen C. Thaman ed., Edward Elgar Publishing 2016)

[4] Jørn Jacobsen, *RT. Concepts of Criminal Law and Representative Reductions*, NORDISK TIDSSKRIFT FOR KRIMINALVIDENSKAB. 46-64 (2012)

[5] Radha Ivory and Mark Pieth, *Overview* in CORPORATE CRIMINAL LIABILITY: EMERGENCE, CONVERGENCE, AND RISK 3-60 (Radha Ivory and Mark Pieth eds, Springer Publishing 2011).

[6] Abiola Makinwa and Tina Søreide, *Structured Criminal Settlements: Towards Global Standards in Structured Criminal Settlements for Corruption Offences* (The International Bar Association (IBA), Anti-Corruption Committee, Structured Criminal Settlements Sub-Committee 2018)

[7] According to their 2019 Agenda, the OECD Working Group on Bribery will address the need for recommendations for non-trial resolutions. A group of experts have developed draft guidelines to be considered in the process (The Recommendation 6 Network: https://www.nhh.no/en/research-centres/corporate-compliance-and-enforcement/guidelines-for-non-trial-resolutions/, 4 May 2019)

2. Efficiency concepts in a criminal justice context[8]

How to define *efficiency* in a criminal justice context is far from straightforward. The word pertains to the way resources are used to achieve objectives. However, while all criminal justice systems are developed for the broad purpose of controlling crime, they assign varying weight to different specific aims, especially crime deterrence, fair process, and value for money, but also sub-goals, such as the law's expressivist function and the system's effort to rehabilitate offenders. The different aims require different policies. At the same time, achieving efficiency with respect to just one of the criminal justice values is not enough to qualify a criminal justice system as 'well-performing'.

2.1 Crime deterrence, fair process and value for money

Crime deterrence may appear to be the most obvious aim, especially to economists, who assume that rational individuals will not commit crime if law enforcers ensure negative net gain for those involved. Firms will operate effective compliance systems if the benefits of doing so outweigh the risks associated with an enforcement action.[9] This argument is intuitively correct for most profit-motivated crime. The problem is on the practical side: how to ensure a negative net gain. The expected gains from corporate bribery may go far beyond the sanctions that wrongdoers can expect if they are caught in the crime. Moreover, corporate bribery typically is well hidden behind financial secrecy providers and corporate structures, which means a very low probability of detection. The lower this probability, the higher the total penalty must be to effectively deter the crime. As a rule of thumb in economics, the penalty must be set equal to the gain from bribery, divided by the probability of detection, if it is to have a decisive deterrent impact on rational profit maximizers.[10] By this rule, for example, deterring crime with a potential $10 million gain and 10 percent probability of detection would require a $100 million penalty. Some firms that use bribery to secure market entry and a strong market position may reap profits in the billions. If so, it will often be impossible for prosecutors to impose a fine that is sufficiently large, according to economic theory, to deter such crime. Politically, there is little willingness to impose such drastic sanctions because higher penalties mean greater risk of harm to innocent people, such as uninformed investors, customers, and employees, who are often unaware of the bribery; moreover, policy makers usually do not want to drive important producers and employers out of business. Reduced sanctions for those who self-police – by operating proper systems for risk prevention and oversight of business practice, and who self-report incidents that nevertheless occur – motivate compliance.[11] However, if decision-makers are rational profit-maximizers, such discounted penalties cannot be expected to deter the most serious forms of corruption unless the benchmark sanction is sufficiently high or the responsible individuals perceive a risk of imprisonment

[8] Arguments in this section are also presented in TINA SØREIDE, CORRUPTION AND CRIMINAL JUSTICE: BRIDGING ECONOMIC AND LEGAL PERSPECTIVES, Chapter 2 . Edward Elgar Publishing (2016.)

[9] In his seminal work, Becker argues that a rational player is deterred from committing a crime if the sanction equals the harm to society multiplied by the probability of being caught. GARY BECKER, CRIME AND PUNISHMENT: AN ECONOMIC APPROACH, 13-68 Palgrave Macmillan (1968). Rose-Ackerman established an economic analysis of corruption and explained why sanctions must be proportional to the offender's gain from the crime, and not, for example, to the harm to society. Susan Rose-Ackerman, *The economics of corruption,* JOURNAL OF PUBLIC ECONOMICS 4, 187-203 (1975). From these works the literature developed further, with contributions on negotiated settlements. William Landes, *An Economic Analysis of the Courts*, 14 JOURNAL OF LAW AND ECONOMICS 61-107 (1971), identified factors that players evaluate when choosing a settlement deal or a court case. RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW, Little Brown and Company (1973), and Steven Shavell, *Suit, settlement, and trial: A theoretical analysis under alternative methods for the allocation of legal costs,* 11,1 THE JOURNAL OF LEGAL STUDIES 55-81 (1982), were among the first to study cross-country variations in settlements, comparing the United States and the United Kingdom.

[10] Susan Rose-Ackerman. *The Economics of Corruption*. 4(2) JOURNAL OF PUBLIC ECONOMICS, 187-203. (1975).

[11] Jennifer Arlen, *Corporate Criminal Liability: Theory and Evidence* in, RESEARCH HANDBOOK ON THE ECONOMICS OF CRIMINAL LAW, (Alon Harel and Keith N. Hylton, Eds) Edward Elgar Publishing (2012). SHARON ODED, CORPORATE COMPLIANCE. Edward Elgar Publishing (2013).

The impact of enforcement actions will depend on how individuals, who allow or condone the corporations' harmful acts, can be held responsible. The economic intuition about crime deterrence leads to a different result if the net gain from crime also depends on these decision-makers' moral burden, or moral cost. Ethically conscious decision-makers are less inclined to commit crime, regardless of the size of expected fines, for the same reason that most people will not steal an unprotected wallet: they *are not* people who steal. This moral position may evolve independently of the size of penalties, depending instead on a range of other factors, including the governance situation and the respect and trust accorded the criminal justice system in society.

This is why legitimacy is another essential criminal justice value. An enforcement system that ignores the principles of fair process will not generate the trust it requires to function as a catalyst for moral development. Why should citizens respect a criminal justice system and the laws it defends if those in charge enforce the law arbitrarily, protect and favour the privileged, fail to find the facts of a case before they condemn an offender, and ignore human rights? On the contrary, a system that enforces laws enacted through a democratic process, protects the autonomy of the individual – so that it is considered worse to punish an innocent person than to let a guilty person go free – and aims to find the truth of a case for the sake of signalling moral judgment is more likely to be heeded. Corporations consist of multiple powerful players. If some of them are pure profit maximizers whose crime is not deterred by the risk of penalties, serious corporate crime might yet be prevented if others refuse to be involved in actions deemed wrong by a trusted criminal justice system. Could a legitimate system that encourages crime prevention be found efficient irrespective of the total burden of sanctions?

It would depend on cost-efficiency as well, and this is the third essential aim. A system able to attach a certain moral burden to crime may achieve its objectives at a lower cost than a system built on the cat-and-mouse approach combined with high penalties and long prison terms. For a government, however, this option depends on its standing in society. It cannot expect to have the necessary moral authority if political leaders themselves are considered corrupt, if the government tries to silence critical journalists, if law enforcers torture prisoners until they confess, and if laws are passed without due democratic process. Therefore, the function and impact of the criminal justice system is hard to isolate from the performance of government overall.

2.2 Efficiency trade-offs

How governments balance the values associated with criminal law comes to expression in their enforcement of corporate liability. The following efficiency trade-offs are particularly relevant to the enforcement of corporate bribery laws.

i) *Trust-based for detection or threat-based for deterrence.* A tough, uncompromising system with strict controls may have what it takes to be trusted as a law enforcer against serious crime. As sanctions become more severe and threatening, deterrence is enhanced, but it becomes more difficult to ensure cooperation between firms and investigators for the sake of efficient law enforcement. The higher the expected penalty, the more inclined the offender is to hide the crime, instead of self-reporting its involvement in bribery.

ii) *Enforcement action based on guilt or responsibility.* Vicarious liability for corporations encourages corporate self-policing if involvement in crime, once detected, automatically leads to undesired consequences. At the same time, undesired consequences for innocent actors are likely to be seen as unfair. The more unfair the consequences of enforcement actions, the weaker the criminal justice system's moral authority. However, the more important to determine the extent of negligence, the more expensive the enforcement action.

iii) *Flexibility or predictability.* When there are few limits on the prosecutor's authority, this implies broad discretion and an opportunity to tailor an enforcement action to the specific context, combining the sanction with integrity systems and monitoring. However, the more

> flexible the enforcement system, the harder it is to secure law enforcement predictability. Different enforcement solutions to what appear to be similar cases may reduce citizens' trust in the system and in its ability to secure legal egalitarianism.

There is no single truth regarding optimal enforcement of corporate bribery legislation. Different societies will consider these trade-offs differently. The definition of an efficient or principled criminal law approach in corporate liability cases may depend on contextual factors, history, culture, and the magnitude of crime problems. Empirical investigations of countries' *de facto* efficiency standards are complicated. Governments have strategic priorities, but they rarely assign an explicit ranking to the fundamental values of their law enforcement system.[12] Instead, they tend to proclaim efficiency, justice, and value for money as if these aims were equally important. Moreover, criminal justice systems are given the ultimate responsibility for crime control, yet corruption and other sorts of crime occur for reasons outside the control of these systems, and so an increase or decrease in the extent of corruption cannot be attributed to the criminal justice system alone. Indeed, there are no accurate estimates of the extent of the problem. Corruption normally happens in secret. For researchers it is nearly impossible to determine a law enforcement system's impact on society, and therefore it is difficult to estimate its efficiency.

To better understand what constitutes good enforcement of corporate liability, we have explored what the IBA survey results can tell us about different governments' priorities regarding the efficiency of their criminal justice systems.

3. Expressions of efficiency priorities in the IBA survey results

The IBA survey presents information about corporate liability and enforcement practices across 66 countries; it was not developed for a study of the efficiency trade-offs discussed above.[13] However, the results do contain information about such aspects as the formal and actual sphere of enforcement, law enforcement's required transparency, and the degree of judicial oversight imposed on the law enforcement process. How can these findings inform us about efficiency in the enforcement of corporate liability?

3.1 Prosecutors' discretionary authority to settle bribery cases

A study of settlements in a broader criminal law context quickly leads to the role of prosecutors. When criminal cases are concluded out of court, the prosecutor's role and her level of discretionary authority become more important to the result. Generally, "a public officer has discretion whenever the effective limits on his power leave him free to make a choice among possible courses of action or inaction".[14] The level of discretion granted to a prosecutor is determined by the explicit procedural laws (*de jure* discretion) and less-formal norms and guidelines (*de facto* discretion) available in the jurisdiction. If plea bargain[15] is permitted, the degree of discretionary authority will determine the prosecutor's ability

[12] Even in countries with an independent criminal justice system, the government shapes policies and priorities through explicit policy instructions, budget allocations, and laws approved by parliament.

[13] All respondents except two were lawyers from private law firms associated with the International Bar Association. The other two respondents were lawyers working for a public institution. Makinwa and Søreide s*upra* note 6, provide the list of respondents and the firms/institutions they represent. The report is available online free of charge.

[14] Kenneth C. Davis, *Discretionary justice: A preliminary inquiry. LSU PRESS 4 (1969)*

[15] "Plea bargaining occurs when the prosecutor induces a criminal accused to confess guilt and to waive his right to trial in exchange for a more lenient criminal sanction than would be imposed if the accused were adjudicated guilty following trial. The prosecutor offers leniency either directly, in the form of a charge reduction, or indirectly, through the connivance of the judge, in the form of a recommendation for reduced sentence that the judge will follow. In exchange for procuring this leniency for the accused, the prosecutor is relieved of the need to prove the accused's guilt, and the court is spared having to adjudicate it. The court condemns the accused on the basis of his confession, without independent adjudication." John H. Langbein, *Torture and plea bargaining.* 46.1 THE UNIVERSITY OF CHICAGO LAW REVIEW 8 (1978)

to dictate the terms of this agreement. The prosecutor makes decisions that affect both the pre-trial and trial outcomes, and is usually the one who proposes the sanction that ends the case if accepted by the defendant. In addition, under *prosecutorial sentencing*, some jurisdictions grant prosecutors the right to impose criminal sanctions, giving them an authority formerly granted only to judges. This judge-like role also occurs when the prosecutor offers and agrees to a bargained settlement, because the prosecutor concludes processes that are otherwise associated with court judgment.[16]

The set of rules that determine the prosecutor's discretionary authority reflects priorities within criminal justice systems. Imposing more limits on what the prosecutor can do may secure more consistency across cases, but it becomes more difficult to tailor the enforcement process and outcomes to the circumstances. From an economic perspective, one would consider the likely threshold that an actor (an individual or firm) has for committing a crime. A rigid system will require the prosecutor to propose the same sanction for similar crimes, while a less rigid system enables the prosecutor to propose different sanctions for similar crimes.[17] Generally speaking, a rigid system will deter every actor who has a threshold for committing a crime that is lower than the proposed sanction, while actors with a threshold higher than the sanction will still commit the crime. In theory, a less rigid system allows the prosecutor to tailor a sanction to the actor's unique threshold level; this means that actors are more efficiently deterred at a minimum sanction, and therefore at a lower cost to society. Whether an actor's threshold is higher or lower than the expected sanction is influenced, for example, by rules that require the actor to admit guilt. Admission of guilt will prevent a settlement outcome in cases where the actor has reason to fear that such admission may lead to compensation claims, debarment from public procurement, reputational costs, and collateral damage that in total constitute a burden that surpasses the actor's personal threshold. Strict judicial review of the settlement outcome will limit the prosecutor's freedom because the result needs to be approved by a second level. However, both a system with wide discretion and a system with rigid rules for the prosecutor can be compatible with incentives for corporate self-policing and self-reporting; it depends on the content of those rigid rules and the circumstances for autonomous prosecutors. This is why the question of which system provides the greatest efficiency remains unanswered.

3.2 A Prosecutor Discretion Index

The IBA survey asked respondents in 66 jurisdictions about the rules regulating use of settlements in corporate bribery cases, focusing on their degree of rigidity or laxness. Based on their responses, we have developed an index to estimate the extent of discretion each country grants its prosecutors.[18] The Prosecutor Discretion Index is based on survey questions that specifically address aspects of prosecutor authority, eliciting both qualitative and quantitative replies.[19] Each country receives scores on five sub-variables: the prosecutor's opportunity to drop the case, the *de jure* bargaining freedom, the *de facto* bargaining freedom, the number of items subject to bargaining, and ex post monitoring.[20] Responses are ranked on a scale from 0 to 5, where 0 is no discretion and 5 is full discretion. For example, if the respondent states that prosecutors have unfettered discretion in choosing which cases to drop, that jurisdiction gets a score of 5 on the sub-variable 'prosecutor's opportunity to skip the case'. The score would be 4 if the respondent replied that the prosecutor has wide discretion on which cases to drop but is bound by some vaguely defined criteria in this regard. These scores are then aggregated, with all five

[16] ERIK LUNA and MARIANNE WADE, THE PROSECUTOR IN TRANSNATIONAL PERSPECTIVE, Oxford University Press (2012)

[17] For an explanation of how these differences influence law enforcement, see Jennifer F. Reinganum, *Plea bargaining and prosecutorial discretion*, THE AMERICAN ECONOMIC REVIEW, 713-728 (1988)

[18] Makinwa and Søreide, s*upra* note 6.

[19] See the Appendix for survey questions included in the Discretion Index and which questions the constribute to the different subvariables.

[20] The IBA survey questions include such aspects as prosecutor institutional independence and whether the jurisdiction abide by the legality principle or opportunity principle – and these aspects are captured in some of the variables included in the index, although these factors are not listed as independent variables.

sub-variables weighted equally. The survey also maps the transparency of negotiated settlements, but this factor is not included in the index. All answers were fact-checked to make sure that the legal references to which a respondent refers correspond with the respondent's answer on the specific question.

Based on the aggregate scores, the Discretion Index gives an overall picture of how countries differ in prosecutorial discretion, as shown in Table 1. For example, France, Croatia, Serbia, Montenegro, and the United States grant their prosecutors a high degree of discretion, while Egypt, Brazil, the United Kingdom, Azerbaijan, and Denmark are more conservative in this regard. Certain caveats should be kept in mind. Each jurisdiction's scores on the sub-variables depend on the answers provided by a single respondent – one respondent per jurisdiction. This, of course, represents a weakness in the data, as different lawyers might perceive the situation differently, and this subjectivity must be taken into account when interpreting results. Moreover, the survey represents a snapshot of the situation at the moment it was conducted. Enforcement practices evolve rapidly in many countries, and some jurisdictions may have introduced new rules after the survey was conducted. For both reasons, the Discretion Index is only one indicator of the situation in each jurisdiction, and should be taken into account along with other indicators in drawing conclusions.

COUNTRY	**Prosecutor Discretionary Index**	Opportunity to skip the case	De jure bargaining freedoms	De facto bargaining freedoms	Ex post monitoring	*Transparency for the public*
France	4,25	5,0	5,0	5,0	2,0	*4,0*
Croatia	4,25	4,0	5,0	4,0	4,0	*1,0*
Montenegro	3,91	5,0	2,6	4,0	4,0	*1,0*
Serbia	3,91	5,0	2,6	4,0	4,0	*1,0*
United States	3,84	5,0	5,0	3,3	2,0	*4,0*
Bulgaria	3,84	4,0	4,0	3,3	4,0	*2,0*
Bosnia and Herzegovina	3,84	4,0	4,0	3,3	4,0	*1,0*
Ireland	3,84	4,0	4,0	3,3	4,0	*1,0*
Belgium	3,84	5,0	5,0	3,3	2,0	*1,0*
Israel	3,75	4,0	4,0	5,0	2,0	*5,0*
Singapore	3,66	4,0	2,6	4,0	4,0	*1,0*
Japan	3,59	4,0	3,0	3,3	4,0	*3,0*
Macedonia	3,59	5,0	2,0	3,3	4,0	*2,0*
Slovak Republic	3,50	3,0	3,0	4,0	4,0	*3,0*
Netherlands	3,50	4,0	4,0	4,0	2,0	*2,0*
Czech Republic	3,50	2,0	3,0	5,0	4,0	*1,0*
South Korea	3,50	4,0	2,6	3,3	4,0	*1,0*
Honduras	3,41	3,0	2,6	4,0	4,0	*1,0*
Finland	3,34	4,0	4,0	3,3	2,0	*4,0*
Paraguay	3,34	4,0	4,0	3,3	2,0	*4,0*
Ecuador	3,34	3,0	3,0	3,3	4,0	*3,0*
Chile	3,34	4,0	4,0	3,3	2,0	*3,0*
Lithuania	3,34	5,0	1,0	3,3	4,0	*2,0*
Taiwan	3,34	4,0	4,0	3,3	2,0	*2,0*
Luxembourg	3,34	5,0	3,0	3,3	2,0	*2,0*
Hungary	3,34	4,0	4,0	3,3	2,0	*1,0*
Slovenia	3,34	4,0	4,0	3,3	2,0	*1,0*
Nigeria	3,16	4,0	2,6	4,0	2,0	*3,0*
Romania	3,09	2,0	3,0	3,3	4,0	*3,0*
Poland	3,09	2,0	3,0	3,3	4,0	*2,0*
Austria	3,09	2,0	3,0	3,3	4,0	*1,0*
Albania	3,09	3,0	2,0	3,3	4,0	*1,0*
Russia	3,00	3,0	3,0	4,0	2,0	*2,0*

Bolivia	2,91	2,0	2,6	3,0	4,0	*2,0*
Costa Rica	2,84	2,0	2,0	3,3	4,0	*2,0*
Peru	2,84	2,0	2,0	3,3	4,0	*2,0*
Portugal	2,84	2,0	2,0	3,3	4,0	*2,0*
Ukraine	2,84	2,0	2,0	3,3	4,0	*2,0*
Argentina	2,84	3,0	3,0	3,3	2,0	*2,0*
Colombia	2,84	2,0	2,0	3,3	4,0	*1,0*
El Salvador	2,84	2,0	2,0	3,3	4,0	*1,0*
Indonesia	2,84	2,0	2,0	3,3	4,0	*1,0*
Uruguay	2,84	2,0	2,0	3,3	4,0	*1,0*
Malaysia	2,84	3,0	1,0	3,3	4,0	*1,0*
Nicaragua	2,84	3,0	1,0	3,3	4,0	*1,0*
Kazakhstan	2,75	2,0	3,0	4,0	2,0	*4,0*
Belarus	2,75	2,0	2,0	3,0	4,0	*3,0*
Switzerland	2,75	2,0	3,0	4,0	2,0	*3,0*
Norway	2,75	4,0	1,0	2,0	4,0	*2,0*
United Arab Emirates	2,75	4,0	2,6	3,3	1,0	*1,0*
Canada	2,66	2,0	2,6	4,0	2,0	*4,0*
Greece	2,50	1,0	2,0	3,0	4,0	*1,0*
Guatemala	2,41	1,0	2,6	2,0	4,0	*1,0*
Mexico	2,41	2,0	2,6	3,0	2,0	*1,0*
Italy	2,34	1,0	1,0	3,3	4,0	*2,0*
Turkey	2,34	1,0	1,0	3,3	4,0	*1,0*
Estonia	2,25	2,0	2,0	3,0	2,0	*4,0*
Latvia	2,25	2,0	2,0	3,0	2,0	*3,0*
Germany	2,25	1,0	1,0	3,0	4,0	*2,0*
Spain	2,25	2,0	2,0	3,0	2,0	*2,0*
Sweden	2,25	2,0	1,0	2,0	4,0	*1,0*
Azerbaijan	2,00	1,0	1,0	2,0	4,0	*3,0*
Denmark	2,00	1,0	1,0	2,0	4,0	*1,0*
England and Wales	1,75	1,0	1,0	3,0	2,0	*4,0*
Brazil	1,75	1,0	2,0	2,0	2,0	*3,0*
Egypt	1,50	2,0	1,0	2,0	1,0	*1,0*

Table 1: Degree of prosecutorial discretion with sub-variables based one the IBA-surveyed countries. Transparency is not included in the PDI.

For our study of enforcement systems, we chose to use a compilation of information about prosecutors' authority across jurisdictions instead of considering the individual sub-variables, which would make it clearer exactly what sort of authority we are addressing. We preferred the compilation to studies of the separate responses because we wanted to capture a broad sense of prosecutorial discretion. For this purpose, the variation in the narrower sub-indicators was too arbitrary. In section 4, we will discuss how the Discretion Index correlates with certain governance indicators.

4. Analysis of governance indicators and prosecutorial discretion

In line with our discussion in section 2 about the three main categories of criminal justice values, we now investigate how the level of prosecutorial discretion correlates with three variables: (a) the extent of corporate corruption in society; (b) the legitimacy of the government system, most meaningfully reflected in a well-functioning democracy and the rule of law; and (c) the budget for law enforcement relative to other budget categories, to establish whether more prosecutorial discretion is associated with larger or smaller budgets for law enforcement.

4.1 The relationship between prosecutorial discretion and the extent of business-related corruption

The World Bank Enterprise Survey collects data from some 135,000 respondents across 139 countries. Firms' self-reported experience with corruption is an indicator of the extent of such crime across

countries, and is highly relevant to our own study, which focuses on corporate practices and liability. Within the World Bank dataset, we selected three specific indicators of corruption: the percentage of firms that had encountered a bribery incident over the last 12 months; the percentage that considered corruption to be a major business constraint; and the percentage that found the courts to be a major business constraint. Comparing these data to the IBA survey data, we found no clear correlation between the extent of corruption reported by firms and the level of prosecutors' discretionary authority.

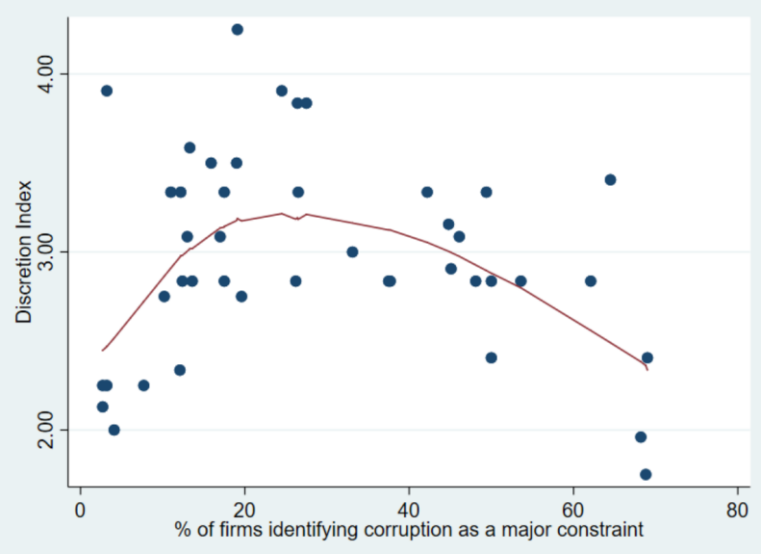

Figure 1: Discretion Index and the percentage of firms in different countries that consider corruption to be a major constraint on business with LOWESS curve.

As Figure 1 illustrates, there is no clear correlation between firms experiencing corruption as a major constraint and reported prosecutorial discretion. Based on this result, there is no reason to claim that a system with broad or narrow prosecutorial discretion is associated with less crime. A closer look at the data, however, reveals that among countries with a high score on the Discretion Index (>3.5), there are very few where corruption is described as a major constraint by over 30 per cent of firms. While providing no basis for claims about causality (as discussed in section 2), this result suggests that government systems that allow their prosecutors broad discretionary authority in corporate liability cases also manage to control corruption fairly well.

When it comes to confidence in courts, we find that countries where a low (<15%) percentage of firms consider courts to be a major constraint on business tend to allow their prosecutors broader discretionary authority (>2.5). Therefore, broader discretion granted to prosecutors appears to correlate with firms having fewer problems with the court system. This may reflect the fact that prosecutorial discretion implies a limit to the court's monopolistic authority. It could also mean that courts are perceived as less of an obstacle to business if cases can be solved with the prosecutor, without the involvement of a court, irrespective of the extent of corruption.

4.2 Connections between prosecutorial discretion and system legitimacy

As we study which countries grant their prosecutors broad discretionary authority, the most striking finding is that rigid rules for prosecutors tend to correlate with poor scores on indicators of governance legitimacy. We ranked countries included in the IBA survey using the Economist Intelligence Unit (EIU) Democracy Index of 2018.[21] Considering the relationship between democratic performance and prosecutors' discretion to settle cases out of court, we find that the least democratic countries limit their

[21] For details about the index see https://www.eiu.com/topic/democracy-index.

prosecutors' authority much more than countries that are more democratic.[22] Intuitively, governments with weaker democratic institutions may need a more rigid system to build confidence in state authority and to make sure their prosecutors act according to the government's goals.[23] Better democratic performance (between 2 and 6 on the Democracy Index) is associated with higher scores on the Discretion Index (see Figure 2). As countries develop politically, they grant their prosecutors more discretionary authority, it seems. One explanation might be that governments offer wide procedural discretion to prosecutors under circumstances where it is more important to be seen as a tough enforcer, while legitimate process comes second. One example could be Georgia after the post-Soviet Rose Revolution, when ample discretion was granted to prosecutors in an effort to curb widespread corruption.[24]

However, Figure 2 also shows a somewhat concave relationship between the variables: as countries develop even further in terms of democratic performance, scoring higher than 6 on the EIU Democracy Index, they tend to add restrictions on prosecutors' discretionary authority. One interpretation of this finding is that as societies develop politically, they establish rules that match their desired enforcement practices, and these new, more rigid rules secure enforcement decisions that other countries need a certain level of discretion to obtain. This is consistent with the current evolution regarding settlements: as more countries introduce such enforcement practices as a real, *de jure* alternative to court proceedings,[25] they want a system where rules secure both legitimacy and the right incentives for firms. In that respect, the curve in Figure 2 may indicate a prognosis, namely that with evolution toward democratic norms, we will see stricter systems for the use of non-trial resolutions – an approach also promoted by the Organisation for Economic Co-operation and Development (OECD) Working Group on Bribery.[26] (This possible prognosis is supported by a similar relationship between discretionary authority and rule of law; see the Appendix, part 7.5.)

[22] Anne Van Aaken, Lars P. Feld, and Stefan Voigt, *Do Independent Prosecutors Deter Political Corruption? An Empirical Eevaluation Across Seventy-eight Countries.* 12(1) AMERICAN LAW AND ECONOMICS REVIEW, 204-244 (2010).

[23] Less democratic countries tend to have more corruption problems. However, a rigid enforcement system does not necessarily imply more opportunity for (corrupt) politicians to interfere in enforcement practices.

[24] Lilli di Puppo, *Police reform in Georgia. Cracks in an Anti-corruption Success Story*, 2 U4 PRACTICE INSIGHT (2010)

[25] Abiola Makinwa, Chapter in *Negotiated Settlements in Bribery Cases: A Principled Approach*, (Forthcoming)

[26] See International Guidelines for Non-trial resolutions of Foreign Bribery Cases (Oct. 31, 2018) https://www.nhh.no/en/research-centres/corporate-compliance-and-enforcement/guidelines-for-non-trial-resolutions/

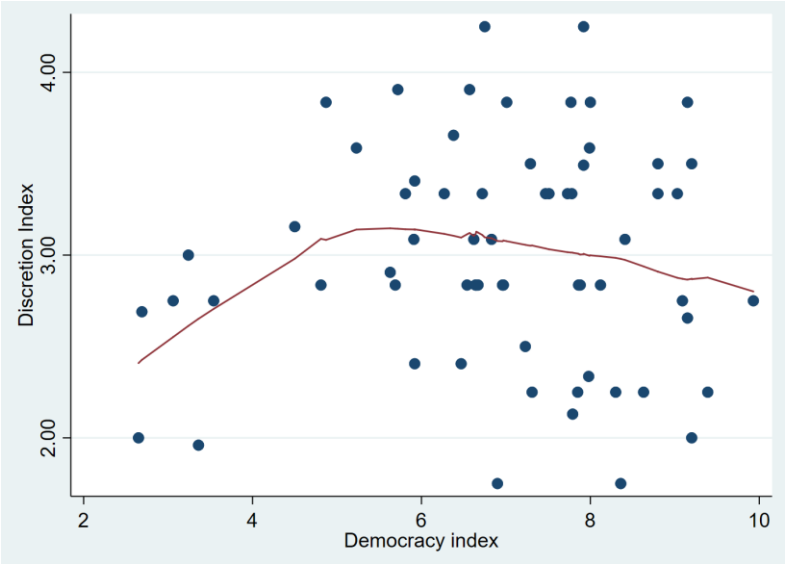

Figure 2: Discretion Index vs. Democracy Index with LOWESS curve.

The IBA survey results provide too weak a basis for any firm conclusions in this respect. In fact, as scores rise on the Democracy Index, scores on the Discretion Index become more widely scattered, indicating a greater spread in countries' levels of prosecutorial discretion. The United States, for example, chooses to grant its prosecutors broad discretion. The main reason it receives a high score on the Discretion Index is the absence of regulations regarding what prosecutors can offer as components of sanctions in negotiated settlements.[27] While the United States is not among the top scorers in terms of democratic performance, it is highly trusted internationally as a law enforcer in corporate liability cases. In general, the US prosecutor is expected to fulfil the goals set by society without strict supervision, although there are academic debates about the risks associated with such vast discretion. [28] The United Kingdom, another common law country, falls at the opposite end of the Discretion Index from the United States, despite a similar level of democratic performance. Compared to the US, the UK is far more restrictive in giving its prosecutors discretionary authority for non-trial enforcement outcomes. This might reflect greater political emphasis on consistency across cases – and by extension, on equality before the law – for the sake of securing the public's trust in the system, as discretion granted to individual prosecutors is easily associated with a less unified enforcement system.

What are the implications for law enforcement efficiency? Discretionary authority might be particularly useful under circumstances where it is difficult to tell which rules would provide the right incentives to corporations to comply with the law and self-report incidents when they happen.[29] As this becomes clearer for regulators, more regulations might be warranted for the sake of legitimacy. In many settings, restricted discretionary authority is considered a pillar of integrity because the system's performance becomes less dependent on the personal integrity of individuals. That means some rigidity regarding prosecutors' freedom with respect to non-trial resolutions is associated with lower risk of favouritism and other forms of biased decision-making.

[27] See guidelines for FCPA enforcement. The guide refers mainly to the process up until sentencing. The sentencing and resolution part leaves the prosecutor with wide discretion. See https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2015/01/16/guide.pdf

[28] Jennifer Arlen and Marcel Kahan, *Corporate Governance Regulation through Nonprosecution*, 84 U. CHI. L. REV. 323-387 (2017).

[29] Arlen, s*upra* note 11.

4.3 Connections between prosecutorial discretion and budget for law enforcement

Across countries, there is variation in the political will to allocate budget for law enforcement, meaning the police and court systems.[30] While settlements allow for 'smart sanctions' – those that push firms onto the preventive track, instead of into a cat-and-mouse game with investigators – some governments may also see settlements as an opportunity to cut expenses for the enforcement of corporate criminal liability. To what extent do small budgets for enforcement imply settlement-friendliness?

Less democratic countries spend more money on law enforcement, relative to other budget categories, than do more democratic countries.[31] As a percentage of gross domestic product (GDP), governments' budgets for law enforcement are higher the less democratic they are, as illustrated in Figure 3. Given that crime rates are typically lower in more democratic societies, which tend to spend less, it is tempting to claim that these countries have more efficient law enforcement systems that keep crime rates low at less financial expense to society.

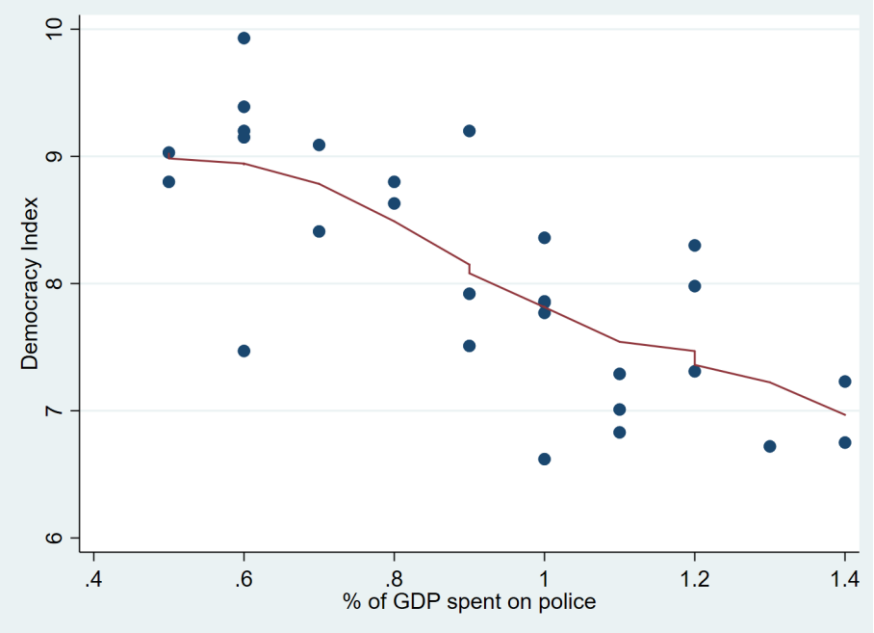

Figure 3: Democracy Index vs. percentage of GDP spent on police with LOWESS curve.

However, we need to look more carefully at the data. Most notably, if we consider countries' law enforcement budgets *per capita*, rather than as a share of GDP, we find that the most democratic countries spend more on law enforcement than less democratic societies. The results are largely driven by the Nordic countries – rich, democratic polities with small populations. Norway, Denmark, and Sweden spend approximately 0.2 to 0.3 per cent of their GDP on court systems, and 0.6 per cent on police forces. These figures may appear low, but on a per capita basis, the expenditures in these countries are actually much higher than in most undemocratic countries, which are often poorer. On the other hand, the high wage level in the Nordic countries implies that most of this additional spending goes to salaries, and thus the effective amount of resources for law enforcement may be similar to what is found in countries with lower expenses.

[30] An example of how shortcomings may be pronounced is *De Cubber v. Belgium* (9186/80), ECHR section 34–35 where Belgium is criticized for not allocating sufficient funds to its courts. For a review of problems with law enforcement in bribery cases, see TINA SØREIDE, CORRUPTION AND CRIMINAL JUSTICE: BRIDGING ECONOMIC AND LEGAL PERSPECTIVES, 76-115. Edward Elgar (2016)

[31] The data is are limited to the EU-28 28 European Union countries plus Norway, Iceland, and Switzerland. See Eurostat, Government expenditure on public order and safety (2016), https://ec.europa.eu/eurostat/statistics-explained/index.php/Government_expenditure_on_public_order_and_safety

5. What extent of prosecutorial discretion seems right for different groups of countries?

Our study of prosecutorial discretion across the 66 countries included in the IBA survey shows how countries that manage to control corruption vary in the degree of discretion they grant their prosecutors. We also see that in countries where prosecutors have the flexibility they need to settle cases out of court, firms tend to regard the court system as less of an obstacle to business. We find the most rigid rules for prosecutors in countries with weak democratic systems. With political development, prosecutors obtain more discretionary authority; countries with reformist governments may even let prosecutors' freedom go too far, at the expense of due process, in an effort to create an environment less tolerant of corruption. We mentioned Georgia as one example.

The most democratic countries are now inclined to introduce stricter regulations for prosecutors, including constraints on their freedom to determine the content of negotiated settlements in corporate bribery cases. The rigidity associated with this category of countries is different from the restrictions imposed in the least democratic countries, especially insofar as the difference between *de jure* and *de facto* discretion is smaller for the more democratic countries. In particular, countries that are more democratic are in general more transparent, which limits the prosecutor's freedom. Governments in the most democratic countries have started to consider limits on prosecutorial authority in non-trial circumstances as a condition for system legitimacy. Several countries that rate high on the EIU Democracy Index were the first to introduce rules for non-trial resolutions, including the United Kingdom, Canada, Spain, and Switzerland, while Norway and Australia, among others, are currently considering adoption of clearer regulations.

It is tempting to interpret the broader discretion for prosecutors in the United States as a reflection of its relatively weak democratic system (the EIU index categorizes the United States as among 'flawed democracies'). This could explain why politicians might have granted prosecutors wide discretion to achieve efficient law enforcement. However, given the United States' impressive track record in corporate liability cases – as a frontrunner with more enforcement cases against foreign bribery than all other countries combined, and as a regulator for market integrity more generally – this interpretation is inadequate. In addition, other countries that have introduced or are about to introduce clearer regulations for settlements cannot claim to have flawless enforcement systems.

In the United Kingdom, for example, prosecutors offer settlements under strict regulations (the UK score on the Discretion Index is a low 1.75), while the country scores very well when it comes to both democracy and the rule of law. While this might seem like an ideal situation, given the arguments above, the UK enforcement system is heavily criticized for its management of recent corporate bribery cases. These include the cases against TESCO[32] and Rolls Royce, both of which received fairly low sanctions.[33] Although the firms in both cases accepted the facts of their case, no individual received criminal sanctions. The outcomes did little to secure public confidence in the enforcement system's ability to prevent crime or to treat individuals equally before the law.[34]

Sweden, another top democracy with a highly trusted government, has an enforcement regime with restricted discretion for prosecutors, but it still has few if any regulations governing non-trial resolutions. The system faced criticism recently due to its management of the Telia case, in which a Swedish telecommunications firm agreed to pay nearly $1 billion in a settlement with US prosecutors because it had paid bribes to the daughter of the Uzbek president in order to obtain mobile phone licenses in

[32] See Zoe Wood and Sarah Butler, Two Tesco directors cleared of fraud as judge labels case 'weak' (Dec. 6, 2018), https://www.theguardian.com/business/2018/dec/06/two-tesco-directors-cleared-of-false-accounting.

[33] Serious Fraud Office (SFO), Rolls-Royce PLC (Feb. 22, 2019) https://www.sfo.gov.uk/2019/02/22/sfo-closes-glaxosmithkline-investigation-and-investigation-into-rolls-royce-individuals/ and https://www.sfo.gov.uk/cases/rolls-royce-plc/.

[34] The deferred prosecution agreement (DPA) with TESCO stated the names of the three managers (the guilty minds), as the UK Bribery Act requires at least one person in the firm to be the 'controlling mind and will'. The SFO charged the individuals, but they were all acquitted based on insufficient evidence.

Uzbekistan.[35] While the lines of responsibility appeared quite clear, the firm's executives were all acquitted in Sweden.[36] In Norway, the Norwegian chief executive of the subsidiary of a state-owned company could not be charged for bribery in a parallel case with a US-driven settlement resulting from bribery in Uzbekistan; instead, he claimed a record-high compensation for the burden of having been investigated unfairly. In Canada, the prime minister was criticized in spring 2019 for his attempt to shield a large firm in his home city from investigation and charge in a corporate bribery case.

These cases illustrate how the best-performing governments can have problems with the enforcement of corporate liability in bribery cases, despite their stellar legislation, checks on prosecutors, and well-trusted governance systems. Unless enforcement systems take action against responsible individuals, better procedures for corporate sanctions may be insufficient for a system to be found trustworthy and *efficient*. A legitimate system protects individuals from criminal law sanctions when there is no proof of criminal intent, but only of negligence. Nonetheless, in such cases it may be possible to impose non-criminal sanctions, such as debarment from certain positions or non-criminal fines.[37] Leaders who go free in serious bribery cases – and who may claim huge compensation if investigated because they had the line responsibility for the relevant business unit – provoke criticism among the public. A system for negotiated settlements in corporate bribery cases may well encourage compliance, risk assessment, and self-reporting, but it will not be deemed efficient unless justice is seen to happen.

6. Conclusion

This chapter explains why differences in prosecutorial discretion exist and how some of these differences are manifested. We find no clear international trend when it comes to the extent of discretionary authority granted to the prosecutor. Different countries belonging to different legal paradigms treat law enforcement differently, and this affects the prosecutor's position. However, the use of settlements in corporate bribery cases does not appear to be motivated by the opportunity to cut budget for law enforcement, even if settlements normally implies lower expenses per enforcement case. Instead, jurisdictions that grant their prosecutors broad freedom, are also among the ones with the highest budgets for law enforcement. Consistent with this result, prosecutors have more freedom to end cases with a settlement in countries where firms report fewer problems with corruption. Developing countries with less democratic institutions and weaker checks and balances in politics tend to have the most rigid rules for prosecutors and limited flexibility for negotiated settlements. As countries develop politically, their prosecutors obtain more freedom, which means that negotiated settlements become possible. Among the most democratic countries, however, the trend shifts again, and we observe a reduction in the gap between *de jure* and *de facto* discretion, indicating that law enforcement institutions enjoy less discretionary freedom to negotiate settlements with corporate offenders. On the basis of our analysis and given our three-dimensional concept of enforcement efficiency, a system that uses settlements in corporate bribery cases is no less *efficient* than a system that keeps to court proceedings. In light of the limited evidence currently available, more research is needed to draw clear conclusions regarding the optimal extent of prosecutorial discretion and its impact on the prevention of corruption and other sorts of crime.

[35] DOJ, Telia Company AB and Its Uzbek Subsidiary Enter Into a Global Foreign Bribery Resolution of More Than $965 Million for Corrupt Payments in Uzbekistan (Sept. 21, 2017) https://www.justice.gov/opa/pr/telia-company-ab-and-its-uzbek-subsidiary-enter-global-foreign-bribery-resolution-more-965.

[36] Olof Swahnberg and Helena Soderpalm, 2-Swedish court acquits former Telia CEO in Uzbekistan bribery probe (Feb. 15, 2019) https://www.reuters.com/article/telia-verdict/update-1-swedish-court-acquits-former-telia-ceo-in-uzbekistan-bribery-probe-idUSL5N20A2VF.

[37] For further explanation, see Jon Petter Rui and Tina Søreide. *Governments' Enforcement of Corporate Bribery Laws: A Call for a Two-Track Regulatory Regime*, 2 TIDSSKRIFT FOR RETTSVITENSKAP (2019).

7. Appendix

This appendix contains:

Questions from the IBA survey relevant to the development of the Discretion Index

Regression analysis of the sub-variables

Democracy Index compared with the independence of the courts

Discretion Index compared with the World Justice Project's Rule of Law Index

7.1 Questions from the IBA survey included in the Discretion Index

The survey is based on responses to the following questions (Numbers refer to the numbering of questions in the IBA survey).[38] The response to the different questions make up the sub-variables listed in table 1. Question 2.1.1 to 2.1.3 provides the data for the score given on the *opportunity to skip the case*. Survey question 2.1.4, until 3.2.6 and 3.5 will either contribute to *de jure bargaining freedom* or *de facto bargaining freedom* or both depending on the respondent's explanation and reference. E.g. if the decision to plea bargain is granted to the prosecutor by law the *de jure* score in influenced. If the opportunity to plea bargain in practice is exercised by the prosecutor thought a norm or practice the *de facto* score is influenced. Survey question 3.3 provides information about the *ex post monitoring* and survey question 4.1 provides the inputs for *transparency for the public*.

2.1 Do prosecutors have unfettered discretion with regard to the following:

2.1.1 Deciding whom to charge with a crime?

2.1.2 Deciding what charges to file?

2.1.3 Deciding whether to drop charges?

2.1.4 Deciding whether or not to plea bargain?

2.2 Which rules determine the exercise of prosecutorial discretion in your country?

2.3 Is there a threshold that determines when a prosecutor should make a decision to prosecute?

2.3.1 How clearly are the factors of this threshold defined?

3.1 Possibility for the alleged bribe payer to enter a structured settlement with enforcement authorities

3.1.1 Regardless of whether the process is formalised by law or regulations, is the resolution of foreign bribery allegation through a structured settlement possible in your country?

3.2.2 Which one of the following factors are taken into consideration by the enforcement authorities to determine the punishment imposed on the alleged bribe payer?

- Voluntary disclosure of wrongdoing/self-reporting
- Cooperation with enforcement authorities during the investigation
- Existing prevention and detection measures
  - Risk assessment
  - Training

[38] The numbering refer to the questions in the survey, only the questions used to develop the Discretion Index is included in this appendix. For the complete survey see: Abiola Makinwa and Tina Søreide, *Structured Criminal Settlements: Towards Global Standards in Structured Criminal Settlements for Corruption Offences*. International Bar Association (IBA), Anti-Corruption Committee, Structured Criminal Settlements Sub-Committee, 2018.

- Detection mechanisms such as internal, anonymous [whistleblowing mechanisms]
- Commitments to institute new prevention and detection measures
- Assistance in investigating and prosecuting individuals
- Other. Please specify

3.2.6 Are there limits on what the prosecution can offer?

3.3 Role of the court with regard to structured settlements

3.3.1 Prior to the settlement

3.3.2 Once the settlement has been reached

3.3.3 During the implementation of the settlement

3.5 *De facto* or *de jure*: In view of your answers to 3.1–3.4 above, would you describe the criminal settlement process for corruption offences in your country as a *de jure* process (i.e., one subject to clearly defined legal rules governing the proposal and implementation of structured settlements) or a *de facto* process (i.e., there is no clear legal framework for settlements)?

4.1 Public access to information on settlements

4.1.1 Is the information about settlements available to the public?

4.1.2 How detailed is the information provided about the settlement to the public?

4.1.3 Please indicate to what extent can a company negotiate the contents of the public statements on the case

7.2 Regression results/relationship between variables

Correlation matrix with the sub-variables:

	Discre~x	skipth~e	Dejure	Defacto	Expost~g	Transp~y	Democr~x	Ruleof~w
Discretion~x	1.0000							
skipthecase	0.8224	1.0000						
Dejure	0.8988	0.7113	1.0000					
Defacto	0.8017	0.4934	0.8215	1.0000				
Expostmoni~g	-0.1143	0.1301	0.2104	0.1690	1.0000			
Transparency	-0.0474	0.0752	0.1465	0.2203	0.5952	1.0000		
Democracyi~x	0.0017	0.0388	-0.1467	-0.1083	-0.3398	-0.1966	1.0000	
RuleofLaw	0.0021	0.0819	-0.1695	-0.0763	-0.3056	-0.0141	0.9113	1.0000

We observe no or minimal correlation between the Rule of Law Index, the Democracy Index, and the different sub-variables.

Source	SS	df	MS		
Model	10.6946704	6	1.78244507	Number of obs	= 22
Residual	.789256881	15	.052617125	F(6, 15)	= 33.88
				Prob > F	= 0.0000
Total	11.4839273	21	.54685368	R-squared	= 0.9313
				Adj R-squared	= 0.9038
				Root MSE	= .22938

DiscretionIndex	Coef.	Std. Err.	t	P>|t|	[95% Conf.	Interval]
skipthecase	.2102544	.0645982	3.25	0.005	.0725666	.3479423
Dejure	.3044008	.0938037	3.25	0.005	.1044629	.5043388
Defacto	.1643683	.099495	1.65	0.119	-.0477003	.3764369
Expostmonitoring	-.6097344	.1139846	-5.35	0.000	-.8526868	-.3667821
Transparency	-.0460329	.0549597	-0.84	0.415	-.1631767	.0711109
CCL	-.0273625	.1155261	-0.24	0.816	-.2736007	.2188756
_cons	1.401021	.2043629	6.86	0.000	.9654318	1.83661

The regressions indicate how the sub-variables influence the Discretion Index.

7.3 Democracy and prosecutors de facto and de jure independence.

In the data produced by van Aaken, Feld, and Voigt,[39] there is a more convincing correlation between prosecutors' independence and the Democracy Index. A prosecutor's independence tends to be higher in countries with a better-developed democracy. By regressing the variables on the Democracy Index, we find *de facto* independence to have a positive impact on democracy, with a 90 per cent confidence interval.

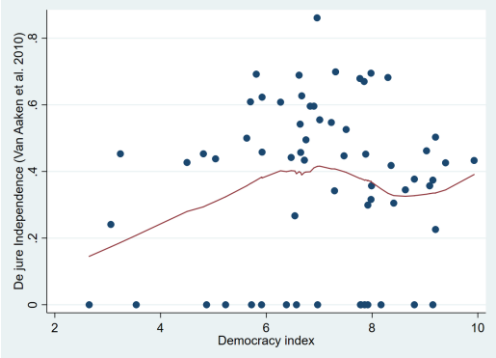

Figure 4: Democracy Index vs. de jure independence

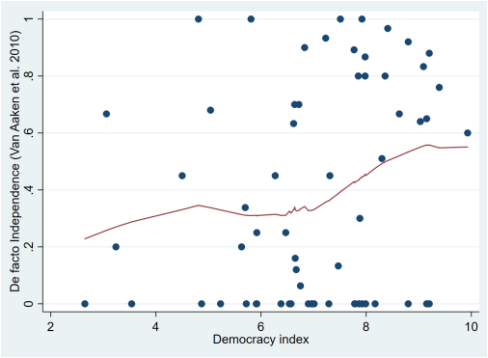

Figure 5: Democracy Index vs. de facto independence

[39] Anne Van Aaken, Lars P. Feld, and Stefan Voigt, *Do independent prosecutors deter political corruption? An empirical evaluation across seventy-eight countries.* (American Law and Economics Review 12.1 2010) 204-244.

7.4 Government spending on law enforcement

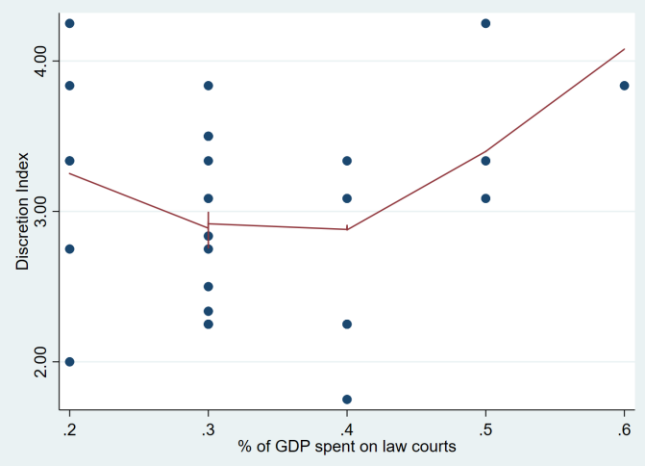

Figure 6: Discretion Index vs. percentage of GDP spent on law courts

We compared the Discretion Index with the percentage of GDP spent on law courts. Greater spending by a country on its courts correlates (marginally) with greater prosecutorial discretion. We also compared the Discretion Index with the percentage of GDP that countries spend on police. These results are rather inconclusive.

	Discre~x	gdpspe~s	gdpspe~e
Discretion~x	1.0000		
gdpspenton~s	0.0945	1.0000	
gdpspenton~e	0.0093	0.5708	1.0000

The Discretion Index correlates 0.09 with the percentage of GDP spent on law courts, and 0.009 with the percentage of GDP spent on the police.

7.5 Discretionary authority under rule of law

The World Justice Project Rule of Law Index ranks countries on a scale of 0 to 1, where the closer a country's score is to 1, the better the rule of law in that country.[40] We tested the hypothesis that countries with well-functioning rule of law will have a higher degree of prosecutorial discretion. No clear correlation was found between rule of law and the level of *de jure* discretion (the most relevant sub-variable of the Discretion Index). Countries that do well on the Rule of Law Index are spread across the spectrum of *de jure* discretion. However, no countries in the lower half of the Rule of Law scale score 5 on *de jure* discretion. As discussed above, however, countries tend to introduce more restrictions on prosecutors as their governments become more democratic, and as they reach the higher levels on the Rule of Law Index. (The correlation between the Discretion Index and the Rule of Law index is 0.027.)

[40] The WJP Rule of Law Index is based on responses from 120,000 households and 3,800 experts, which in 2019 covered 126 countries. The index relies on eight factors: constraints on government powers, absence of corruption, open government, fundamental rights, order and security, regulatory enforcement, civil justice, and criminal justice World Justice Project, Rule of Law Index, https://worldjusticeproject.org/our-work/research-and-data/wjp-rule-law-index-2019.

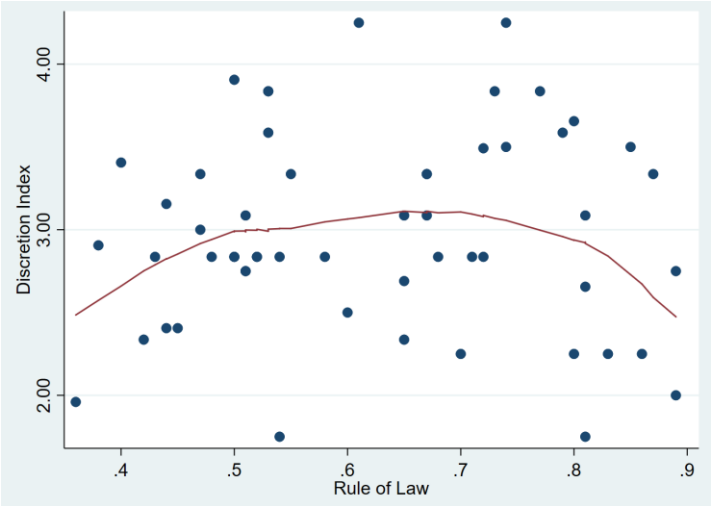

Figure 7: Rule of Law Index vs. Discretion Index

The Norwegian School of Economics (NHH) is one of the leading business schools in Scandinavia, and is students' number one choice for a business education in Norway. The School's **Department of Accounting, Auditing and Law** is an ambitious and thriving environment for research and learning. Our faculty has three main research and teaching areas: Financial Accounting and Auditing, Management Accounting and Control, and Economics, Ethics and Law. For details, see the School's website: www.nhh.no.