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Prosecutors and Presidents in New Democracies: The Russia Case

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Abstract

This article aims at an empirical verification of prosecutors' partisan behavior through a case study based on the Russian President Yeltsin and Putin periods. According to Gretchen Helmke's original theory of strategic defection, dependent judges may occasionally check their principal, the executive leadership, by withdrawing their support in the course of an electoral cycle. However, a modified theory of strategic defection can be readily applied to civil-law prosecutors' behavior in new presidential democracies, where several presidents dominated that office during most of their tenure but experienced prosecutorial defection in their final phase. Russia provides a textbook case for examining the modified theory in relation to prosecutors' partisan behavior against an incumbent president. Meanwhile, this paper uses within-case analysis based on a qualitative method, because the methodological approach can have more advantages in discovering whether prosecutors acted 'really' strategically when an incumbent government was outgoing in Russia, and in further explaining a pattern of prosecutors' partisan attitudes in new presidential democracies, through the modified version of Helmke's theory.

Introduction

Why would judicial officers rule against the incumbent political leadership? Perhaps most obviously: when they are independent. In fact, there have been debates over how to define and measure judicial independence (Rosenberg, 1992; Tate and Haynie, 1994). Yet the assumption that judicial officers can behave independently of politicians has generally been unquestioned – as long as they preserve their institutional security, particularly regarding career changes, from other branches of government,

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so that inter-branch ‘checks and balances’ can continue to operate. Some, in this connection, have focused not on judicial officers’ institutional security but on political conditions, such as divided government and political polarization (Barzilai, 1997) or the greater popularity of the judiciary as compared with politicians (Caldeira, 1986; Vanberg, 2001), which encourages them to behave autonomously. But these arguments can be built only on the prerequisite of a judiciary that is somewhat insulated from the political branches. As Olson (2000: 35) has put it, judicial officers would seldom have an incentive to challenge a chief executive if their career and fate were ultimately dependent on the executive branch.

Helmke (2002, 2005), however, using the Argentine experience, makes the important distinction that dependent judges may occasionally check their principal, the executive leadership, by withdrawing their support at a time of regime change or in the course of an electoral cycle. In a similar way, judicial officers who have collaborated with an incumbent government can damage the incumbent, when it is outgoing, through the politicization of criminal justice in new democracies. Accordingly, judicial behavior in these countries, where judges do not enjoy the same institutional autonomy as in developed countries, especially the US, must be analyzed in rather different terms. Indeed, if some theoretical modifications are made, Helmke’s insightful finding can be readily applied to prosecutors’ behavior in young democracies, given that several presidents in those countries (for example, Alberto Fujimori in Peru, Chen Shui-bian in Taiwan, and Young-sam Kim and Dae-jung Kim in South Korea) dominated that office during most of their tenure but experienced prosecutorial defection in their final phase. In particular, prosecutors of civil-law countries, rather than those of common-law countries, must receive close attention, as they can arbitrarily make a targeted politician a criminal suspect via their far-reaching power over procedure, irrespective of the courts’ final decision – although judges have hardly any initiative to manipulate criminal proceedings because they can issue no decision without the prosecutors’ pre-trial actions (Di Federico, 1995, 1998). Thus, an incumbent government, especially a president, can wield massively destructive power when civil-law prosecutors are available to implement its directives, but can be seriously vulnerable when they choose to defect. In this regard, Dae-jung Kim (2011: 565) argued, ‘Currently the worst cancer in South Korea is the Prosecution Service . . . It is excessively subservient to an incumbent president during his heyday but violently bites him at his last phase.’

On the one hand, this paper aims at an empirical verification of prosecutors’ partisan behavior based on a case study of Russia during the periods of office of President Boris Yeltsin (1991–9) and Vladimir Putin (2000–8). Russia after the dissolution of the Soviet Union provides a textbook case for examining a modified theory of strategic defection in relation to prosecutors’ partisan behavior against an incumbent president. In Russia, first, an incumbent president has been decisive in determining high-ranking prosecutors’ career since the adoption of the new constitution in December 1993, and, as in many post-communist countries and parts of Africa, it is the ‘major challenge’ to the rule of law (Chavez, 2008: 66). Secondly, prosecutors exercised greater power

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over criminal procedures than in other civil-law countries, and therefore could, until recently, deal a massive blow to even an incumbent government.

On the other hand, this paper uses within-case analysis based on a qualitative method, rather than a quantitative one, because this methodological approach can have more advantages in identifying a hypothesized causal mechanism through close observation (Liberman, 2005). At the same time, this method can provide substantial leverage for causal inference via the clarification of explanatory variables or preconditions even in a single case (Collier *et al.*, 2004; George and Bennett, 2005). In this regard, from a comparative perspective, almost all variations of the case concerning prosecutors' partisan behavior could be found across the two Russian Presidents' tenure. Moreover, within-case analysis is also preferred for developing preliminary theory (Paterson, 2010). Hence, the case selection and research method can contribute to discovering whether prosecutors who had been loyal to an incumbent government betrayed it by acting 'really' strategically when the incumbent was outgoing in Russia, and further explaining a frequent pattern of prosecutors' partisan attitudes in new presidential democracies through a modified version of Helmke's theory.

This article is structured as follows. The second section critically reviews Helmke's original theory of strategic defection and proposes a modified version that can be more applicable when explaining prosecutors' partisan behavior and strategic defection in particular. The third section introduces the Russian circumstances that might dispose prosecutors to take a partisan attitude, either in favor of or against an incumbent chief executive. The fourth section empirically examines the relevant cases across the Yeltsin and Putin periods, within a broader comparative perspective, through the method of within-case analysis. The last section seeks to draw some wider practical as well as scholarly conclusions.

A modified theory of strategic defection

The core prerequisites of the original theory of strategic defection, proposed by Helmke (2002: 292–4), are as follows. First, in several parts of the developing world, judges encounter greater threats than simply having their decisions overturned by other branches of government. The punishments that can be visited on them by incumbent rulers extend from career disadvantages to physical violence, or even murder. Secondly, in many developing countries parliament exercises almost no influence over judicial officers because of the concentration of power in the executive branch. This is especially the case in Latin America, as the separation of power among the political branches is notoriously weak or present in the form of 'delegative democracy' (O'Donnell, 1994), and the sanctions that executive leaders may apply against judges cannot be successfully challenged by other actors. Thirdly, and most importantly, in numerous developing countries, the most critical threat to judges comes not from an incumbent government but from an incoming one. That is, an incoming government has more incentives to dismiss judges, particularly the highest ones, than the current rulers who select them.

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This theory is itself open to criticism, and requires a few modifications for application to prosecutors' partisan behavior in young democracies. To begin with, the broad scope of the theory and its application to 'developing countries' in general weakens its rigor when it is also applied to a range of authoritarian regimes, including military governments (as in Argentina before 1983). In fact, judges' defection along with regime changes and electoral cycles in democratic countries cannot usefully be compared on the same basis. In addition, a more critical point regarding the establishment of the rule of law for democratic consolidation is not that judicial officers may take a different view of authoritarian regimes before the collapse of such regimes, but that they will betray elected governments strategically while neglecting their original role in curbing a tyrannical majority. It will be suggested in what follows that the theory of defection can be of more value if we limit its application to emerging democracies.

Secondly, unlike Helmke's first prerequisite, judicial officers would hardly expect to be physically attacked or even murdered by incumbent governments. They are unlikely to suffer such an extreme form of retribution even after a regime changes from authoritarian to democratic, let alone when a change takes place between elected governments. Instead, judicial officers are usually influenced by the fact that their career advancement can be blocked by incumbent governments. In particular, civil-law judicial officers have traditionally been advanced to the upper ranks of the bureaucratic hierarchy, unlike their common-law counterparts who work relatively independently after their appointment (Guarnieri, 2003: 225–6; Shapiro, 1981: 32). Judges have recently attained more institutional autonomy in their career administration via a judicial council than previously, regardless of legal traditions, all over the world (Tate and Vallinder, 1995). But in most civil–law countries, prosecutors still have to gain promotion through a lengthy career ladder where the political executive plays the ultimate role in selecting the top rankers. Thus, civil-law prosecutors are more likely than civil-law judges or common-law prosecutors to seek to advance their career through an incumbent government.

There is an additional reason for the focus to be more on civil-law than common-law prosecutors when modifying the theory of defection. It arises from the fact that civil-law prosecutors can inflict considerable damage on an outgoing government through their greater influence over criminal procedure (Di Federico, 1995: 242). In common-law countries, prosecutors' powers are significantly limited by the decentralized nature of criminal procedure based on the adversarial system. Indeed, they are usually checked by investigators from other law-enforcement agencies, especially police officers, who carry primary responsibility for the investigation into criminal proceedings. In typical common-law countries, such as the US, Canada, and England, prosecutors generally possess neither the right to open and close criminal cases on their own authority, nor the power to command police officers in the course of their investigations. They just declare whether indictment will be brought on the basis of pre-investigated cases, and even the right to charge a criminal suspect may be shared with grand juries. This decentralized criminal procedure allows 'checks and balances' to be introduced

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between the investigative agencies and the prosecution service in terms of 'due process' (Hamilton, 2008). Although common-law prosecutors can also be said to have a considerable influence over pre-trial procedures through plea bargains, at least the presumption of innocence is seldom damaged (Dammer and Albanese, 2014: 128). Therefore, any politician can be involved in criminal proceedings but the prosecutors cannot easily stigmatize them as criminal suspects for political purposes. Even if the prosecutors choose strategic defection against an incumbent president, their behavior cannot have much effect.

By contrast, civil-law prosecutors can exercise extensive influence through every pre-trial stage of criminal procedure, because they hold the power not only to control criminal investigations but also to indict suspects on the basis of the inquisitorial system (Lee, 2014). There are in fact some additional mechanisms that contribute to curbing their considerable power. For example, in Germany, the prosecution service adopts a mandatory indictment system, in which a prosecutor must charge a criminal suspect unconditionally when some necessary conditions are presented in the course of an investigation. In France, prosecutors are essentially required to transfer their investigative powers to the examining judges in high-profile cases (Guarnieri, 2003: 234). Nonetheless, in most civil-law countries, prosecutors can intervene almost without constraint at any point from investigation to indictment, and correspondingly manipulate pre-trial criminal proceedings. This allows prosecutors to pervert democratic processes, by selectively initiating criminal proceedings against political factions they do not support, and seriously damaging the presumption of their innocence. Vigorous competition among the media to get the first reports of political scandals can also enhance the prosecutors' political influence (Jiménez, 1998). Hence, their strategic defection will strike a heavy blow at an outgoing government.

Thirdly, regarding the second prerequisite, the concentration of power in the executive branch, which Helmke equates with its monopolistic control over judicial officers, looks a bit vague. In fact, an executive with the power to appoint is insufficient as a necessary premise for the theory of strategic defection. A cabinet government in a parliamentary system may also hold power over the parliament, especially in countries based on the Westminster model (Lijphart, 1999: 12), and often seizes control over judicial careers, relying on parliamentary sovereignty (Alivizatos, 1995: 572). However, the executive leadership tends to have some difficulty in abusing the position of judicial officers, because the official tenure of the cabinet, including the premier himself or herself, is flexible. Hence, prosecutors cannot easily seek promotion to higher ranks by making partisan decisions in favor of the incumbent, due to the unpredictable composition of the executive leadership exerting ultimate control over their career, as when an assembly dissolves, regardless of regular elections, or a shift of power takes place within a ruling party. Moreover, in consensual parliamentarism, a prime minister usually has to respect collegial decision-making processes and share ministerial posts with other parties, not just other leaders of the ruling party (Linz, 1994: 31–2). Likewise, a suprapartisan coalition – even embracing the left and right – is required for appointing

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top-ranking prosecutors. Therefore, civil-law prosecutors have no obvious incentive to pursue a strategic defection while exercising their great powers. In practice, the political distortion of criminal proceedings occurs less often, despite the civil-law prosecution system, not only in old consensual democracies but even in young ones (The World Justice Project, 2013).

By contrast, since many new democracies adopted a presidential system that gave the president almost exclusive authority over the formation and operation of the executive branch, ministers and several other high state appointees are accountable only to an incumbent president during his or her fixed tenure (Carey, 2005: 95–7; Shugart and Carey, 1992: 106–11). Even under a divided government, the president's appointment power is neither significantly restricted *ex ante* nor *ex post*. It is particularly important that the president can exclusively control the highest judicial posts, especially top-ranking positions in the prosecutor's office. This is why the modified theory of strategic defection requires a presidency with appointment power over the high-ranking prosecutors. According to this model, senior prosecutors who wish to get promoted to the top rank can be expected to be loyal only to the incumbent president over the course of his or her fixed term. Top-ranking prosecutors who have less incentive to gain promotion to the upper ranks may be predicted to remain politically impartial, and to institute criminal proceedings against the president's faction whenever required. To bring this into effect, in some countries, the constitution fixes the tenure of the prosecutor general. However, most top-ranking prosecutors, including even the prosecutor general, can be expected to remain loyal in the expectation that they would obtain other high executive posts or at least sustain their current position into the future (Lee, 2014: 87–9).

Yet, most importantly, when a president can no longer exert control over prosecutors' careers, they would have less incentive to be loyal to him or her and consequently choose strategic defection against the incumbent. Even if a candidate of the ruling party has the most potential to become the next president, continuity between governments is much weaker in presidential systems than in parliamentary ones, and presidents often have difficulty in cooperating even with the ruling party when their terms are ending (Valenzuela, 1993: 10). It is also uncommon for a retired president to exercise any political leverage. Thus most senior prosecutors, who have accumulated enough career capital to secure a top-ranking post in a future government, would show no loyalty to the outgoing president, similarly for supreme justices (Helmke, 2002, 2005). Instead, they will pretend to be politically neutral, or change their patron to a leading candidate, in order to maximize their chances of career progression under a new president.

In short, according to this modified theory of strategic defection, civil-law prosecutors in emerging democracies can be expected to exercise their vast power in favor of an incumbent president throughout most of his or her tenure but betray him or her in the final phase of his or her term. As long as the president is not expected to exercise great political power even after his or her retirement, prosecutors are likely

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to defect against him or her. The next sections seek to establish this theory empirically through the Russia case during the President Yeltsin and Putin periods.

Two main actors in the Russia case

The Russian Prosecution Service

In Russia, the Communist Party regime made undue use of the prosecution service (Procuracy) as one of the most important power resources in order to secure its survival and authority during the Soviet era (Diehm, 2001). In particular, the prosecution service played a critical role in manipulating criminal proceedings against political resistance, as in other authoritarian regimes (Chen, 2004: 432–8). Since the first enactment of the Criminal Procedure Code based on an inquisitorial system in 1922, the power resources of the Soviet Prosecution Service were preserved, without major changes, across the entire totalitarian era. But prosecutors were permitted to exercise powers that were more far-reaching in criminal proceedings, than their equivalents in other civil-law countries, in order to protect the party leadership. The party leadership could effectively destroy an opposition in these circumstances, encouraging prosecutors to secure their speedy arrest and imprisonment even in the name of the rule of law.

The Russian Prosecution Service continued to exercise its considerable powers and maintained its high prestige on almost exactly the same basis as under the previous system, in spite of the democratization of the political system as a whole (Zvyagintsev, 2012). Along with the collapse of the Soviet Union and the adoption of the 1993 Constitution there were some revisions of the laws on the prosecution service, but the statutes of the Soviet era continued to be the central frame of reference for the Russian criminal justice system until the later part of President Putin's second term. Although a new Criminal Procedure Code was eventually enacted in 2001, the code made no radical changes, at least in pre-trial criminal procedures, as compared with the Soviet version (Butler, 2009: 277; Greenberg, 2009: 12–21). Until the far-reaching revisions of the Criminal Procedure Code and the Federal Law on the Prosecutor's Office in June 2007, Russian prosecutors retained a comprehensive jurisdiction: (1) the power to direct all investigative agencies, such as the Federal Security Service (FSB) or the police agency in the Ministry of Internal Affairs (MVD) in the course of their investigations; (2) investigative powers of their own; (3) the monopolistic right of indictment; and (4) a discretionary right of indictment (Butler, 2009: 286; Mikhailovskaya, 1999). Indeed the combination of these prerogative powers enabled them to exercise even more extensive influence over pre-trial criminal procedure than the prosecutors of other civil-law countries.

The enormously wide power of the prosecution service, if it were not checked, was indeed so great that it could distort democratic processes. That is, prosecutors could institute criminal proceedings against individual politicians, while giving immunity to the illegal behavior of others, at a time and in a manner of their own choosing. Moreover, as prosecutors could deliberately leak information on their targets to the press, which

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was always eager to report political scandals, the presumption of innocence was often prejudiced before the judges' final decision (Ulyanov, 1999). In practice, politicians who were targeted by the prosecutors lost a considerable part of their moral legitimacy and political support. Indeed the prosecution service could abuse its enormous power to influence national elections, and wider debates in civil society, in favor of particular groups, such as the presidents' immediate circle or big business, up to the reform of the prosecution system in June 2007.

At the same time, the prosecution service is officially part of a national organizational hierarchy, as in other typical civil-law countries. In a pyramid-like organizational setup, where a prosecutor general is at the top, all the high ranker's commands are strictly obeyed by lower rankers. Indeed, as the Federal Law on the Prosecutor's Office states, 'The Prosecutor's Office of the Russian Federation shall be a single centralized system of bodies exercising on behalf of the Russian Federation supervision over compliance with the Constitution of the Russian Federation and execution of the laws in force within the territory of the Russian Federation' (Article 1). In the Soviet era, this provision was specified not only to protect the prosecution service from external influences of various kinds but also to enable the totalitarian regime to dominate it vertically, via the prosecutor general and other top rankers, for its own political purposes (Smith, 1978: 13–14).

In the Soviet era, however, state officials' individual career development depended more on their political commitment as assessed by party cadres via the *nomenklatura* system than on legally formal and impersonal mechanisms (Jowitt, 1983), and correspondingly the organizational hierarchy among prosecutors was also somewhat undermined (Murashin, 1972: 103). Also since the collapse of the Soviet Union, the weak bureaucratic discipline within the prosecution service has further undermined its organizational hierarchy and led to the emergence of a variety of factions at federal and local levels (Lee, 2015). In addition, a considerable number of prosecutors sympathized with the Communist Party of the Russian Federation (CPRF), which constantly urged the restoration of previous Soviet traditions throughout the Yeltsin period. Nevertheless, the legal principle of single and centralized agency has still contributed to the strong organizational hierarchy of the prosecution service.

The Russian presidency

The 1993 Constitution provides the Russian president with a broad range of powers to form the executive branch (Article 83). In particular, the president can select all his or her ministers and preside over sessions of the Russian government, while the Duma (lower house) has almost no direct influence of any kind on the composition of a cabinet. Although the legislature is able to reject nominations to the premiership, the effect is significantly restricted because the president is required to dissolve the parliament if it does so three times in a row (Article 111). Except for the appointment of prime minister, the president can choose the other ministers with no confirmation by the parliament. Although the constitution also grants the Duma the right to pass a vote of no-confidence

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in the government, the president can ignore its advice and indeed dissolve it if another vote of no-confidence is proposed again within three months (Article 117). Thus, the president has almost no occasion to hand over the priority in composing a cabinet to the legislature, when he or she encounters a parliamentary majority, unlike the French-style semi-presidentialism (Elgie, 1999). For instance, although the communist-led Duma rejected Yeltsin's nomination of Sergei Kirienko to the premiership, it eventually accepted him in 1998 in order to prevent its own dissolution. Yeltsin conceded a part of his prior right for composing the cabinet to the legislature only once, by appointing Yevgeny Primakov who was enjoying a broad support from the Duma for prime minister. But it also cannot be said that a true 'cohabitation' government was formed during the Primakov period. Then the majority of the other ministers were still Yeltsin's loyalists, and Primakov might also not have been the most preferred candidate of the parliament.

In addition, the president's power to select the nominees for core state posts is not limited to ministers. The 1993 Constitution grants him or her the right to appoint the chiefs of federal law-enforcement agencies, and even the highest judicial positions (Article 83). Specifically, the president can nominate the prosecutor general, and the supreme and constitutional justices, although the approval of the Federation Council (upper house) is required for these appointments. Then, it may be said that the presidential power to appoint candidates to the influential posts will be significantly limited in a divided government, because the Duma or Federation Council exercises the right to approve such nominations (Article 102, 103). However, the president has no constitutional obligation to hand over the initiative to choose the chiefs of the core state organs, as well as to compose the executive branch, to the parliament, when he or she faces its veto against his or her political appointees. A legislature led by opposition parties cannot repeatedly refuse appointments, because it then cannot avoid being blamed for continuous refusals. Even though a deadlock between the two democratic bodies would ensue, the president is likely to appoint his or her preferred nominees to important state posts after a first or a second failure.

In addition, Russian Presidents have relatively less difficulty in appointing supreme and constitutional justices, and the prosecutor general, since the Federation Council retains a weaker capacity for collective action than the Duma, where the heads of provincial executives and legislatures, or their representatives – who rarely belong to political parties – automatically acquire membership. The upper house holds the right of veto over the dismissal of a prosecutor general (Article 102), but it could neither protect him or her nor ensure his or her political neutrality. As explained below, President Yeltsin was also unable to dismiss Prosecutor General Yuri Skuratov, because of the disapproval of the Federation Council, but could suspend the chief prosecutor through presidential decree and appoint an acting prosecutor general. Hence, Russian presidents have generally been thought to dominate judicial bodies, especially the prosecution service (Greenberg, 2009: 18–19).

However, as discussed above, some factions within the prosecution service, while showing loyalty to the president, were not only in conflict with each other but also

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sometimes colluded with other political or business forces outside the president's circle, owing to the ambiguous organizational hierarchy. For example, an old enmity between the Federal and Moscow City Prosecutor's Offices was well known, as the latter used to switch its support between President Yeltsin and Moscow Mayor Yuri Luzhkov (*Kommersant*, 14 January 2000). Nonetheless, this did not mean that a particular faction within the prosecution service could easily challenge an incumbent president and bring criminal proceedings against his or her faction. As long as the president held the ultimate power to advance prosecutors to top-ranking positions, he or she could make unconstrained use of the civil-law prosecution service to destroy his or her political opponents (Yasin, 2012: 384). This tendency was apparent at least until the final phase of the president's tenure.

Within-case analysis of Russia

The Yeltsin period (1993–9)

In late 1993, President Yeltsin barely achieved a triumph in the constitutional crisis that was provoked by his conflict with the Supreme Soviet over the distribution of political power and direction of economic transformation after democratization, and finally obtained a new constitution that established a super-presidency that guaranteed his control over prosecutors' careers. From this point forwards, the president could enjoy precedence over all other political actors in exploiting the prosecution service.

Using these powers, the president quite often made instrumental use of the prosecution service, especially under Acting Prosecutor General Alexei Ilyushenko, to attack critical broadcasters and newspapers during 1994–5. It made a lot of sense for Yeltsin, who had to prepare for a presidential election in 1996, to attempt to extend his control over the Russian media at this time. This made Ilyushenko one of the best candidates for the prosecutor generalship, considering that he had already ordered a criminal investigation into Vice-President Alexander Rutskoi, who had stood against Yeltsin during the 1993 Constitutional Crisis, as the head of the Interdepartmental Commission of Combating Corruption. However, the appointment of Ilyushenko did not go smoothly, as the Federation Council rejected the nomination twice on the grounds of partisan bias. Nonetheless, Yeltsin pushed for Ilyushenko, even appointing him to acting prosecutor general, in order to fully use the prosecution service for partisan ends. Predictably, the acting prosecutor general went out of his way to punish the domestic media that were critical of his patron (Smith, 2007).

For instance, *Moskovskii komsomolets*, one of the highest-circulation newspapers in Moscow, was targeted by the prosecution service under Ilyushenko. After Dmitri Kholodov, an investigative journalist on the paper who had written articles about the large-scale corruption of high-ranking military officers (such as the Minister of Defense Pavel Grachev), was killed in suspicious circumstance in October 1994, relations between the newspaper and the president were naturally fraught. Grachev even sued the editor of the newspaper, strongly denying his involvement in corruption, let alone

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the murder. Yeltsin also defended him throughout the scandal while dismissing a deputy defense minister, Matvei Burlakov. Acting Prosecutor General Ilyushenko, for his part, announced that Grachev had never been involved in such affairs (Desch, 1999: 59). It remains unclear if Grachev actually had a connection with the military corruption and murder cases. However, the prosecution service hardly attempted a thorough investigation into the cases during Yeltsin's term, even though the Federal Counterintelligence Service (FSK: the previous title of the FSB) had already submitted a detailed report about prime suspects to the president (Korolkov, 1995). Rather, in November 1994, Ilyushenko brought criminal proceedings against *Moskovskii komsomolets* on account of its 'outright rudeness' and the newspaper finally reversed its stance to supporting Yeltsin before the 1996 presidential election.

Moreover, in June 1995, prosecutors initiated criminal proceedings against the NTV television channel's puppet show 'Kukly' (Dolls) for damaging portrayals of Yeltsin and Prime Minister Viktor Chernomyrdin (Smith, 2007: 5). While there were various reasons for one of the oligarchs, Vladimir Gusinsky, and his NTV channel to turn pro-Yeltsin in the 1996 presidential election, the prosecutors' aggressive attitude must have also been a critical factor. After the leader of the channel joined Yeltsin's election campaign, the criticism of Yeltsin and of the conduct of the Chechen war naturally ceased (Koltsova, 2000: 45). Therefore, Ilyushenko could be understood to have devoted his loyalty to the incumbent president and consequently preserved his 'acting' position for as many as 19 months.

Some of Yeltsin's political opponents, however, were also unable to avoid such partisan attacks. The case of Rutskoi, who was Governor of Kursk, was typical (Igorev, 1998). In June 1998, Rutskoi's closest allies, First Vice-Governor Yuri Kononchuk and Vice-Governor Vladimir Bunchuk, were arrested at the same time on corruption charges. Rutskoi furiously denounced his longstanding foe, the Kursk Chief Prosecutor, for fabricating criminal proceedings in order to injure the former Vice-President's image in regional politics. According to informed commentary, the arrests were part of a large-scale campaign by the Federal Prosecutor's Office, although the politicians might indeed have been involved in some corrupt businesses (Arnold, 1998a). Obviously, these criminal proceedings were also instituted by prosecutors acting at Yeltsin's behest. Rutskoi immediately flew to Moscow in order to request reconciliation with the president and even claimed that the constitutional court should permit Yeltsin to stand for reelection in 2000, but nothing changed (Arnold, 1998b). It is clear that Yeltsin eventually got revenge on his old political rival via these criminal proceedings. In another similar case, the former Mayor of St Petersburg, Anatoly Sobchak, was also investigated by the prosecution service in 1996 after he had fallen out with the president (Jack, 2004: 84).

In contrast, Prosecutor General Alexei Kazannik's behavior in the case of a conflict between the president and parliament in early 1994 might be considered a counterexample against the modified theory of strategic defection. In February 1994, the Duma granted amnesty to the leaders of the 'August *coup*' as well as the

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organizers of the opposition forces, such as the former Supreme Soviet Chairman Ruslan Khasbulatov and former Vice-President Rutskoi, in the constitutional crisis of the previous September. Outraged by the release of his political rivals, Yeltsin ordered Kazannik to block their release by all means. However, Kazannik only confirmed, 'The Prosecutor's Offices have no right to interpret legal acts of the legislature but must carry them out' (*Izvestiia*, 1 March 1994), though Yeltsin had long remaining term of office. Nonetheless, Prosecutor General Kazannik cannot simply be understood as having ruled against the incumbent president, given his old friendship with Yeltsin. Rather, it would be more correct to conclude that even Russian prosecutors could never technically carry out a presidential order other than to affirm that they chose strategic defection or maintained their political neutrality.

However, at the beginning of 1999, the prosecution service actually initiated a strategic defection against the incumbent president, as Prosecutor General Yuri Skuratov launched a criminal investigation into the corruption of Yeltsin and his 'Family'. Skuratov had spent many years serving as a law professor in Yekaterinburg. But due to his private ties with Yeltsin, he was appointed to head a research institute of the Federal Prosecutor's Office in 1993 and was eventually promoted to the position of prosecutor general in October 1995. Hence, the new prosecutor general was also expected to lean in favor of the current president, like Ilyushenko. In practice, Skuratov served the president's interest until the last phase of his tenure. For example, the prosecution service attempted no meaningful criminal investigation into Yeltsin and his faction with regard to the corruption scandal implicating them in the 1996 presidential election campaign or the murder cases of influential journalists, Vladislav Lystiev and Kholodov (Holmes, 1999: 78; Wishnevsky, 2006: 185). Particularly according to the transcript of a taped meeting published by *Moskovskii komsomolets*, Deputy Prime Minister Anatoly Chubais, who had directed Yeltsin's 1996 presidential election campaign, actually pressured Skuratov to cover up the scandal quietly. Interestingly, the transcript contained Chubais's testimony that Skuratov was a politically pliable person (Stanley, 1996).

All the same, Skuratov opened fire on President Yeltsin and his 'Family' members in early 1999 when his presidential tenure was coming to an end, in accordance with the modified theory of strategic defection. This affair began as the Federal Prosecutor's Office started a criminal investigation into the scandal of high-ranking officials, who had lobbied for the interests of a Swiss construction company, Mabetex, in association with Boris Berezovsky, a powerful oligarch who had close connections with the Kremlin. Eventually, the Prosecutor's Office reached the president's daughters, Elena Okulova and Tatiana Diachenko. Yeltsin responded with a request for the Federation Council to relieve Skuratov of his heavy obligations on the grounds of ill health, though there was speculation in the press that the dismissal might have arisen from a conflict with the Kremlin (Viktorov, 1999).

It can be debated whether Skuratov had already planned the investigation into Mabetex before the conflict between him and the Kremlin broke out in February 1999.

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In particular, Yeltsin (2001: 224–6) revealed that Skuratov had suggested a 'deal' to him through the Mabetex affair in order to secure the position of prosecutor general. However, Yeltsin's explanation, according to which Skuratov began the investigation against the Kremlin to force the president to withdraw the decision on his dismissal, is not so persuasive, because the prosecutor general could have maintained his alliance with Yeltsin by not opening the criminal cases involving some members of the 'Family' such as Berezovsky. Skuratov (2012: 49–52) has also testified in his memoirs that the Kremlin had threatened him, via a fake sex video that showed a naked man 'resembling Skuratov' in a sauna with two young women, by reason of his criminal investigations into Berezovsky and Mabetex. Also given Primakov's and Luzhkov's strong support for Skuratov as well as his candidacy for the 2000 presidential election, he could be analyzed as choosing strategic defection against the incumbent president in preparation for the post-Yeltsin era.

Meanwhile, as the sex video was aired on state-run television (RTR) on 17 March, Yeltsin could take the opportunity this provided of avoiding the crisis. Hence, as stated above, the presidential decree to relieve Skuratov of his duties as prosecutor general could be ordered on the basis of Article 42 and 54 of the Federal Law on the Prosecutor's Office (*Rossiiskaia gazeta*, 3 April 1999). Yeltsin even appointed an acting prosecutor general, instead of him, in order to stop the defection of the prosecution service. As a result, the investigations by the prosecution service were finally suspended, but Yeltsin quickly degenerated into a 'lame duck' president, while his approval rating was plunging, after this scandal. According to the modified theory of strategic defection, except for the prosecutor general, other top-ranking prosecutors would have also eventually betrayed Yeltsin immediately before his resignation, unless his heir had become the most likely candidate for the next presidency. In actuality, Skuratov's two deputies, Vladimir Ustinov and Yuri Chaika, and the Chief of Moscow Prosecutor's Office Sergei Gerasimov are known to have deserted their own boss under the direction of the most likely presidential candidate, Putin (Taylor, 2011: 61; *Kommersant*, 14 January 2000). For example, his party of power, Unity, had already achieved an unexpectedly good result in the 1999 Duma election before the upcoming presidential election in March 2000. That is, the organizational defection of the prosecution service could be narrowly suspended, not only because Yeltsin *de facto* named Putin as his successor, but also because Putin could rapidly obtain high popularity.

The Putin period (2000–8)

The Russian Prosecution Service often exercised its enormous power in favor of the incumbent president during the Putin period as well. Yet the frequency and intensity of the politicization of criminal justice were much more serious than in his predecessor's terms. Due to Putin's great popularity, from the beginning of his term, the president could effectively exploit the prosecution service to destroy his political enemies or to give immunity to cases of corruption within his own faction.

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For instance, Vladimir Gusinsky and his Media-Most group, which had been highly critical of the Kremlin-aligned Unity party but helped its rival, Fatherland-All Russia, in the 1999 Duma campaign, and then a liberal champion, Grigori Yavlinsky, in the 2000 presidential election, could not help being targeted for the president's political revenge by the prosecution service. On 11 May 2000, Gusinsky's office was searched by masked agents, and the following month he was arrested by the Federal Prosecutor's Office on the charge of having defrauded a state-owned Russkoe Video out of about USD 10 million with the help of its directors (Saradzhyan, 2000a). The criminal cases which had once been terminated in 1998 were reopened by prosecutors at an unreasonable time. President Putin said that he had not himself suggested the institution of these criminal proceedings, but several people, including a variety of political figures such as Mikhail Gorbachev, were already convinced that the prosecution service had brought criminal proceedings against Gusinsky at Putin's behest (Zolotov, 2000a). As Gusinsky secretly agreed to sell his media unit to Gazprom for repayment of the debt, he was able to secure release.

However, release was by no means the end of the affair. In September 2000, Gazprom-Media complained that almost all the assets of Media-Most had been withdrawn from Russia in April 2000, which was devaluing the shares of the company as collateral for Gazprom, and correspondingly the prosecution service brought criminal proceedings against Gusinsky again. A remarkable point was the timing of the criminal proceedings. The Federal Prosecutor's Office had not initiated the criminal proceedings, but did so right at the moment when a lawyer of Media-Most revealed that a secret agreement between Media-Most and Gazprom had been concluded in June under government pressure (Pyanykh, 2000). Moreover, according to Deputy Prosecutor General Vasily Kolmogorov, on the one hand, investigators collected enough evidence that Gusinsky withdrew the company's assets out of Russia, but, on the other hand, they were convinced that he had received an unduly large loan as security for his company, which was close to bankruptcy in 1999, by deceiving the creditors. However, if the shares had already been worthless from 1999, his withdrawal of assets was not a problem. Nevertheless, the Federal Prosecutor's Office did not account for how these essentially contradictory charges could be brought at the same time (Paukov, 2000). Later, Media-Most was searched as many as 35 times, and its ownership was ultimately transferred to Gazprom (Baker and Glasser, 2005: 82–83). Gusinsky, who made efforts to avoid indictment, has not yet been able to return to Russia.

Meanwhile, the political distortion of criminal justice against Berezovsky also occurred, which was relatively unexpected, since he had helped Putin win the presidency through his considerable media power. However, as Berezovsky began expressing his political dissent against Putin to strengthen his bargaining power, the situation took a twist. First, Berezovsky publicly announced his plan to create a party of 'constructive opposition' against an 'authoritarian president', criticizing Putin's plan to obtain the power to dismiss elected provincial governors (Zolotov, 2000b). A few days later, he even gave up his seat in the Duma as a protest against some moves by Putin's government – for

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example, the criminal cases opened against oligarchs including Gusinsky and Vladimir Potanin, and Putin's attempt to dominate provincial leaders. However, Berezovsky's choices seemed unable to attain popularity, given that there was a high level of distrust towards the oligarchs, not only in political arena but also in the wider society.

In this context, Berezovsky had to go to the Federal Prosecutor's Office to be examined and possibly indicted for the suspected diversion of about USD 1 billion from Aeroflot, the biggest airline. The criminal case, which had already been dropped in 1999, was suddenly reopened by the prosecution service under President Putin (Saradzhyan, 2000b). Even if the termination of the criminal case in 1999 had been fabricated by the prosecutors, this reopening of the case also confirmed that their far-reaching power could always be misused as an effective instrument for incumbent presidents. Berezovsky finally sold his 49% stake in ORT, the biggest TV channel, to another oligarch, Roman Abramovich, who had strong ties with the Kremlin, but refused to return to Russia in order to escape arrest by the prosecution service.

As these examples indicate, Putin completely destroyed his two political enemies, through the civil-law prosecutors' enormous power, less than a year after becoming president. Due to the deep public antagonism toward the oligarchs, the political distortions of criminal justice could easily be accomplished. In addition, criminal proceedings against Gusinsky and Berezovsky could be advantageous for Putin as a new president, also in seizing control of growing media power in Russia (Rutland, 2005: 171). Meanwhile, as mentioned below, the top-ranking prosecutors who managed these criminal cases could get promoted to a higher post in the Federal Prosecutor's Office or gain other high government positions during Putin's two terms, even though the criminal proceedings were not reasonably completed, while the criminal suspects lost all their political influence.

Mikhail Khodorkovsky's case should also be examined here, at least in outline, because of the crucial role of prosecutors. Certainly, there were numerous reasons why Khodorkovsky was targeted by the prosecution service under Putin. First, his oil giant (Yukos) attempted to build a new private pipeline competing with the pipeline monopolized by the state-controlled company, Transneft, justifying the decision on the ground of the inefficiency of the public pipeline system. In addition, Khodorkovsky had a plan to sell most of his shares in the oil giant to Exxon Mobile, which was in contradiction to Putin's policy for the renationalization of energy industries (Goldman, 2008: 123). Most of all, this ambitious oligarch seemed to dream of seizing a dominant position in public life. Khodorkovsky not only gave donations to some NGOs, but also sponsored more than 100 legislators in the Duma. Even members of the CPRF were included in his list (Aslund, 2007: 237). These reasons were sufficient for Putin to destroy him, and in October 2003 he was arrested at Novosibirsk airport. Considering that this criminal proceeding was instituted just two months before the 2003 Duma election, the prosecutors' timing was hardly fortuitous.

The prosecution service immediately indicted Khodorkovsky on charges of tax fraud and evasion. However, in April 2003, the Federal Prosecutor's Office had

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already instructed the tax authorities to execute tax laws scrupulously, because of which the tax arrears of Yukos could eventually be disclosed (Fortescue, 2006: 159). In addition, Khodorkovsky was exceptionally held without bail, though white-collar crime rarely entails pre-trial imprisonment in Russia. Above all, the fact that he had been singled out for prosecution was important (Kvurt, 2007). Although Abramovich enjoyed a similar style of tax evasion in the region he was ruling, Chukotka, he was secure from the prosecutors' initiative because of his strong connections with the Kremlin (Aslund, 2007: 238; Jack, 2004: 211). As a consequence, Khodorkovsky was exiled to Siberia, sentenced to eight years' imprisonment, and his oil giant was completely dissolved to become a state-controlled company. In contrast, as predicted, Prosecutor General Ustinov and Deputy Prosecutor General Chaika, who controlled the criminal proceedings against Khodorkovsky as well as the other oligarchs, could gain advancement to the positions of minister of justice and prosecutor general, respectively, during President Putin's tenure.

However, an interesting point is that Putin, unlike Yeltsin, did not face the prosecutors' strategic defection even in the last phase of his second term. Why was there such a difference between the two presidents? Is this modified theory of strategic defection wrong? Our discussion focuses on the two reasons that enabled Putin to avoid the prosecutors' defection, which does not deny the modified theory of strategic defection but rather supports it, in comparative perspective, according to the methodological advantages of within-case analysis.

First, when President Putin's second term was beginning in May 2004, political competition, not to mention polarization, was *de facto* eliminated in Russia. As rapid economic recovery – relying on 'oil money' – bolstered his popularity and a number of elites from federal power structures, the so-called *siloviki*, moved into crucial state positions, Putin achieved the 'consolidation of vertical power' for a strong state in the later part of his first term (Hiro, 2007; Kryshtanovskaya and White, 2003; Shevtsova, 2004; Way, 2005). By contrast, as discussed above, most of the oligarchs hostile to the president were devastated. The size and influence of the major opposition parties such as the CPRF or Union of Right Forces had also sharply declined, and they actually degenerated into 'cosmetic' oppositions (Gelman, 2005). Putin himself was never even expected to leave the political arena but to amend the constitution to allow him to remain for a third term – relying on his high popularity – despite his repeated denials (Latyshev, 2007). Otherwise, he was at least expected to choose his successor between the two First Deputy Prime Ministers, Dmitri Medvedev and Sergei Ivanov (Nikolaeva, 2007). In practice, Medvedev could obtain over 70% of the total votes because of Putin's overt assistance in the presidential election in March 2008. In addition, Putin declared his plan to assume the post of prime minister under the next president, if United Russia won the parliament election (Arutunyan, 2007). This unusual plan was smoothly realized, because of the overwhelming triumph of the 'party of power' in December 2007. In these circumstances, prosecutors had no incentive to go against President Putin, even in his final phase, for their career development under a future

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presidency. That is, the potential of change of the executive leadership along with an electoral cycle, as a precondition of the modified theory of strategic defection, was no longer present in Russia.

Secondly, prosecutors lost a considerable part of their power in criminal proceedings by the prosecution service reform that took place in June 2007 (Sakwa, 2011: 191–3). Accordingly, they could no longer control the investigators of law-enforcement agencies, such as the FSB, MVD, and the prosecutor's office itself, during an investigation. 'Checks and balances' were introduced between the prosecutorial and investigatory agencies. Thus, prosecutors could no longer initiate or manipulate criminal proceedings against any politician, including incumbent presidents, like common-law prosecutors (Ershov, 2010). This means that a civil-law prosecution system, as another precondition of the modified theory of strategic defection, was also no longer present in Russia. Consequently, prosecutors were no longer able to inflict unacceptable damage on an outgoing president, even if Putin had not been expected to retain a dominant political position after his retirement.

In fact, this article may have a limitation in that identifying the 'real' reason might be difficult, because both Putin's influence after resignation and prosecutors' reduced power in criminal proceedings could change the incentive structure for the prosecution service. Nonetheless, the Putin case could rather strongly support the modified theory of strategic defection. Whether the president's sustained influence or the curtailment of prosecutors' powers made them refuse to betray him, both circumstances exactly contrast with one of the core explanatory preconditions of the theory. In other words, the limit does not make a big methodological problem. Rather, a sharp change in the pattern of the prosecution service's behavior between the Yeltsin and Putin periods in the Russia case could ensure the main preconditions of prosecutorial defection for political ends in young democracies, which the modified theory suggests.

Conclusion

According to Helmke's original theory of strategic defection, dependent judges could betray an outgoing government in order to serve an incoming one. This hypothesis seems very reasonable, but more exactly applicable to civil-law prosecutors' behavior in presidential countries. As prosecutors can take the initiative in attacking an incumbent government, unlike judges, and civil-law prosecutors in particular can manipulate pre-trial criminal proceedings for partisan ends, their defection can be most destructive. In addition, an incumbent president is more likely to become their target than any other type of government, because he or she exercises exclusive control over high-ranking prosecutors' careers during most of his or her tenure, but loses this huge power as his or her term comes to an end. The empirical cases during the Yeltsin and Putin presidencies offer strong support to the modified theory of strategic defection that we developed at the outset.

Helmke's original theory implies that judicial officers' strategic defection may, in part, correspond to a democratic ideal, as they will consistently serve a political

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majority along with an incoming government in crucial policy-making processes or political debates. However, criminal justice is substantially different from general judicial processes in that judicial officers should take their own role of checking crimes of a majoritarian government, not at the end of its tenure, but throughout its incumbency. Therefore, as a practical implication, if a new democracy introduces presidentialism without careful consideration of whether its prosecution system is closer to the common-law or civil-law tradition, a hasty choice may impede democratic development accompanied with the consolidation of politically fair criminal justice system. In several new democracies, as noted in the introduction, presidents who had dominated the powerful prosecution service were faced with its defection at the last phase of their tenure.

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