Monitoring public administrators or signaling trustworthiness to the demos? The two functions of ethics regulations

Abstract
Roughly since the 1990ies, a nearly worldwide trend of reviewing, updating, unifying and tightening the framework of ethical regulations for the public administration can be observed. Still, the shape of the regulatory framework differs between countries with regard to both type and quantity of measures implemented. In this article, a model is developed providing an explanation for this contradictory development of convergence on the one hand, persisting differences in shape and quantity of ethics measures on the other. Based on a Principal-Agent-Scheme, two functions of ethics measures are distinguished, the 'instrumental' and the 'signaling' function. This distinction helps to account for the selection of different types of measures as well as for differences in quantity of ethics measures between countries. The theoretical model is underpinned and completed by exemplary evidence from two comparative case studies of the US and Germany. The examples illustrate how the preference for one or the other function depends largely on institutional factors of a country influencing the situation of decision of politicians.

1 Background of the problem and research question

Ethics measures for public officials have recently become a topic of major interest in public administrations and public administration research alike. Ethics measures denote the corpus of rules and regulations that monitor the behavior of public officials in order to prevent, control or sanction instances of corruption or conflict of interest. Now, those ethics measures have been reviewed, updated and tightened in many countries during the last ten to fifteen years. International organizations, first among which the OECD[1], but also Transparency International, the EU, the World Bank and in part the US Government,[2] have made it their policy to set uniform standards of ethics measures which serve as guidelines for the countries' reform processes. Indeed, the content of those rules and regulations is very similar in most of the countries, so it seems fair to state a *trend of convergence* of the framework of ethics regulations.

When looking at single countries more closely, however, it becomes obvious that as regards both the *shape* of singular regulations as well as the *density* of the network of regulations, there are *significant differences*. Germany and the United States, for example, are both countries which might be regarded in international comparison as not very corrupt. Both have a highly professionalized public sector and clear and detailed regulations against all instances of corrupt behavior such as bribery, sleaze, fraud, or conflict of interest. Still, their ethics infrastructures differ widely.

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1 Since 1996 the Public Management Section (PUMA) of the OECD promotes an active 'Ethics Management' in a whole series of publications. Starting with the notion of an 'Ethics Infrastructure', which was developed and introduced in 1996 (OECD, 1996, 1997; Behnke, 2004, 79), they went on to pass the international 'Anti-Corruption-Convention' in December 1997, which was since signed by 35 countries. In 1998, twelve 'Principles for managing ethics in the public service' (OECD, 1998) were elaborated, which serve as practical guidelines on how to successfully implement the elements of an ethics infrastructure. The progress of establishing an ethics infrastructure in 29 countries has been documented by a survey (OECD, 1999, 2000). Meanwhile, also a virtual center of information and documentation for fighting corruption has been established online (`http://www.oecd.org/daf/nocorruptionweb/`, 11.05.2004).

2 To mention just a few influential initiatives: Transparency international conducts and publishes yearly a corruption perception index (`http://www.transparency.org/cpi/`, 17.08.04) and has established an online resource center on corruption (`http://www.transparency.org/knowl_intro.html`, 17.08.04); the EU has issued an anti-bribery legislation in 1998, and a convention with the aim to set uniform standards in criminal law as regards instances of corruption hast been issued by the European Council in 1999; the World Bank has established a 'Governance and Anti-Corruption Center' (`http://www.worldbank.org/wbi/governance/`, 17.08.04); and the US Office of Government ethics has been advising and teaching for years other governments in establishing elements of an ethics infrastructure (Gilman, 2000).

In Germany, to start with, the mere notion of 'ethics' is still quite unusual: Instances of ethical or unethical behavior are thought of rather in terms of 'legal' or 'illegal' behavior. Ethics measures are mostly found to be laws proscribing certain types of behavior, establishing control mechanisms and stating sanctions in case of violations. They are embedded in the tradition and strong systematics of the German legal system. This means that usually they form paragraphs or articles of particular law books such as the criminal law or the public service law. Consequently they can be changed or adapted only through a formal process of legislation passed by Parliament. The rules are stated in a very parsimonious manner, expressing nothing more than the dry judicial facts. This prevalent type of ethics measures is called by the OECD 'Compliance-based ethics management' (OECD, 2000, 25). Elements of an 'Integrity-based ethics management (ibid.) on the other hand, e.g. codes of ethics, a central ethics coordination body, ombudsmen or procedural arrangements, which aim at avoiding unethical behavior by raising awareness and enhancing the sensitivity for delicate situations, are only rarely found in Germany.

In the US, in contrast, ethics as a notion has a much longer tradition dating back to the 1950ies.[3] Today, ethics are highly fashionable, and whole armies of lawyers, journalists and counsellors earn their living by public ethics. Some observers even speak of an 'ethics supermarket' (Mackenzie, 2002, 83) or an 'ethics explosion' (Morgan & Reynolds, 1997, 74). Ethics is a topic in every election, and the volumes containing rules, examples and instructions for implementation are ten times thicker than the respective German law books.[4] Furthermore, ethics regulations are found not only in law books, but in organizational 'missions', in codes, slogans and self-binding statements.

Now, when comparing the evidence of those two countries, the obvious question is: *What accounts for those significant differences in shape and quantity of ethics regulations although their content is very similar?* The argument most often put forward to explain, justify or promote the introduction of a new ethics measure is to promote public trust. When expected

3 The so-called 'Douglas-Commission', which had been established by Congress in order to elaborate a proposal for the establishment of a central ethics coordination body for all three branches of Government, played an important role in promoting the ethics-debate (Douglas, 1952). And in 1958, both houses of Congress passed the first 'Code of Ethics for Government Service' as a concomitant resolution.

4 To give just one example: In the German Federal Civil Service Law (Bundesbeamtengesetz, BBG), the rules and regulations relevant to ethics extend to seven printed pages. The ethics handbook of the US Office of Government ethics is a 75 pages volume, and the ethics handbooks for the two houses of Congress have each several hundred pages.

standards are known to be high, controls are tight and sanctions strong, and when most of the activity in the public sector is transparent, then the public will be convinced of the efficiency and trustworthiness of the public sector. But this provides no argument for there being less ethics measures in Germany than in the US. Is the German public more trusting or less demanding than the American? It is hard to imagine. Thus, in looking for an answer to this question in my paper, I must take another path. Following an individualistic approach, I regard ethics measures as norms brought into existence by the action of persons who have the authority to establish norms. So, the relevant question becomes: *Which norms will authorized persons choose in a given situation of action, which can be defined by formal characteristics?*[5]

The answer to this question will be given in two steps. First (in section two) I will outline the formal characteristics of the type of situation in which the authors of ethics measures find themselves. I will argue that the best description of this situation is a 'Principal-Agent-scheme', and from that scheme deduce two different functions of ethics measures: Ethics measures can have either an instrumental or a signaling function (sometimes they have both). This distinction is important, because the concrete shape of an ethics measure depends on the function it is meant to fulfill. Also, the quantity of measures in a country is linked to the functions: When the signaling function prevails in a country, there will be implemented ceteris paribus more ethics measures than when instrumental function prevails. Thus, the forms ethics measures have and the quantity of measures in a country are both dependent upon which function prevails. The prevalence of either the instrumental or the signaling function of ethics measures, however, depends itself on institutional and cultural factors. Thus, in a second step (section three), empirical evidence will be used to feed flesh to the bones of the pure theoretical model: The institutional frameworks in Germany and the US shaping the decisions of the authors of ethics measures will be contrasted. Using exemplary evidence from concrete processes of the emergence of ethics measures, it will become evident how cultural and institutional factors deeply influence the ethics infrastructure of a country by giving preference to solutions with either an instrumental or a signaling function.

2 The public official in a Principal-Agent-Relationship

In this paper, the focus is exclusively on ethics measures guiding and monitoring the behavior of public officials. Yet, public officials usually do not set

5 This individualistic approach of reconstructing the logic of the emergence of norms follows a line of reasoning which was first introduced by Edna Ullmann-Margalit (1977) and adopted and formalized by James Coleman (1990, 249ff.).

up ethics measures themselves; rather, ethics measures are disjoint norms (Coleman, 1990, 246), in that their authors are not at the same time their addressees. The authors are typically either Parliament (in the case of laws) or the executive and the heads of the administration (in the case of other regulations). Thus, we must investigate the situation between Parliament, the executive leaders and the public officials. This triangle can best be modelled by a series of *Principal-Agent-relationships* (P-A-relationships) (cf. Pitkin, 1967, v.a. 127; Holcombe & Gwartney, 1989; Weingast, 1984; Andeweg, 2000; Huber, 2000). But before I argue why this model is particularly appropriate, the most important features of a P-A-relation are to be introduced.

2.1 Features of a P-A-relation

A P-A-relationship is a model originally derived from the field of law studies, but it was adapted and formally refined in economics. Its use in economics has made it ever more fashionable in the social sciences as well, as it is an elegant and parsimonious model for representing features characteristic for many social situations. Examples of P-A-relations are the relation between a doctor (A) and his patient (P), a lawyer (A) and his client (P), an insurance agency (P) and an insurance holder (A), an employer (P) and his employee (A) or between a voter (P) and his elected representative (A). All these relations have a fiduciary element in common: The principal entrusts the agent to act on his behalf. Thus, the basic element of a P-A-relation is a *task* given to the agent by the principal, and the agent is *accountable* to the principal for fulfilling this task in the best possible way. The situation, however, entails three further typical features: *divergence of interest*, *asymmetry of information* and *limited control*.[6]

A divergence of interest is not necessarily involved in every P-A-relation, yet it is very likely so. Once the agent is entrusted by the principal, the only guideline of the agent's actions ought to be to realize the principal's interest and not his own. Insofar as his own interests diverge from those of the principal, however, he is inclined to realize his own interests at the cost of the principal's. The divergence of interest in itself is not a problem as long as the principal can control the agent. However, in a real world, complete control is impossible due to transaction costs and incomplete information. Furthermore, the agent owns private information about his actions that the principal does not share, which enhances the problem of control.[7] From the point of

6 In the emphasis on and description of the features of a P-A-relationship I follow mainly Coleman (1990, 145ff.); cf. also Pratt & Zeckhauser (1985).

7 A systematic elaboration of the consequences of the asymmetry of information is given by Arrow (1985), also Akerlof (1970).

view of the principal, the informational gap on the possible divergence of interest cannot be closed completely by mechanisms of accountability and control. The remaining gap is a matter of *trust*.[8] To a certain extent, the principal has to be *confident* that the agent will not abuse the leeway that was necessarily granted to him to the principal's detriment.

This is the core of the basic tension inherent in a P-A-relationship: both the principal and the agent are interested in entering in a relationship, because both can profit from it. Yet, both know about the problems connected to it: the principal incurs the risk of being exploited, and in order to limit this risk he needs a reason for trusting his agent. Thus, the agent who wants a task to be assigned to himself has to signal credibly to his principal that he will not exploit the potential the situation will offer him. In its structure, the situation is analogous to a situation of promise, where an exchange of goods or favors is agreed upon, but not given simultaneously (see figure 1). The one who delivers first risks to be exploited by the second who might fail to deliver after having received his share. If the principal (he who delivers first) wants to realize a potential profit of cooperation, he has to incur the risk of being exploited, which would be worse than not having entered the cooperation at all (the cooperative strategy is not sub-game perfect). The agent, on the other hand, gains from the cooperation even if he does not exploit the situation. But he will have the chance to cooperate only if he can be trusted not to exploit the principal. If he can bind himself credibly, the cooperation will come about, if not, none of them can realize a surplus.

2.2 Internal and external P-A-relations

P-A-relations involve the assignment of a task, the accountability of the agent to the principal, divergence of interest, asymmetry of information and problems of control. All these instances apply to the situation of a public official. He is, however, an agent to two different principals. First, he is an agent to his superiors along the hierarchic line of order and responsibility within the public administration. In this relationship, ultimately the chief of the executive is the public official's principal, but the hierarchic line can be split in a series of P-A-relationships. That is, a head of department or of an agency is

8 Of course, it is far from obvious, what exactly is meant by 'trusting'. Benz (2002) for example argues that the absence of trust is an explicit feature of Principal-Agent-Relations as opposed to a representational relationship. In a less demanding version, however, a 'rational' trust (cf. Dasgupta, 1988, 50f. or Zintl, 2002, 174) as opposed to a blind trust is compatible with the structure of a Principal-Agent-Relationship. This is so in particular, as a rational trust can be backed by ex post controls and the possibility of sanction in cases of repeated interaction.

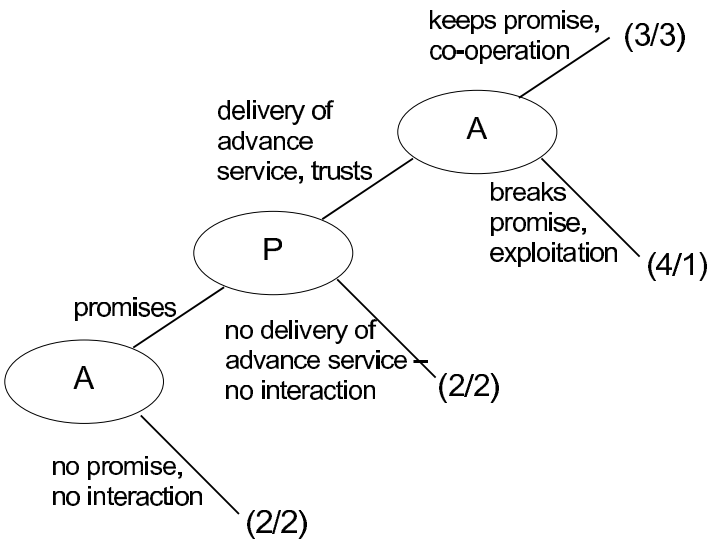

Figure 1: Extensive form of a situation of promise

agent to the chief of the executive, an undersecretary or employee is agent to the head of the agency, and so on. Second, a public official is an agent to Parliament. The public service as a whole is entrusted by Parliament to execute the laws Parliament makes and to allocate and distribute the funds Parliament has agreed upon. Both principals, the superiors in the administrative hierarchy, and Parliament, have a vital interest in controlling the actions of the public service. This triangle of relationships shall be called the internal P-A-relationships (see figure 2). Yet, the matter is more complicated, as the two principals, the executive leaders and Parliament, are themselves agents of the democratic sovereign who elected them and entrusted them to act in a manner that promotes the common good.[9] In their positions,

9 In Germany, the chancellor as chief of the executive – other than the American president – is not elected directly by the people. Due to the organization of a parliamentary system, he is elected by the majority of the representatives in Parliament and thus supported and entrusted by them. In practice, however, when German parties campaign for parliamentary elections, each party designates a candidate for chancellery that will be nominated in case the party wins the majority in Parliament. Thus, the vote for a party is at the same time the vote for a candidate for the chancellery, and often the latter consideration is given even more weight by the voters than the former. Taking account of these distortions of parliamentary practice from parliamentary theory, it seems fair to assume, for the purpose of this analysis, that also in Germany the chief

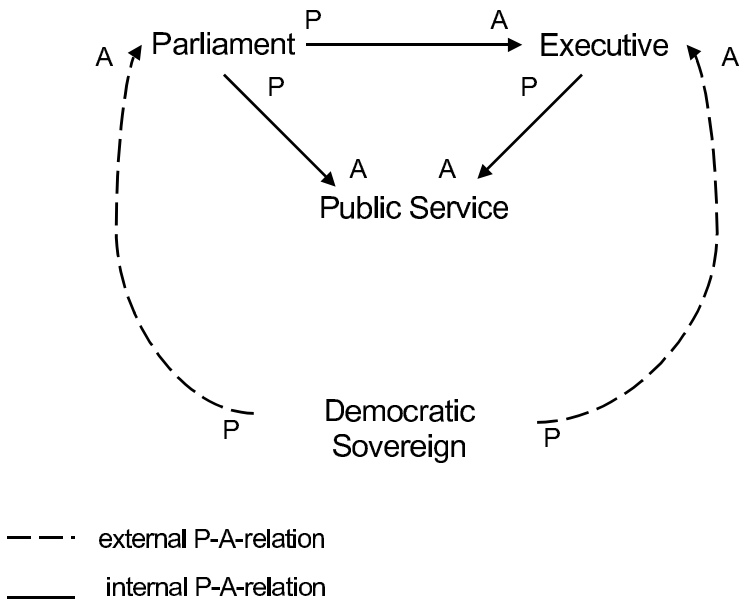

Figure 2: Internal and external P-A-relations

they depend crucially on public trust as a legitimate basis for their actions. If the public withholds or withdraws trust in the integrity and efficiency of the public sector, the system of democratic division of labor is bound to collapse. One important part of the political leaders' legitimization lies in the reputation of the public service. Hence, their interest in controlling the public service is directly linked to their effort to maintain their democratic legitimization. The situations in which Parliament and the executive leaders, respectively, are agents of the democratic sovereign, shall be called the external P-A-relationships (see figure 2).

To sum up: Members of Parliament and the executive leaders have the institutional authority to establish ethics measures. At the same time, they have a dual position: they are principals of the public officials and agents of the democratic sovereign. In their role as principals they have a direct interest in controlling the actions of the public service. They expect the public official to fulfill his task reliably and efficiently and to further the interests of the agency or department, not to waste money and not to profit privately from his public office. In their role as agents they must uphold

of the executive has a direct popular legitimization and a direct accountability towards his electors.

public trust in order to secure the legitimacy of their public positions. So they have an indirect interest in showing that the public service works well and efficiently. They expect the public official to be faithful to the letter as well as to the spirit of the rules and laws and to avoid scandals as well as the appearance of improper influence of private interests, politicization or distorted impartiality in the execution of their office. All these instances would hamper the reputation of the public service and reflect negatively on the legitimization of the legislators and executive politicians.

2.3 Two functions of ethics measures

The two kinds of P-A-relationships identified in the preceding section, the internal and the external relationships, imply different strategies for the authors of ethics measures. In their role as principals, they have oversight and control over the actions of public officials. In this respect, they use ethics measures in an *instrumental* manner to proscribe and prescribe particular courses of action, to establish control mechanisms and to provide for sanctions. In this sense, the notion of an instrumental function of an ethics measure is quite obvious and needs no further explanation. In their role as agents of the democratic sovereign, on the other hand, parliamentarians and executive leaders make use of ethics measures in order to *signal* their trustworthiness to the electorate. This is important, as often the principal cannot directly observe the agent's actions and has to rely on informational substitutes. In this sense, the expression 'signaling' is used with reference to Robert Frank's compelling analysis of "The Strategic Role of Emotions" (Frank, 1988). According to Frank, signals serve to convey to a person with whom I interact additional information on my behavioral dispositions, usually whether or not I can be trusted to keep my promises in case of a cooperation. Thus, signals play an important role in enabling cooperation, when other kinds of information, such as personal experience or reputation, are not at hand. But signals are useful as informational substitutes only insofar as they are credible, which means they can neither be imitated nor copied. Similarly, ethics measures with an instrumental function have their desired effect only, when – in principle at least – the democratic sovereign can observe that the agents behave indeed in a trustworthy manner.

These two functions, the instrumental function and the signaling function, of ethics measures have been described in a congressional hearing on the ethics process:

> "First, consider legislative judgment. Ethics rules, if reasonably drafted and reliably enforced, increase the likelihood that legislators (and other officials) will make decisions and policies on the

basis of the merits of issues, rather than on the basis of factors (such as personal gain) that should be irrelevant.
The other precondition or purpose – restoring or maintaining citizen confidence – is related to the first. Ethics rules give citizens greater assurance that officials are making decisions and policies on the merits."[10]

Although this statement refers to elected representatives, the basic problem applies to the public service as well. It points out very clearly that ethics measures do have different functions, but that these functions belong together. A policy relying exclusively on the instrumental function would be as useless as one relying exclusively on the signaling function. Rather, they complement each other, and the effectiveness of one function enhances the effectiveness of the other. Correspondingly, it is often hard to tell whether a concrete ethics measure has an instrumental or a signaling function. In most cases, they fulfill both, but often the predominance of one function can be determined. If we assume that in a given P-A-relationship it is the purpose of an ethics measure to overcome one of the problems typically involved in a P-A-relation (i.e. either divergence of interest, asymmetry of information or limited control), then it is possible to identify for each of these types of problems ethics measures that cure the problem with an emphasis put either on the instrumental or on the signaling function (see table 1).

Problem involved in P-A-relation	**Instrumental function**	**Signaling function**
Divergence of interest	oaths, ethics training	declarations of commitment, like mission statements or codes of ethics
Asymmetry of information	institutionalized reporting, rights of question and information	transparency
Limited control	tightened laws, more severe sanctions, new mechanisms of control	self-control, higher level of liability of a regulation

Table 1: Ethics measures as instrumental or signaling solutions to the problems of a P-A-relation

10 Statement by Dennis Thompson in the second hearing on "The Administration's Ethics Proposals and Congressional Standards of Conduct" before the 'House Bipartisan Task Force on Ethics', 24 Mai 1989.

2.4 The logic of the situation for parliamentarians and executive leaders as authors of ethics measures

When combining the distinction between ethics measures with a signaling and those with an instrumental function on the one hand with the two kinds of P-A-relationships identified in the preceding section – i.e. internal and external P-A-relationships – on the other, the logical conclusion is this: Elected representatives or executive leaders will establish ethics measures with an instrumental function when they perceive the necessity to better control the administration. They will establish ethics measures with a signaling function when they feel that public trust is decreasing and they must do something about it.

The fundamental difference between the two strategies is this: An ethics measure with an instrumental function, e.g. a new law specifying more severe sanctions for misbehavior, can be assumed to fulfil its purpose more or less directly. When in procurement law the threshold for a public bidding is lowered, then the next time the amount of a procurement contract is above this threshold, the bidding will be public.[11] Ethics measures with a signaling function, in contrast, can never be linked directly to their desired effect. If, after a scandal of financial conflict of interest of a leading public official in the US State Department which aroused much indignation among the media, the financial disclosure requirements are enlarged further, nobody can know whether this measure really helps to reassure the public on the integrity of public officials. Thus, because a direct link between cause and consequence can never be ascertained, the authors of ethics measures find themselves in a situation of uncertainty in which they tend to establish ever more ethics measures in order to make sure that the desired aim – to maintain or restore citizen confidence – be indeed realized. So, it is quite obvious why in tendency there are so many more ethics measures with a signaling function than with an instrumental function.

But still the question remains unanswered, when and why a parliamentarian or a high executive perceive a pressure of the one or the other kind. Do political decision makers in the US perceive more declining trust than in Germany? For the total amount of ethics measures is much higher in the US than in Germany, as we have seen. Is there a difference between members of the legislature or of the executive? Some conjectures can be formulated in an abstract manner.

For example it can be said that very probably a decline of public trust

11 Of course, the impact of a regulation is not always so obvious. But in general a direct effect between a new measure and the behavior of public officials can be assumed.

is perceived after a scandal with a high media coverage. In such cases it is very likely that measures with a predominantly signaling function will be established. Ethics can – in another instance – have a signaling function when used as an argument in campaigning. Parliamentarians will generally tend to use signaling measures, because they depend crucially in their positions on public support, whereas executive leaders are less directly exposed to the good or bad will of the electorate.

The instrumental function will be reinforced if either Parliament or the executive perceive that the administration is becoming an autonomous body no longer controlled from the out- or the inside. One instance is, for example, the worldwide initiative to curb corruption in public administrations. Here, the effect measures might have on public perception is secondary to the direct goal of avoiding, uncovering and sanctioning corrupt behavior among public officials. Sometimes, instrumental measures may be used to strengthen Parliament as an institution relative to the executive. But in the end, the very concrete circumstances of a situation of decision depend – in part at least – on features of the respective political systems. Therefore, in the next section, some examples of the emergence of ethics measures will be described, highlighting the driving forces and the reasoning of the authorized persons in the two countries.

3 Ethics measures in the US and Germany as consequences of the respective political systems

As – as has been pointed out several times already – ethics and ethics measures play a much more important role in the American public sector than in the German, and as the regulatory framework for ethical rules is much more differentiated and elaborated there, I take some of the most important developments in ethics measures in the US as examples and compare them to regulations of the same situations in Germany. First, I look at the most fundamental ethics requirements: The foundation of any kind of normative system on which ethics regulations can recur is the loyalty to the constitution and the central values of a society. These are often incorporated in codes of ethics, which play an important role in the USA, but not in Germany. Second and third, some consequences of the Ethics in Government Act (EGA) of 1978 and the Ethics Reform Act (ERA) of 1989 as the two big legislative works of ethics reforms will be highlighted. These are the financial disclosure requirements and the rules and regulations relating to gift acceptance and bribery. Last but not least, the so-called 'Appearance Standard' is to be mentioned, which probably forms the core of all ethics regulations for the American public service.

3.1 Codes of Ethics

Fundamental for a working government is the loyalty of its public officials, not only to the government of the day, but to a State's constitution, to the letter and the spirit of its laws and to its basic values. Most ethics measures were established with the goal to secure this loyalty and to avoid that a public official promote his own interest at the cost of the public good. In the US, these core values often take the form of codes of ethics. The first code of ethics for the public service was passed by Congress under the presidency of Dwight D. Eisenhower as a concurrent resolution. Although it never reached the state of a law, its spirit guides still today all ethics regulations. The next codes were issued by president John F. Kennedy as executive order 10939 of May 05, 1961, by president Lyndon B. Johnson as executive order 11222 of May 08, 1965, and by president George Bush as executive order 12674 of April 12, 1989. At least two of them, Dwight D. Eisenhower and George Bush, made ethics an explicit part of their presidential campaign by announcing that they would raise ethical standards in the public service and end corruption and misbehavior. The most recent code by President Bush (1989) is now part of the CFR and starts in § 2635.101 with the paragraph: "Public service is a public trust. Each employee has responsibility to the United States Government and its citizens to place loyalty to the Constitution, laws and ethical principles above private gain. To ensure that every citizen can have complete confidence in the integrity of the Federal Government, each employee shall respect and adhere to the principles of ethical conduct set forth in this section, as well as the implementing standards contained in this part and in supplemental agency regulations."

A very similar formulation is found in the German Civil Service Law at the beginning of section III: "The Civil Servant serves the whole people, not one party. He fulfills his tasks impartially and just and considers in the execution of his office the common good. The Civil Servant must express in his behavior his commitment to the liberal democratic basic order according to the Basic Law and actively stick up to its maintenance." (translation N.B.) In Germany, however, core values have so far not been given the form of codes of ethics. In 1998, the Federal Government drafted a code of ethics for public service in implementing its anti-corruption legislation in the administration.[12] This draft code, however, has never materialized into any more formal regulation and was quickly forgotten.

The functions of such codes and statements of core values are twofold:

12 The code is a part of an administrative order issued on June 17, 1998 containing detailed instructions on how to implement the anti-corruption provisions passed as law a year earlier (anti-corruption law of June, 26, 1997 - BGBl. 1997, 2038ff.).

They are instrumental in guiding the public officials' behavior. But commitment to basic values is hard to control. Therefore, it is necessary to send credible signals that the public official will stick to the fundamental values even without control. This is, for example, the purpose of oaths of office, which public officials in both countries have to swear.

3.2 Financial Disclosure

In 1978, in direct reaction to the Watergate scandal, a major ethics reform law was passed by Congress – the 'Ethics in Government Act' (EGA). Among many other institutional reforms, such as the establishment of the 'Office of Government Ethics' (OGE) as central ethics coordination body of the executive, the act required all members of Government to publicly disclose their financial interests.[13] Already as early as in 1964, first requirements of financial disclosure had been introduced (Vaughn, 1990, 436). But the EGA made financial disclosure obligatory for all three branches of Government. At that time, the requirements for Members of Congress were stricter than those for the public administration. Thus, in 1989, with the 'Ethics Reform Act' (ERA) the disclosure requirements were further enlarged for the administration and applied uniformly to all branches of Government.

The disclosure regulations require every member of the public service to declare their income as well as the stock and property they hold by May 15 every year. These declared financial interests are the basis for the application of financial conflict of interest regulations, at least insofar as prohibited financial interests are concerned. The kind of information to be disclosed has become ever more detailed and entails even the financial interests of spouse and children.[14]

The rationale of the financial disclosure requirements is to avoid conflicts of interest by creating transparency. If an interested public, e.g. a journalist or a pressure group, can see which financial interests a public official has, then conclusions on possible influences on his political decisions can be drawn and discussed publicly. As an indirect goal, the transparency is meant to promote public trust. However, the legitimate public interest in transparency must be balanced with the respect for the public officials' private sphere (cf. Farina, 1993, 309). In particular in the last few years, this balance has repeatedly been questioned (Mackenzie, 2002, 90ff.). Meanwhile, in the Office of Government Ethics some efforts are being taken to loosen the disclosure

13 Those parts of the EGA that relate to financial disclosure requirements were codified in title 2 United States Code (U.S.C.) §§ 701ff.

14 The detailed regulations are contained in Title 5 U.S.C. section 6, §§ 101-111, see also Mackenzie (2002, 56ff.).

requirements at least for the lower ranks.[15]

In Germany, up to now, members of the public administration are not required to publicly disclose their financial interests. This requirement exists – albeit to a very limited extent – only for Members of Parliament. It must be said, however, that for the German public administration, there is objectively not such a pressing need for financial disclosure, as there is less opportunity for conflict of interest. In the US, the traditional revolving-door-principle still prevails at least in the higher ranks of the public service. With persons changing back and forth between influential firms and companies and leading positions in the public sector, the contacts and kind of information people they can easily create conflicts of interest. In Germany, in contrast, the traditional public service careers still prevail where people use to spend their whole working life in the public administration without any opportunity of establishing close bonds with particular companies.

The evidence for the function which the financial disclosure requirements play is mixed. On the one hand, they were introduced in order to avoid conflict of interest by exposing those interests to the public. This is clearly an instrumental function. The aim to promote public trust by securing transparency, on the other hand, is a signaling aspect.[16] Furthermore, the thrust for the enlargement of disclosure requirements came from Congress.[17] For a Member of Congress, a detailed account of personal financial interests is also a potent signal of trustworthiness to his constituents. So, Congress may have enlarged the requirements with an eye on the signaling function. In requiring the executive to meet the same standards of disclosure, however, the Congress follows another rationale in that it tries to enhance its control over the executive, which again indicates an instrumental function between the two branches of Government. Finally, the fact that in Germany no disclosure requirements exist for the public service due to a lack of opportunity for financial conflict of interest suggests that the requirements have primarily an instrumental function. This is a good example to show how the interpretation of the function of an ethics measure may vary according to the context.

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15 Personal information given to the author by the head of the OGE in 2002.

16 This impression is supported by the recent revelations made in 2002 by the media on a secretary of defense in Washington DC. He had kept holding stock worth more than 1 million $ in spite of having pledged at the OGE to sell it. Yet, this behavior was judged by administrative ethics experts a being still within the range of admissible behavior?

17 Especially the Ethics Reform Act of 1989 applied the higher disclosure standards of Congress to the Administration.

3.3 Bribery and Gifts

In both countries bribery is a matter of criminal law. In Title 18 U.S.C., § 201, the offering or accepting of bribes or illegal gratuities in exchange for an official action is interdicted, a law protected by a maximum penalty of 15 years prison. Title 5 U.S.C., § 7353, interdicts the soliciting of bribes or illegal gratuities. Similarly, in the German criminal code, §§ 331-334, the offering, accepting or soliciting of bribes is forbidden. In a recent reform of the German criminal code, in reaction to an accumulation of several incidents of undue acceptance of gifts, of bribery and preferential treatment in procurement contracts, these paragraphs have been changed in order to provide for a more efficient prosecution.[18]

At a lower level, gift acceptance is also an instance of bribery. Gift acceptance is forbidden in both countries at statutory level. In the US, the basis of the gift rule is the 'Appearance Standard' (see the next section), according to which gifts must not be accepted if this might create the impression that the recipient of the gift is influenced in the execution of his official duties. As the application of the 'Appearance Standard' depends on the subjective judgment of the recipient, however, over the years the regulations became ever more detailed. In 1989, the gift rule has been standardized and unified for the legislative and executive branches of Government as part of the Ethics Reform Act. Since then, the prohibition of accepting gifts is part of the U.S.C. [19] Even before the Ethics Reform Act, since 1978, a gift rule at regulatory level had existed for public officials.[20] But the fact that it was lifted from regulatory to statutory level in 1989 reflects a concern to give it greater weight and importance. This interpretation is underpinned by the fact that in 1989, the logic of the gift rule was reversed. Whereas formerly it consisted of a list of unacceptable gifts, since 1989 gifts were banned generally, while the permissible exceptions were listed. This list, however, is very long and detailed, and public officials still have a certain leeway in determining whether a gift falls under the list of permissible exceptions, for example whether he regards the gift giver as a close friend or not.

In Germany, § 70 of the Federal Civil Service Law states that a public servant must not accept gifts. Permissible exceptions are not listed ex ante, but rather the superior must decide on a case-to-case basis whether or not a

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18 The Act to Fight Corruption of 1997 enlarged the range of application of the relevant paragraphs and raised the maximum term of imprisonment from two to three years (in the case of solicitation) and form five to ten years (in severe cases of bribery).

19 Title 5 U.S.C., § 7353.

20 § 2635 of the 'Code of Federal Regulations' (CFR), Office of Government Ethics (8ff. 1999, cf.).

public official may accept a gift. So far, gift acceptance in the public service has not been a topic of major interest or reform efforts.

Again, the evidence of bribery and gift regulations is mixed. Primarily, both rules have obviously the instrumental function to avoid that external interests influence the public official in the execution of his duties. In the same line of reasoning, the recent reforms in the US and in Germany can be meant to close gaps of effectiveness. However, those reforms were always a reaction on scandals and publicized instances of manifest conflict of interest. This fact, and the incorporation of the gift rule in the U.S.C. by the Ethics Reform Act suggest that the ban of acceptance of bribes and gifts can also have an important signaling function to the public. However, this signaling function seems again to be more important in the US than in Germany.

3.4 The Appearance Standard

A central and integral part of the framework of ethics regulations in the US is the so-called 'Appearance Standard', which requires holders of public office – roughly speaking – to avoid actions that might create the appearance of improper, unethical or corrupt behavior.[21] Almost all ethics measures regulating very different situations make reference to this standard (such as the gift rule explained in the section above). It can be regarded as the most important manifestation of the signaling function of ethics measures. In 1965, it was stated for the first time explicitly in the code of ethics issued by President Lyndon B. Johnson (Executive order 11222 of May 08, 1965):

> "It is the intent of this section that employees avoid any action, whether or not specifically prohibited by subsection (a), which might result in, or create the appearance of
>
> 1. using public office for private gain;
> 2. giving preferential treatment to any organization of person;
> 3. impeding government efficiency or economy;
> 4. losing complete independence or impartiality of action;
> 5. making a government decision outside official channels; or

21 The standard makes allusion to an event reported by Plutarch: One night, Clodius was caught in Caesar's palace disguised in women's clothes, while he tried to get to Pompeia, Caesar's wife. Although it was never proven that Pompeia had really arranged for a secret date with Clodius, Caesar expulsed her because her behavior had given reason to speculation on her moral inappropriateness and thus maculated Caesar's reputation. This is why the 'Appearance Standard' is also referred to as 'Caesar's wife principle' (cf. Thompson, 1995, 214ff.; Driver, 1992).

6. affecting adversely the confidence of the public in the integrity of the Government."

Today, the standard is incorporated in the CFR, which says that a public servant should refrain from actions, "... if he determines that a reasonable person with knowledge of the relevant facts would question his impartiality in the matter" (§ 2635.501 CFR).

Thus, the 'Appearance Standard' sets a higher threshold for unacceptable behavior than do the formal regulations. Behavior is forbidden (or to be avoided) not only if it violates the rules, but even if it might create the appearance that rules have been violated in spite of the behavior being de facto perfectly in accordance with the rules. It is not obvious at first glance what might be the logic of requiring public officials to comply with the 'Appearance Standard'. But in the light of the problems of control and asymmetric information described above as typical features of a P-A-situation, an interpretation offers itself: The democratic sovereign has no possibility of looking closely inside the everyday work of the public sector. Rather, people depend on the general impression they get by media reports or official speeches. As the informational gap is wide and control almost impossible, the appearance of behavior is the substitute of information on which the public must rely. As long as it can be assumed that unethical behavior usually would also appear as such, the requirement of avoiding the appearance can be a good safeguard against unethical behavior without incurring the trouble to investigate into every single case whether there was real or only presumable conflict of interest.

As strict as the 'Appearance Standard' may appear in theory, in practice it is much less restrictive. For in the end the public official himself must decide whether or not the appearance of impropriety may be created by his behavior. The only criterion given is a fictive "reasonable person with knowledge of all relevant facts" (however, a person with knowledge of all relevant facts would not be left to speculate upon appearances). The 'Appearance Standard' is needed because in many situations the expected behavior cannot be described precisely in advance. The same problem of ambiguous criteria, however, flaws the application of the standard itself. So in most cases the 'Appearance Standard' can require no more than to avoid manifest conflicts of interest. This insight underpins the primarily signaling function of the standard. It is meant to promote public trust. In this function, however, it is not unambiguous, at least for two reasons:

1. By emphasizing the 'Appearance Standard' as yardstick for the public to judge an administrator's behavior, the tendency is created to take

the appearance of a situation in which a conflict of interest might exist for the administrator's actual succumbing to this conflict of interest. But then the public gets the impression of much more unethical behavior than actually exists, which undermines the initial goal of the 'Appearance Standard' to promote public trust.

2. Relying exclusively on the appearance of behavior may develop its own dynamics: To the degree that real unethical behavior is not only a subset of apparent unethical behavior, but appearance and behavior are getting disconnected to the effect that it is possible to behave unethically while maintaining the appearance of proper behavior, the 'Appearance Standard' degenerates to nothing more but symbolic politics. This disconnection is fatal as – as was mentioned above – signals fulfill their function only as long as they are credible. Sooner or later the public will necessarily discover that the appearance is not congruent with reality which inevitably must lead to a heavy loss in public trust.

In spite of the problems mentioned here, the 'Appearance Standard' plays an important role in underpinning the intention of ethics measures and making them workable. Its effectivity, however, depends crucially on the extent of connectedness between appearance and actual behavior.

In Germany, no such standard is expressed for public officials. It may be part of the self-conception of the public service, as stated in § 54 clause 3 of the Federal Public Service Law: "His behavior in and outside the office must do justice to the respect and trust that his profession requires." (translation N.B.) But this provision does not even distantly have the same meaning as the 'Appearance Standard' in the US.

4 Conclusion

These empirical examples gave powerful evidence that the signaling function does indeed play a much more important role in the US than in Germany. Also, ethics initiatives date back much farther in the US than in Germany. This accounts for the much greater quantity and density of ethics measures. At the same time, the examples give some hints as to which factors account for the emphasis on the signaling function in the US compared to Germany.

Whereas the statement of basic values is a matter between "the State" and its public officials in Germany, in the US the statement of basic values in the form of codes of ethics has been a major topic in many election campaigns, not only among presidential candidates, but also in congressional campaigns. In the American system of highly personalized and competitive

election campaigns, the signaling function of ethics is always a welcome tool to attract votes.

The need for financial disclosure requirements, per se, is more justified in a public service based on the revolving door system, such as in the US, than in one based on a life-long career system, such as in Germany, because in the former there exist many more opportunities for conflict of interest than in the latter. Thus, the organization of the public service is itself a factor influencing the choice of particular ethics measures. Furthermore, the emphasis on the signaling function of financial disclosure regulations was initiated by Members of Congress who again used this as a tool to gain trust among their voters. That these tightened regulations were extended to the public service in 1978, is – at least in part – due to an effort of Congress to extend its control over the administration. Thus, a high rate of ethics measures with a signaling function in the administration is in part due to the strong dualism between executive and legislature, in the course of which Congress extended high standards of transparency to the administration in order to have better chances to control it.

The same logic applies also to the gift rules. The tightening of the gift rule over the years took place primarily in Congress as a reaction to major and minor scandals, where Members of Congress had been involved. Here, tightening the rules aimed clearly at sending signals of trustworthiness to the voters. Then, in the ERA of 1989, they were extended to the administration in an effort to set uniform standards for all branches of government.

The 'Appearance Standard' is nearly the incorporation of the signaling function of ethics measures. It plays a central role in the American network of ethics regulations, whereas in Germany it is only marginally mentioned. The history of the introduction and development of the 'Appearance Standard', however, offers no clue as to relevant explanatory factors why it came to play such a central role here and not there. At this point, a little speculation may be justified. As was mentioned above, the whole system of elections to legislative and executive positions is highly competitive and personalized in the US. The other side of this coin, however, is a very close connection between elected and electors and consequently a direct accountability of elected politicians to their constituency.[22] This system differs significantly from the party-oriented election system in Germany with only little direct accountability, which might be described as a mediated democracy. Perhaps this more direct democratic understanding of representation in the US promotes ethics measures with a signaling function in general, and the 'Appearance

22 This particular mechanism and understanding of representation has been termed the 'Personal Vote' (Cain, Ferejohn & Fiorina, 1987).

Standard' in particular.

A last point is to be mentioned which was rather implicit in the examples given above. It refers to the law system of the two countries under investigation. In Germany, we have a tradition of Roman law in the specific form of the German "Rechtsstaat". The US, in contrast, follow the British tradition of Case law and Common law which is much less systematic and develops incrementally. In the German public adminstration the prevailing degree of education is still the law degree. That means that most public officials are trained in dealing with the dry language of law, and there is little need to give ample examples of interpretation of the relevant regulations. The parsimonious formulations are fitted in the rigid systematic of existing laws, so that the overall quantity of ethics regulations is very low. The American Case law, in contrast, encourages an incremental and unsystematic experimentation with new forms of regulations and sets no limit to extensive interpretative rulings, which – on the other hand – may be more important because of the less homogenous training background of public administrators.

To conclude, the distinction of instrumental and signaling function of ethics measures is not artificial, a mere product of sophisticated theorizing, but has a real empirical foundation and significance. A strong emphasis on ethics measures with a signaling function leads to an overall dense network of ethics measures. And whether or not a strong emphasis is put on the signaling function, depends – in part at least – on institutional factors of a country such as the law system, the election and party system or the organization of the public service.

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