

Grant
H-2-86
MF!

HEUNI

HELSINKI INSTITUTE
FOR CRIME PREVENTION AND CONTROL
AFFILIATED WITH THE UNITED NATIONS

102332

SCALE OF NOT PROTECT

Helsinki Institute for
Crime Prevention and Control,
affiliated with the
United Nations
POB 178
SF-00171 Helsinki, Finland

Publication Series
No. 8

NCJRS

AUG 25 1986

ACQUISITIONS

THE LEGAL SCOPE OF NON-PROSECUTION IN EUROPE

by

Peter J.P. Tak
United Nations ad hoc expert

Professor of Law, University
of Nijmegen, the Netherlands,
(former district prosecutor at
the court of 's Hertogenbosch)

Helsinki, April 1986

FOREWORD

In March of 1986, the Helsinki Institute convened a European Seminar on Non-Prosecution. The theme of the seminar was selected in the light of the importance of this prosecutorial decision in the over-all criminal policy of a country, and of the interest of the United Nations in promoting guidelines for the activity and functions of the prosecutor.

In preparation for the European Seminar, the Helsinki Institute requested the services of Dr. Professor Peter Tak of the University of Nijmegen, as a United Nations appointed ad hoc adviser. Dr. Tak, himself a former prosecutor with experience in transnational studies, undertook the preparation of a survey of the legal scope of nonprosecution in Europe, as basic documentation for the European Seminar.

As Director of the Helsinki Institute, it is my great pleasure to include Dr. Tak's excellent report in the publication series of the Institute. Despite the daunting intellectual challenge involved in analyzing the quite different prosecutorial services in Europe, Dr. Tak has been able to single out the key issues involved in nonprosecution, as well as develop a set of valuable recommendations.

Dr. Tak's report is the first part of a set of two publications on the basis of the European Seminar. The second publication will contain a report on the proceedings of the Seminar itself, prepared by Dr. Professor Karoly Bard, as well as the papers presented at the seminar.

Helsinki, 7 April 1986

Inkeri Anttila
Director
Helsinki Institute for
Crime Prevention and Control,
affiliated with the
United Nations

TABLE OF CONTENTS

Introduction		1
Chapter I:	The right to prosecute	18
Chapter II:	Prosecution principles	26
Chapter III:	Extending or reducing the scope of non-prosecution	43
Chapter IV:	Grounds for the waiver of prosecution	50
Chapter V:	Conditional waiver of prosecution	67
Chapter VI:	Guidelines for the waiver of prosecution	73
Conclusions		84
Recommendations		86
Bibliography		88
Annex I	List of experts who provided national reports	96
Annex II	Questionnaire	97

INTRODUCTION *

1. The criminal justice policy of a country is the product of interaction between the various policies generated by the organs of the criminal justice system. In accordance with its particular role and function within the legal framework, each of the respective organs, such as the legislature, the police, the prosecution agency, the judiciary, the bar, the probation agency, and the prison administration, contributes to the criminal justice policy through its reaction to deviant behaviour. For example, the legislature, inter alia, provides the structure for the legal framework through the establishment of abstract behavioral norms, the definition of subsequent duties delegated to the criminal justice agencies, and the provision of finances for the accomplishment of these duties. The police is delegated the duties concerning the prevention and the detection of law violations; the prosecution agency the responsibility for deciding whether prosecution must be instigated in a given case; the judge the task of sentencing and imposing the appropriate penalty and/or measures; the bar with the defence of the accused; the probation service with the supervision and support of the offender in the community; and the prison administration with the execution and supervision of the confinement of the condemned. To some degree, these agents exercise discretion in the execution of their duties.

Through the utilization of this discretion, they all contribute to the creation and the recreation of the underlying criminal justice philosophy, and of the subsequent practical criminal policy. This policy is the product of choices, of settings of priorities, and of the mutual and co-existing influences of all these agencies, which together shape it in its final practical form.

2. The prosecution agency or service plays a pivotal role in the administration of justice. The decisions made by prosecutors influence other actors in the criminal justice framework. Not only does his decision involve profound consequences for the defendant, but repeated refusals to prosecute certain crimes may also lead to a decline in the investigation and charging of offences by the police. In turn, the charges laid against an accused largely delineate the adjudicatory and dispositional functions of the courts. The prosecutorial decision consequently has a significant impact on the rest of the criminal justice agencies, and on their everyday functions.

* I would like to express my thanks to Miss Hannele Jantti, from Simon Fraser University, Canada, who has functioned as my research assistant during my stays in Helsinki, in 1985 and in 1986.

This report focuses on the contribution of the public prosecution agency to the formulation of criminal policy through its utilization of prosecutorial discretionary power. The main concern of this report is the existence and the extent of this power in the European countries included in this report. The question to be answered concerns the extent to which a given prosecution agency possesses discretionary prosecutorial powers, and the extent of the utilization of this power.

The discretionary prosecutorial power has been considerably expanded over the past twenty years in many of the European jurisdictions, both in law and in practice. Jurisdictions requiring compulsory prosecution of all detected and investigated offences have vested the prosecution service with the right to waive prosecution in cases involving minor crimes, or cases where the offender has become a victim of his own offence, or the jurisdictions have introduced new ways of dealing with offences which circumvent the formal court procedure (such as conditional discontinuance of the criminal proceedings) applied to criminal acts in general, or to specific crimes (such as those related to drug abuse).

Also in jurisdictions which recognize discretionary prosecution, the use of this power appears to have been considerably extended. Indeed, statistics show that the percentage of non-prosecuted offences have increased over the past twenty years in such countries.

Although the legal framework for the utilization of discretionary power has been reduced in some countries through the abolition of the diversion alternative of transferring the case to another "non-criminal" court (such as a people's court), the extent of discretionary power does not seem to have been affected, due to the coinciding expansion of the prosecutorial discretionary power to other areas of criminal law.

The general rise in crime, particularly in minor crimes such as shoplifting, cheque frauds and traffic offences, has led many jurisdictions to implement major changes in their administration of justice for practical reasons. However, it must be stressed that these changes have not only been based on the demand for efficiency in the administration of justice. New perspectives on crime control, on the legal position of the victim and the offender, as well as new approaches to crime, have been decisive factors in this process of change. One of the changes that has occurred in the administration of justice has been the innovation of alternatives to prosecution which were, until recently, relatively rare. These alternatives are numerous, as will be seen in this report. The various aspects of the prosecutorial decision form the main topic of this report.

3. The working definition provided for this report is that "non-prosecution" shall be understood as:

any decision by the prosecutor or corresponding official according to which he does not bring a case to court, despite the availability of evidence regarding the guilt of a specified person.

In the course of this report, a more precise definition for this term will be provided. This is due to the fact that, in many of the criminal justice systems studied, other prerequisites or conditions are placed on prosecution, in addition to the sufficiency of evidence in a case. It must also be noted that in cases where a prosecutor can not prosecute because of the absence of these prerequisites or conditions, we would not speak of the utilization of a discretionary power, due to the prosecutor's lack of choice with respect to prosecution.

4. In the market economy countries of Europe, the primary prerequisite for the utilization of prosecutorial discretionary power is the existence of a criminal offence. This is the context within which the utilization of the discretionary power in these countries is discussed in the present report.

However, when we adopt this definition, we exclude the use of discretion - which in practice is rather restricted - by the investigating or the prosecuting agencies of the socialist countries, which exists with respect to whether or not an act is considered a criminal offence.

The introductory sections of the socialist countries' penal codes contain a definition of a criminal offence: an act which corresponds with the elements defined by the penal law, and which endangers society is a criminal offence. (The relevant provisions of the penal codes for the respective countries are: Bulgaria art. 9(1), Czechoslovakia 3(1), German Democratic Republic 1(1), Hungary 10 (1), Poland 1, Romania 17, RSFSR 7(2), Yugoslavia 8 (1)).

Consequently, an act which represents an insignificant danger to society (for example, because of slight importance and insignificance, or absence of detrimental consequences) does not constitute a criminal offence in Bulgaria (art. 19(2)), Czechoslovakia (3(2)), the German Democratic Republic (3(1)), Poland (26 I), Romania (18(1)), RSFSR (7(2)), and Yugoslavia (8(2)).

In Hungary, however, sections 28 and 36 of the penal code state that an act is not punishable if, at the time of its perpetration, it represented a danger so slight to society that even the mildest punishment applicable would appear unnecessary. Therefore, lack of social danger is a ground for non-prosecution in Hungary.

The doctrine underlying this legal reality is known as the material concept of crime. The investigating or the prosecuting agency decides, to a considerable extent, whether the social danger of an act is significant. The prosecution agent must evaluate, according to his own judgement, the degree to which an act harms society, specifically taking into consideration the importance of the protected interests affected by the act, the manner in which the act was committed and its consequences, the circumstances surrounding the act, the personality of the offender, the degree of his culpability, and the offender's motives (e.g. section 3, par. 4 of the Czechoslovakian penal code, section 58 of the Code of Criminal Procedure of the German Democratic Republic).

The assessment of all of these factors, together with the consideration of whether or not the act is criminal, is up to the prosecution agency. When the social danger of an act is insignificant, criminal prosecution can not take place. If it has been initiated, it cannot be continued.

This fact, however, does not mean that such an act goes unnoticed. For example, the authorities in Hungary (such as the police, the prosecutor, or the court), may express their disapproval via an admonition, and warn the perpetrator to abstain from further law-breaking. In the German Democratic Republic, an act may be determined to constitute a minor offence (Verfehlung), an infringement (Ordnungswidrigkeit), or a breach of discipline (Disziplinarverstoss). The act may then be transferred to another (non-criminal) court.

No detailed information is available to the present author on the practical extent of the utilization of this type of discretionary power, but it appears to be rather restricted. For example, less than two percent of all reported cases in Yugoslavia in recent years have been determined not to be criminal due to the act's insignificant social danger.

Further on in this report, we will explain how we view this decision as comparable with the prosecutorial discretion exercised in the market economy countries. This "material concept of crime" demonstrates the difficulties in formulating a definition of non-prosecution, which would cover its existence and application in the various, and sometimes very differing, criminal justice systems. We must therefore be flexible with the working definition.

5. There is another point which must be raised in this context. In many countries, the legal system contains procedures which lead to official reactions, but which circumvent the official court contact. For example, in Turkey, France, Greece, Belgium, Luxembourg, Italy, Scotland, and the Netherlands, an offender can, at times, avoid a criminal charge by voluntarily paying a certain amount of money either to a treasury or the victim. In some legal systems, this possibility exists only for minor offences, while other

systems allow its use for more serious crimes. This is legally known as a "transaction", "composition", or "settlement out of court", and is not considered a waiver of prosecution. It appears, however, to be comparable with the conditional waiver of prosecution existing in various legal systems. We will deal with this procedural possibility, to the extent of the information available to us, as it fits within the framework of the prosecutorial waiver.

Another procedural possibility which is comparable to non-prosecution is the caution, which, for example, in England and Wales, is used instead of official court contact in connection with a large number of detected crimes. The formal caution has its roots in the discretionary power of the police over whether or not to initiate criminal proceedings when an offence is disclosed, and is generally regarded as an alternative to prosecution. In practice, the caution implicates that the offender is reprimanded with a formal warning by a senior police officer, with no further action taking place. No statutory definition of cautioning exists, except concerning juveniles.

Cautions are utilized primarily with young or elderly offenders in minor offences, with those who are mentally disturbed or under particular stress, and with first offenders. The police will usually issue a caution only when the following conditions are met:

- there is sufficient evidence that an offence has been committed;
- the offender admits the offence; and
- the offender consents to a caution.

If these conditions are met, the decision to caution is made, keeping in mind:

- the background of the offender;
- the gravity of the offence;
- the wishes of the aggrieved person; and
- any recommendations of the social services and other concerned agencies.

In a strict sense, cautioning is not considered a prosecutorial waiver, whereas in the Netherlands, for example, the reprimand, which is a comparable procedural alternative, is perceived as a waiver. Despite this fact, a caution will be considered a waiver in the present report, as it is based on the utilization of discretionary power, and it results in the circumvention of court proceedings.

These alternatives closely resemble the so-called simplified procedures, such as those known in the Scandinavian countries and in the Federal Republic of Germany. In particular, the most common alternative for misdemeanors is a special summary procedure, such as a penal order procedure. The prosecutor drafts an order directing the defendant to pay a certain fine. Unless opposed by the accused, the order then becomes final, and the need for a trial is eliminated.

Various forms of diversion also exist in the socialist countries. The most important of these (for the purposes of this report) appears to be the transfer of cases to social or comrade courts, conflict and dispute commissions, or other agencies of public social activity which deal with offences. The procedural framework of these courts varies considerably from the administration of justice by state courts in the context of an ordinary criminal trial. The main aim of the functioning of these "alternative" non-criminal courts is the prevention of law-breaking, the education of the people through persuasion and influence, the settlement of conflicts caused by the offence, and the avoidance of a complicated court procedure where a criminal trial seems unnecessary. These "alternative" courts may order various forms of restitution to be paid by the offender, such as performance of work deemed to be socially useful, or apologising to the victim or to the concerned collective of the working people. The court may also order the offender to pay a fine.

It is therefore clear that a waiver of prosecution does not necessarily imply a total absence of a official reaction; it merely constitutes a circumvention of the court system.

6. This report will not contain descriptions of the organizational structures of the prosecution services or agencies. Also, tasks other than prosecution delegated to the prosecution services or agencies shall not be dealt with within the context of this report. Such descriptions would be too time-consuming, as the variety of structures and tasks is too vast to be dealt with within the space of a few lines.

Indeed, it can be stated that no single uniformly organized prosecution service exists in Europe: At least three different organizational forms appear prevalent:

- the prosecution services organized according to the French Napoleonic concept (e.g. Italy, Germany, Belgium, the Netherlands, and France);
- the Prokuratura organized according to the socialist concept (in all of the socialist countries);
- the absence of an independent prosecution service (England and Wales until 1986, Ireland)..

In addition to these forms, mixed organizational structures also exist (e.g. in Spain).

If the legal tasks of an agency consist mainly of prosecutorial functions, it is apparent that the organizational structure of that agency differs significantly from that of an agency which is responsible for tasks which are more diversified.

For this reason, for example the structure of the French 'Ministère Public' can not be compared with the structure of the Russian Prokuratura.

The duties of the Prokuratura (the Procuracy) consist of the supervision of the exact and uniform compliance with the laws of the Soviet Union by the ministries, state committees and departments, enterprises, institutions and organizations, executive committees of local organs of the Soviets of the People's Deputies, kolkhozes, cooperatives, and other social organizations, officials and citizens of the USSR (Art. 1 Law on the Procuracy of the USSR of 30 November 1979). The initiation of the criminal proceedings in any case can be the result of such supervision, which is but one of the Prokuratura's duties.

In contrast, the task of the French public prosecutor is much more restricted to ensuring compliance with the laws and the legal order. The Ministère Public is in charge of handling criminal matters, and bringing actions on behalf of the State.

Unlike the French Ministère Public, the Prokuratura is not subject to the Ministry of Justice, and is independent of any other ministry. Although both the French Ministère Public and the Russian Prokuratura are rigorously hierarchical organizations, the first is a dependent body, while the latter is a completely autonomous organ,

The Prokuratura in most of the socialist countries, such as Yugoslavia, Poland and Bulgaria, is a state service which, in the administration of its legal tasks, is independent of any other state agency or organization. This does not mean that the Prokuratura may apply a policy formulated within this agency. In Yugoslavia, for example, the Prokuratura must perform its function in accordance with the Constitution, the law, and the policy formulated by the Assembly of the Socialist Federal Republic of Yugoslavia. In Poland, the head of the prosecution service, the Procurator General, is accountable to the Council of State, and is obliged to act in accordance with the Council's guidelines. These instructions include, as a rule, directions respecting the general policy to be executed by the Prokuratura.

The prosecution services of most of the market economy countries form part of the executive power of the state, and are subject to the authority of the Minister of Justice or an equivalent political officer who may issue directives for the execution of prosecutorial policy, and who may order the commencement of prosecution in a case.

Such an authority, as a rule, is not vested with the power to order a waiver of prosecution for expediency's sake.

Therefore, the prosecution service of a number of European countries exists as a more or less independent service, subjected to hierarchical governmental control. The Minis-

ter, or whoever is the hierarchical head of the prosecution service, is accountable to the parliament for the general prosecution policy applied by the service in the Western European countries.

The variety of legal tasks imposed on the prosecution services of the socialist countries as well as of the Western European countries is also of considerable importance.

The main task of prosecution services in Western European countries is the administration of justice via the prosecution of detected and investigated offences. This task is procedural. In the socialist countries, the contribution of the Prokuratura to the administration of justice consists of tasks far more extensive than the prosecution of offences. Its overall task is the general supervision of the exact, uniform, and strict compliance of state agencies and other public or private agencies, bodies or individuals with the laws of the given country. This general supervision implies that the Prokuratura must file a protest with the administrative agency if an agency has acted illegally or has breached the existing regulations. This action does not lead as such to an annulment of the administrative act. Instead, on the basis of the protest, the administrative agency must examine the protested act, and annul or modify it so that it conforms with the law. The prosecution of offences is but one of the functions of the Prokuratura.

No independent prosecution service has existed in the countries which belong to the Common Law system, such as Ireland, and England and Wales (however, since 1986, England and Wales have established such a service). Instead, the prosecutorial functions were divided amongst several public agencies, and subdelegated in a manner which reflected the decentralized structure of the police organizations. Unlike most of the Western European countries, the police in England and Wales is not accountable to a superior; instead, the police is accountable to the city council which is its employer.

Both of these examples make it clear that a description of the specific characteristics of the structure and tasks of the prosecution service could, in themselves, be the subject of a separate report in its own right.

There is a second reason why this report does not deal with the issues of the structure and the tasks of the various prosecution services.

This service is under reconstruction, or has only recently been reconstructed, in many of the European countries. For example, in 1986, the Prosecution of Offences Act was enacted in England and Wales, creating the Crown Prosecution Service, a service which exists independent of the police.

In Portugal, a Bill discussing the structure of the prosecution service has been passed recently (Lei organica do

Ministerio Publico).

In Denmark, a recent Bill addressing the reduction of the prosecution's caseload proposed a reshuffling of police duties.

In Austria, Liechtenstein, Spain, and Italy, a total reform of their respective criminal procedural codes is foreseen in the near future.

Since it became clear, during the preliminary preparations for this report, that the European countries examined possessed varied and diversified prosecutorial services, a pragmatic decision was made: detailed information about the organizational structure or the legal tasks of a given prosecution service in a particular country will be provided only as far as it appears necessary for the understanding of the utilization of prosecutorial discretionary power; otherwise, due to the apparent diversity in their structures and tasks, such information will not be provided within the context of the present report.

7. The interim report was based on information provided by twenty-one experts commissioned by the Helsinki Institute for Crime Prevention and Control, affiliated with the United Nations (HFUNI) to prepare national reports on the existence and the practice of the waiver of prosecution in their respective countries (the list of experts is given in Annex I). They were requested to write a paper containing the following basic information regarding the criminal justice system in their country:

- 1 The role of the prosecutor (or the corresponding official) in the criminal justice system. This would be a brief description of what official decides on the measure referred to above (i.e. to avoid the court system), and what his position is vis-à-vis the police and the courts. It would thus indicate who has the authority to decide on the measures.
- 2 The normative basis for the waiving of prosecution. This would refer to the relevant legislation and other provisions, and to possible standing orders regulating the use of discretion in these cases, not only on the termination of cases, but also on the directing of cases outside of the criminal justice system.
- 3 The alternatives available to the prosecutor. This would deal with the grounds on which the prosecutor can waive measures either completely or subject to certain conditions.
- 4 The availability of statistics and other empirical data on the activity of the prosecutors or other comparable officials dealing with this stage of the proceedings.

5 A bibliography of literature on the role of the prosecutor, either in national language(s) or in (another) major language. This would include e.g. handbooks designed for the officials, university textbooks and academic treatises.

8. After the preparation of the interim report in June 1985, each of the twenty-one experts received a copy of the report, together with a questionnaire. The experts were asked to check the contents of the interim report, and to respond to the questions provided (Annex II). We are grateful to these authors for their efforts to provide further detailed information. Unfortunately, no information was available for Albania, Austria, Belgium, Iceland, Liechtenstein, Malta, Portugal, Romania and Spain for the interim report. Experts in these countries were invited to contribute in order to expand the number of countries dealt with in the final report. We are particularly grateful to those experts who have written their national reports since the initial report. In as far as no national reports were provided, an attempt was made to answer the main questions of the report on the basis of the available literature.

In November 1985, a select committee of experts gathered in Helsinki to discuss the interim report and the feasibility of a transnational comparison of statistical data regarding the practice of non-prosecution, which would be the next step for the completion of this study. One of the prerequisites which must be fulfilled prior to further steps in this research is the completion of the theoretical and legal frameworks in respect of the use of discretion in the prosecutorial practice. Therefore, a meeting was scheduled for March 1986 in Helsinki with all of the experts who contributed to the study through the national reports, and who answered the questionnaire, in order to discuss the final draft of this report, as well as to obtain additional information.

9. Supplementary information was obtained from the literature which became available after an intensive search in various national and international libraries (such as the library of the Max Planck Institute for foreign and international penal law, Freiburg, FRG). As the author of this report is able to read Dutch, German, French and English, the information available in these languages was accessible. A list of the literature used is included as a bibliography at the end of the report.

10. As already stated, the present report will deal especially with the existence and the extent of the utilization of prosecutorial discretionary power.

The reasons for choosing this item for a transnational study are numerous.

One major reason is related to the general increase in crime which has become apparent in recent years in many countries. This increase in crime has subsequently increased the case-loads of the criminal courts. Moreover, there has been an increase in the complexity of cases, and in the number of cases involving serious crimes, matters tying the courts up for extended periods of time. Examples of such complex and time-consuming matters are economic and environmental crimes, transnational fraud cases, drug offences, and cases involving corruption. The expansion of the judiciary has not kept pace with this increase in caseload, resulting in the considerable backlog now faced by the courts. This disproportion has not only resulted from financial difficulties, but also from the simple fact that the size of the judiciary can not be indefinitely increased, if a high level of quality is desired.

It should be mentioned in this context that 'law enforcement is a scarce resource'. It is increasingly difficult to ensure law enforcement, a difficulty which reduces the public's confidence in the administration of criminal justice. Deep concern has been expressed in many of the European countries about the efficient functioning of the administration of justice. More than once have high officials of the law enforcement agencies stated that the criminal justice system is no longer able to maintain a minimum standard of law enforcement, which is essential in any state based on the rule of law. When the gap between the number of law violations and the number of official responses by law enforcement agencies becomes too wide, the objectives of deterrence and uniform enforcement are not adequately achieved, and it is feared that the tendency of citizens to take the law into their own hands can no longer be satisfactorily kept in check. To avoid this situation, both legislative and practical measures have to be taken. Consequently, diversion has emerged as a measure alleviating this existing situation.

Diversion exists in different forms in Europe. In many of the European countries, the legislatures have recently decided to remove a large category of petty infractions, via statutory revision, from their criminal codes. The transformation of former criminal acts to "Ordnungswidrigkeiten" or "Verfehlungen" (administratively sanctioned acts) in the Federal Republic of Germany and the German Democratic Republic may be taken as examples of this process of decriminalization.

Another measure to improve the administration of justice is the vesting of appropriate bodies other than the criminal courts with the power to deal with criminal acts, and with the power to impose non-criminal sanctions.

As well, the other previously mentioned avenues of dealing with criminal cases, such as transactions, cautions, and transfers, constitute different forms of diversion, as does

non-prosecution.

It can therefore be stated that diversion from the courts has gained importance as an alleviation measure in the existing situation.

Diversion is generally used to deal with minor crimes, in order to provide the courts with more time to deal with more serious criminal offences. It appears that an important avenue for diverting cases is the utilization of discretionary power by the public prosecutors. The pivotal role of the public prosecutor has grown in importance in this context. His prosecutorial decision has an impact on the influx of cases before the court, both quantitatively and qualitatively (i.e. he decides the content of the charge, and, in countries such as Iceland, France, Luxembourg, Scotland and the Netherlands, has some discretionary power to choose what crime the suspect will be charged with. For example, theft committed under aggravating circumstances may be responded to by a charge of theft without a mention of the aggravating circumstances).

Both in countries which allow the prosecutor a discretionary power, and in countries which do not provide him with it, the prosecutor plays an important role in contributing to the relief of caseload pressure on the courts through the prosecutorial waiver.

The discretionary power to initiate formal criminal charges against a suspect puts the prosecutor in a position of considerable influence in the criminal justice system. This fact in itself is more than enough of a reason to study the existence and the extent of discretionary prosecutorial power.

Another major reason to study this item is related to the adoption of resolution VII during the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held in Milan, Italy, 26 August - 6 September 1985. In this resolution, the Committee on Crime Prevention and Control was called to consider, amongst other matters, the need for guidelines relating to the means of enhancing the prosecutor's contribution to the smooth functioning of the criminal justice system, and their co-operation with the police, as well as the scope of their discretionary power and their role in criminal proceedings. The Committee was asked to report thereon to future United Nations Congresses. This study made on the request of HEUNI will, it is hoped, contribute as a preliminary step to the proper implementation of the said resolution.

11. In the present report, a large number of criminal justice systems are dealt with, which, although in some ways comparable, possess unique and particular characteristics. Our hesitation to make general, overall statements must therefore be appreciated. For example, drinking and driving

appears to be a matter dealt with in all of the European penal codes or regulations. However, the circumstances in which it is seen as a criminal offence, and the official reaction to its commission, vary from country to country. These variations are demonstrable by comparing the Netherlands and the Federal Republic of Germany. In the former, driving with a blood alcohol percentage, for example, of 1.00 per mille constitutes a crime, while in the latter nation, it is considered an "Ordnungswidrigkeit", an administrative offence. In the Federal Republic of Germany, this act lacks the necessary level of moral guilt to justify its consideration as a criminal offence, whereas it is considered to be serious enough to deserve a penal sanction in the Netherlands. In accordance with its administrative nature, this act is dealt with by an administrative authority in the Federal Republic of Germany, and a penalty of imprisonment is non-existent for the act which does, in turn, exist in the Scandinavian countries.

Decriminalization has occurred with respect to other crimes in other countries. In Bulgaria, for example, theft and illegal appropriation of state and public property up to the value of fifty levas have been decriminalized, providing that the acts are committed by first offenders. These acts are not dealt with by the criminal courts but by administrative agencies through the imposition of a fine. In other countries, theft under the same conditions remains a crime, but no prosecution may occur as diversion is utilized.

While being aware of these kinds of differences, we nevertheless discuss such acts within the context of this report as far as these acts are considered as crimes in the other countries.

12. It should be noted that, particularly in the market economy countries, the prosecutor's use of discretion is not the first filter in the criminal justice system. This position is held by the police.

The police can not detect and investigate all crimes. Various factors limit their ability to carry out their assigned tasks, such as the availability of manpower, and the complexity of certain crimes and cases. Consequently, it is necessary for the police to set out priorities for their duties. This prioritization can be based on an explicitly formulated policy through which the competent and proper authorities request that the law enforcement officials concentrate their activities on certain types of crimes, and to allocate less time and energy to others. These "competent authorities" vary from one country to another. For example, in England and Wales, where no independent prosecution service existed until 1986, the police itself set these priorities, while in other countries it may be the prosecution agency. Such authorities may also give tacit directives for the formulation of an investigation and detection policy. Such directives seem to be usually given with

respect to offences of low priority. After a while, the directives, whether explicit or tacit, form practical guidelines for the prioritization of the police's investigation of offences. In addition, the police can develop their own criteria for dealing with various crimes. Overall, it can be stated that their strategies are influenced and determined by various factors, including internal instructions, the daily routine, and the professional subculture. Through the interaction of these influencing factors, the police filter cases which reach this initial level of contact with the criminal justice system.

It is important that the authorities in question harmonize the directives on the detection and investigation policy with those formulated for the prosecution policy, to avoid unnecessary work by both the police and the public prosecution agency. When the directives are effectively coordinated, part of the prosecutorial discretionary power shifts, in practical terms, to the police. This filter, in fact, limits the number of cases which the public prosecutor must decide upon. This point must be considered when comparing the number of prosecutorial waivers in the countries studied. The extent of such "waiving" might be limited through the pre-elimination of certain cases by the police in some of these countries. For example, the use or possession of drugs for one's own use in countries such as Denmark, is an act which is not prosecuted, but which nevertheless is met with a warning, an action which is actually perceived as a waiver in Denmark, or a fine. In other countries, the use or possession for one's own use of drugs has such low priority that it is rarely even investigated in practice. In fact, only in cases where the suspect has been caught for another offence, and subsequently found in possession of a small amount of soft drugs, is the matter officially waived. The number of waivers for drug offences is therefore considerably higher in the first type of a country than in the second, while the general level of actual drug offences can be similar, as can the number of cases dealt with by the courts in both types of countries.

Countries such as Hungary, Italy, the German Democratic Republic, Poland, Switzerland (e.g. canton of Bern) and the Federal Republic of Germany do not seem to permit police discretion in the investigation or detection of crimes. In these countries, the theoretical basis for prosecution rests on the legality principle. In practice, however, discretion is allowed in the Federal Republic of Germany, Italy, and in Switzerland, as long as nothing in relation to the given case has appeared in writing. It is consequently difficult to determine the extent of the use of discretion in such countries, as no records exist of the cases in which discretion has been applied.

Even in countries such as Belgium, the Netherlands, and France, where the basis for prosecution rests on the expediency principle, police discretion is not permitted by the code of criminal procedure. The police is obligated to

inform the prosecution service about all detected and investigated crimes, and in this realm, the code of criminal procedure expresses the premise of the legality principle. In practice, however, the police waive many cases, particularly those which would have been waived by the prosecution service. The police anticipates the prosecutorial decision, and is allowed to do so as long as the decision by the police is in line with the general prosecutorial policy set by the prosecution service. Repeated refusals to prosecute certain types of crimes (such as battery charges arising out of fights in pubs after heavy drinking) may lead to a decline in the official filing of such offences by the police.

A special form of a police waiver appears to exist in England. When an offender is suspected of multiple offences, the police may offer to drop the prosecution of certain charges if the offender will admit to them later in prison. The police need not prosecute offences admitted by the offender in prison because it would serve no useful purpose. The advantage to the police is that time is saved in investigation and the preparation of the appropriate prosecution papers; congruently, the procedure allows the police to clear these crimes. This procedure is not rare: in 1984, up to 18 percent of cleared crimes were cleared this way. This practice may be confined to England, but it serves to illustrate how discretion can be brought about within the criminal justice system.

In other countries adhering to the legality principle, such as Finland, police routine has developed to a stage at which the greatest diversion from the system occurs prior to the official recording of an offence. Of the recorded and cleared cases, a considerable portion lead to a waiver of further measures by the police. The police has the right to refrain from reporting petty offences which were committed with understandable carelessness, thoughtlessness or ignorance, if the complainant does not wish to press charges, and the public interest does not demand formal processing of the matter.

In Sweden, the scope of police remission has been recently widened. A policeman may now use remission of police report, or not pass the report to the prosecutor, or hand out a reminder or an admonition to the offender if it is obvious that the penalty in concreto will not be more severe than a fine, and the crime is minor (taking into account all the circumstances). The possibility of a prison penalty in abstracto is no longer a hindrance for remission of a police report in Sweden.

13. The present report deals with the prosecutorial decision which occurs between the official filing of a record of the offence by the police, and the time at which the case is actually brought before the court and dealt with by the judge within the framework of a substantive trial.

14. The report consists of six chapters.

The first chapter examines which authorities possess the right to prosecute in the various criminal justice systems. The issue is mainly one of whether the State has monopoly over prosecution, or whether this right is shared by private persons or bodies.

The second chapter deals with the two principles which provide the basis for prosecutorial policies and practices, the principle of legality and the principle of expediency. Within the context of the chapter, we categorize all of the European countries involved in the study according to which one of these principles they have adopted, and examine whether that principle is explicitly incorporated into their legal regulations. As well, we note some of the exceptions which exist to compulsory prosecution in countries which have opted for the legality principle.

Chapter three deals with the methods by which the use of non-prosecution is extended or reduced. It seems that the legislature and the judiciary can largely influence the legal formulation of non-prosecution. In practice, the use of prosecutorial discretionary power can be influenced by changes in the organization of the prosecution service, or by changes in the policy conducted by the service.

Chapter four divides prosecutorial waivers into those which are purely technical, and those which result from the utilization of discretionary power. The technical waivers are not of concern to us in this report, since they are not based on the utilization of discretionary prosecutorial power. The main categories of the existing grounds for the discretionary waiver of prosecution are also analyzed.

The fifth chapter, in turn, examines the phenomenon of conditional waiver of prosecution. In certain countries, conditions can be attached to the waiver of prosecution. Examples of such conditions are also provided.

The last chapter deals with the relatively new phenomenon of guidelines for the waiver of prosecution, which now regulate or direct the utilization of prosecutorial discretionary power in the various European countries. The main aspects of these guidelines are discussed.

15. One final remark.

While twenty-six countries are dealt with in this report, each with its own specific legal system, it seems impossible to make general statements covering at least some of the countries, because when the matter is examined in detail, it becomes apparent that exceptions exist with respect to all of them. Nevertheless, we have tried, to the best of our ability, to "group" countries which appear to share some characteristics, and have at times excluded information

which would make the understanding of the systems too complicated.

It is the destiny of a comparative penal lawyer that he can never go into details, particularly when the number of legal systems which must be compared is considerable. It seems that the extent of detailed analysis is inversely proportional to the number of compared countries.

Another fate of a comparative penal lawyer is that native lawyers know their system the best. For them, a comparative report may be a disappointment.

On the other hand, the work of a comparative lawyer is extremely enjoyable, as it widens his scope and knowledge, providing possibilities for the improvement of the understanding of his native legal system. He is challenged to subject his native system to a critical analysis, and sometimes he finds solutions in foreign legal systems for problems which have arisen in his own system. By reporting the results of his comparative legal studies, he may provide his readers with basic material to reflect upon and with which to compare one's own system; perhaps such an evaluation would result in the improvement of the reader's native system.

The feeling of joy associated with the finishing of this report is much more intense than the feelings that the present author, at times, felt in the duration of writing this report. We sincerely hope that the reader will find this joy within the lines of this work.

CHAPTER 1 - THE RIGHT TO PROSECUTE

1. All European countries possess some form of a prosecution service or a prosecuting authority. A relevant issue with respect to this reality is whether the state has monopoly over the prosecutorial power, or whether the power is also granted to private persons or bodies. In the latter case, a private individual or a body may, for example, have the right to prosecute when the prosecution agency abstains from so doing.

2. Some of the European codes of criminal procedure grant the right of prosecution exclusively to a state agency, particularly to the public prosecution agency. This is the case, for example, in Bulgaria, Czechoslovakia, the Federal Republic of Germany, Greece, Hungary, Iceland, the Netherlands, Norway, Portugal, Romania, Scotland, Switzerland, Turkey, and Yugoslavia.

The justifications for the state monopoly vary. In Czechoslovakia, for example, the monopoly is justified by the fact that only serious infringements of the social interest are regarded as offences. On the other hand, in Norway, the legislature has concluded that an injured party only has an interest in a civil suit (not a criminal one), and consequently no official avenue is granted in law to an individual to challenge a decision of non-prosecution by a public prosecutor. However, Norway appears to be an exception in in taking this position.

In a number of countries where the state monopolizes the prosecutorial right, this general rule is somewhat restricted.

In Bulgaria, Hungary, the Federal Republic of Germany, Turkey and Yugoslavia, for example, an individual's prosecutorial right exists in a limited sense, its application being restricted to certain crimes, those termed "Privatklagedelikte" (offences of private prosecution). These crimes are predominantly those which violate private legal rights, such as defamation, insult, petty cases of bodily injury committed negligently or with intent, breach of domestic peace, threat, and violation of personal privacy. The legislature has allowed the victim the right to initiate criminal proceedings in such cases, since the state prosecutors, due to lack of public interest, have given low priority to the prosecution of these offences.

An individual's prosecutorial right in these cases exists independent of the state prosecutor's prosecutorial decision. Similarly, the prosecutor's decision over the matter is separate from the individual's decision.

In Poland, private prosecution by an injured party is also restricted to certain offences, such as minor bodily injury, domestic violence, defamation, insults, and the secrecy of

correspondence. When the public prosecutor is of the opinion that public interest requires prosecution, he may intervene and prosecute ex officio. The private prosecutor is then granted the rights of a subsidiary prosecutor.

In Denmark, the right to individual prosecution also exists as a right limited to certain crimes, such as libel, intrusion of privacy, and assault. This right is exercisable only when the public prosecutor decides to waive prosecution in a case due to lack of public interest. The law notes that, in general, prosecution is to be conducted by the police or the prosecution agencies.

The number of cases prosecuted by private individuals differs considerably from one country to another. In the Federal Republic of Germany, the percentage of private prosecutions was approximately 1.5% in 1984. In Yugoslavia, this percentage was approximately 26, which equals one quarter of all prosecutions. However, a private prosecution does not mean that the court is obliged to proceed with a case until a verdict is reached. Most of the cases are dealt with by a so-called conciliation council. After receiving a private suit for a criminal offence, and after finding that the matter falls within the court's jurisdiction, the trial judge is obliged to hand the suit over to the conciliation council, which shall then attempt a conciliation between the victim and the offender. If the conciliation council informs the court that the conciliation was successful and the private prosecutor has withdrawn the charge, the judge shall dismiss the private suit. If the conciliation was unsuccessful, the court will schedule a trial.

3. In various other legal systems, independent prosecutorial powers are granted to both the State prosecution agencies and to private individuals or other public or private bodies. The right of prosecution is granted separately by the law to each body, and can be used irrespective of the other's prosecutorial power. However, some conditions and/or limitations may be attached to these prosecutorial rights, either in the actual legislation, or in practice.

In the old Roman Empire, where a penalty was perceived to be a matter of private civil law, everyone (*quivis ex populo*) could prosecute an offender. This is still the case in England and Wales, where anyone can initiate criminal proceedings. This notion rests on the old obligation held by all citizens to take part in maintaining law and order. At that time, neither police force nor state prosecution services existed, and the ordinary citizen was consequently responsible for initiating legal proceedings. However, since the middle of the nineteenth century, various statutes have been enacted which contain provisions stating that the consent of some public authority, such as the Director of Public Prosecutions, the Attorney General, or a high ranked police officer, is required for prosecution.

In practice, this right of individual persons to launch a prosecution is exercised only in minor cases of common assault, shoplifting, and domestic violence, where the police routinely declines to prosecute, and leaves it to the victim to commence proceedings. In fact, private prosecutions by individuals now constitute less than one percent of all prosecutions. The 1985 Prosecution of Offences Act has not affected this right of private prosecution.

On the other hand, this right to initiate proceedings is utilized extensively by various governmental departments for offences relating to matters of immediate concern to them, and by national boards, as well as public bodies, such as British Rail, the Post Office, or the Inland Revenue Department.

As in England, an individual may commence prosecution in Ireland. This right exists irrespective of whether he is a citizen of the country, and is extensive in its coverage, including even serious crimes, such as capital murder. However, no person can be tried for an indictable offence before a jury without the consent of the Director of Public Prosecutions, who can, at his discretion, refuse to continue with the prosecution of the offence.

The law of the U.S.S.R. recognizes three forms of prosecution: state prosecution carried out by representatives of the procuracy for crimes which are of great social danger; private accusation carried out by the victim or his representative in the case the procuracy does not consider public prosecution as necessary; and social accusation by representatives of social organizations or workers' assemblies.

In all of these prosecutorial forms, the respective prosecutors enjoy, theoretically, equal procedural rights. However, substantial differences exist in the legal formulation of the procedural rights, as well as in their practical application; while the social accuser has no right to appeal, the private prosecutor is entitled to do so, and the state prosecutor is obliged to appeal if he considers the judgment ill-founded or inappropriate. Private accusations usually concern cases of minor bodily injury, defamation, and insult. The victim not only controls the initiation of the prosecution, but also its processing and termination. The case is dismissed if a reconciliation between the victim and the offender occurs. If the crime has some special significance, or if the victim is not able, on his own, to protect his rights and lawful interests, the state prosecutor is empowered to institute prosecution on his own initiative (ex officio). The case then becomes a matter for public prosecution, and a dismissal resulting from reconciliation is no longer possible.

The social accuser may only be allowed to prosecute by leave of the court. His participation in, and conduct of, the prosecution exists independent of the state prosecutor. In

practice, the social accuser expresses condemnation in the name of a collective, such as the Party, Komsomol, workers' assemblies, and other such organizations, and may give testimony regarding the defendant's former behaviour. Such social accusers or community prosecutors are known in various socialist countries, such as Czechoslovakia and the German Democratic Republic (gesellschaftliche Ankläger.)

In Finland, the right to prosecute is shared by the prosecutor and the person harmed by the offence. In reality, the individual's right to prosecute is utilized only when the prosecutor decides to waive prosecution. If an individual proceeds with the prosecution, he must then present the case to the court, summon witnesses, and complete all other tasks called for by the legal procedure. If the case is prosecuted by a public prosecutor, the complainant has the right to assume an active role in the proceedings.

Similarly, there is no monopoly over prosecution by the State (the Attorney-General or his representative) in Cyprus, where any citizen of the country is able to initiate a prosecution. However, this right is subjected to certain conditions, which, in fact, make private prosecutions rare, and restricted mainly to such offences as common assault, insult, or trespass by animals.

The utilization of the individual prosecutorial power is also hindered by practical difficulties. Whereas the prosecutor routinely deals with various matters before the court, the private person seldom possesses any prior experience with the court system and its proceedings. It could be said that he is a "one-shooter", while the prosecutor is a "repeat-player".

Various other reasons making private prosecutions rare may also exist; for example, an individual may be afraid of revenge, he may be unaware that the committed act is a criminal one, he may be afraid of a scandal caused by a prosecution, or he may fear that a civil suit for malicious prosecution will follow.

It can therefore be stated that the public prosecution agency prosecutes in most cases, and private prosecutions are relatively rare.

4. A combination of the systems described above exists in some of the European countries. In these systems, prosecution is primarily the state prosecution agency's task, but a private person may launch a prosecution in cases where the prosecutor refuses to do so. The private person's prosecutorial right is therefore subjected to the prosecutor's prosecutorial decision. In most of these systems, such as in Switzerland (particularly in Zürich) and Austria, this subsidiary prosecutorial right can be exercised only by victim of the crime in question, or by his representative. Knowledge of the prosecutor's waiver of prosecution is

therefore important in these systems.

In France, Luxembourg, and Belgium, the prosecutorial rights of the state and the private individual co-exist in a unique fashion. The individual's prosecutorial right is utilized as a corrective measure on the public prosecutor's discretionary power over prosecution. Once an individual has initiated prosecution in a case where the prosecutor has abstained from doing so, the prosecutor must take the case, and proceed with its prosecution, regardless of his own opinion. The most common aim of such a private prosecution is the attainment of compensation for damages caused by the crime. Due to the fact that the public prosecutor actually possesses the exclusive right to conduct prosecution pending trial, France is generally perceived to possess state monopoly over prosecution.

As in France, every citizen of Spain is legally granted the right to initiate prosecution, but the actual prosecution during the trial is, in fact, conducted by the public prosecutor.

In Sweden, although the public prosecutor has no absolute monopoly over prosecution, he is, nevertheless, usually its initiator. The victim can commence prosecution only when one of a limited number of crimes is in question, such as when criminal defamation has been allegedly committed. If the prosecutor waives prosecution without the victim obtaining compensation (for example, in cases involving wounding and battery), the injured party may proceed with the case, and pursue the matter with respect to both the criminal guilt of the accused, and compensation.

5. State monopoly over prosecution does not mean that the victim of a crime is without any right to protect his interests in the case. To some extent, the laws in the countries mentioned provide some opportunity to challenge a prosecutorial decision to waive a case.

In some European countries, where the right to prosecute is, as a rule, a state monopoly, anybody with an interest in the prosecution of an offence can file a protest against such a decision by lodging a complaint with a court. The court then examines the manner in which the discretionary power over prosecution was utilized by the public prosecutor, who subsequently has the duty to inform the court about the basis for his decision to waive prosecution.

This examination may be purely legal, the issue being the proper application of the law in the particular case, or it can deal with the extent to which the decision is in line with the general prosecutorial policy at the national, regional, or even the local level. Such forms of examination can coexist in a legal system, as they do, for instance, in the Netherlands, and in some cantons of Switzerland (such as Neuchâtel), where both are applied in reviewing each case

protested. The court may then order the initiation of prosecution, if it is of the opinion that the public prosecutor misused his discretionary power. In reality, the number of complaints in the Netherlands, in comparison with the total number of waivers, is rather low (less than 0.5 percent), and prosecution is seldom ordered by the court of appeal.

In the Federal Republic of Germany, the victim of a crime may lodge a complaint with the Prosecutor General, who then, if agreeing with the victim's viewpoint, instructs the prosecutor to review his prosecutorial waiver. If the complaint is rejected, the victim may lodge a complaint with the court of appeal, which then reviews the prosecutorial decision, and subsequently either instructs the prosecutor to commence with a prosecution, or rejects the victim's complaint. This so-called 'Klageerzwingungsverfahren' (complaint procedure) is restricted to complaints concerning technical waivers, such as those which are based on the lack of evidence. The court may therefore only examine whether the evidence was/is sufficient for prosecution.

The complaint procedure is not applicable to waivers based on grounds of expediency in the Federal Republic of Germany. This is due to the fact that a public prosecutor is, in general, required to obtain the consent of a judge before he can waive prosecution on the grounds of expediency.

Countries adhering strictly to the legality principle do not need to provide for the possibility to lodge a complaint because the public prosecutor does not have any discretionary power regarding prosecution.

Legal systems in which the right to prosecute is not restricted to a state official, but is extended to private persons, do not need to provide for the right of lodging a complaint either, due to the fact that when a person disagrees with the prosecutorial decision waiving a case, he can initiate the prosecution himself. Consequently, the Supreme Court of Cyprus, for example, has decided that it does not possess the right to examine a decision made by the Attorney General to waive prosecution.

However, it must be noted that almost all of the legal systems examined appear to offer some avenue through which complaints can be made against a prosecutorial waiver by anyone interested in doing so. An individual can request the prosecuting agent to take action, or, in case the public prosecutor refuses to do so, write a letter to a higher official within the hierarchy of the prosecution authority, requesting him to review the decision of the subordinate prosecution agent.

6. Exceptions or restrictions to the general rule that either a member of the prosecution service or a private individual may initiate prosecution exist in an number of

countries. A specific agency or a body outside the prosecution service is sometimes vested with the right to prosecute with respect to specific offences, or has the right to decide whether prosecution should take place. In Belgium and the Netherlands, the House of Parliament may decide to prosecute if a Minister has committed a political crime. In Switzerland, the Federal Council decides whether a political crime must be prosecuted.

In the Federal Republic of Germany, Belgium, and Luxembourg, tax evasions are prosecuted by tax agencies, and breaches of postal legislations by postal authorities.

Another restriction which exists in countries where the public prosecutor, as a rule, decides on prosecution, exists with respect to certain offences which the prosecutor may only prosecute if the victim lodges an official complaint. For the prosecution of other crimes, a special authorization is required by a high ranked official. This consent is required primarily in cases involving crimes against the State, and crimes committed by politicians (e.g. England and Wales, Italy, Czechoslovakia, Cyprus and Greece). In Ireland, for example, the Attorney-General must consent to prosecution when a person is charged under section 3 of the 1962 Geneva Conventions Act (grave breach of certain conventions), under the 1963 Official Secrets Act, or under the 1973 Genocide Act.

These exceptions and restrictions, however, occur so rarely in practice that the general rule appears to be unchanged.

7. There has been a considerable increase in interest in victimology in the past decade. Various methods have been utilized to strengthen the position of the victim in the administration of justice. In some countries, the scope of private prosecution has been widened, while in others, the victim or victim support organizations have been allowed to join the public prosecution framework, or to extend supplementary prosecution, so that a state prosecutor and a private prosecutor are both prosecuting the given offence. The strengthening of the victim's legal position will have a considerable impact on the utilization of prosecutorial discretion, and, more than ever, the prosecutor must take into account the interests of the victim when deciding whether or not to initiate proceedings.

8. This brief review demonstrates that, throughout Europe, the general rule is that prosecution is undertaken by the State, in which case the prosecutorial agency may consider both State interests and the interests of the individuals in question in deciding on whether or not prosecution is appropriate in a case. Several countries permit prosecution by private individuals, either as an alternative system (when the public prosecutor waives charges), or as a co-existing system (irrespective of the prosecutor's actions). Prosecu-

tion by private individuals, however, is generally limited to a selected category of offences. In most of the countries examined, the number of cases in which private prosecution occurred does not exceed one percent of all of the criminal cases tried; it can therefore be stated that private prosecution is, in practice, rather rare.

CHAPTER II - PROSECUTION PRINCIPLES

1. The present report deals with the filter function of the prosecution agency. It is concerned with the extent of this agency's discretionary power to divert a case out of the formal flow of criminal justice. The alternatives to prosecution are diverse, some of which will be discussed here.

The prosecution agency generally receives its cases from the police, and the present discussion will therefore be limited to cases which come to the attention of the police or other similar authorities. Most cases, primarily petty cases, in fact remain outside of the criminal justice system entirely, to be absorbed by society.

In general, when the prosecution agency decides to waive a matter and not to proceed further with the case, the matter is also absorbed by society. That is, although the act has deviated from the norms of acceptable social behaviour, and gone beyond the boundaries of tolerance set by society for acts and actions, society is nevertheless able to deal with it without the formal legal procedure. Society is capable of absorbing some criminality without being harmed by doing so.

The offence can also be dealt with by methods other than the formal court procedure. For example, the offence can be channelled aside via a settlement or a reconciliation between the victim and the offender, without the further involvement of the criminal justice system.

Other such methods include the use of a caution, an oral or a written admonition, a transaction, simplified procedure, a referral to legal bodies other than the criminal courts, and various other forms of diversion.

These methods are utilized in many of the European criminal justice systems, where their use is aimed at diverting the suspect out of the criminal justice system at the earliest possible stage. Once such an alternate method has been applied in a case, prosecution can no longer take place.

These and various other alternatives to the formal court procedure exist for dealing with offences. Further criminal proceedings are therefore avoided, while some form of reaction is still provided to the deviant act.

2. The extent to which the prosecution agency diverts cases from the criminal justice system depends primarily on the legal basis adopted for the existence of the prosecutorial power.

Two basic principles provide the basis for prosecutorial policies: the legality principle, and the opportunity principle (the expediency principle).

The primary premise of the legality principle is that prosecution must take place in all cases in which sufficient evidence exists of the guilt of a suspect, and in which no legal hindrances prohibit prosecution.

Adherence to the legality principle in the procedural sense means that the prosecution service can not exercise any discretion over the prosecutorial decision. Strict adherence to the legality principle exists in only a few countries, such as Italy. Most of the countries adhering to the legality principle have made some legal exceptions to this principle, sometimes to such an extent that from a pragmatic viewpoint, these countries may be perceived as having a mixed system: the legality principle which is applied in cases involving serious offences, and the expediency principle utilized in cases involving minor offences. This is the case, for example, in Iceland and the Federal Republic of Germany.

The principle of opportunity, on the other hand, does not demand compulsory prosecution. Instead, it allows the prosecution agency discretion over the prosecutorial decision, even when proof exists as to the occurrence and the identity of the offender, and when no legal hindrances bar proceeding with the matter.

These two principles therefore define the prosecutorial power differently, one confining its existence and utilization to certain definite rules, the other granting discretionary freedom in its utilization.

The issue of which basic principle has been adopted in a country is only of concern with respect to public prosecution (state prosecution). Legal systems which allow private prosecution of offences have opted, with respect to such prosecution, for the expediency principle. Private prosecution exists as a right of the injured person, never as his duty. Therefore, the very existence of this right in a system adhering to the legality principle is an automatic deviation from this principle in favour of the expediency principle.

In most of the provisions which express the expediency principle, or which ease strict adherence to the legality principle, some reference is made to the public interest. It is stated that the prosecutor may waive prosecution for reasons of public interest, or if public interest does not require prosecution.

It therefore seems that the expediency principle can be expressed and applied in either a positive or a negative fashion. When applied in the negative form, prosecution generally takes place, and prosecutorial waiver is an excep-

tion to this rule. When applied in its positive form, non-prosecution exists as the rule, and prosecution is an exception to this rule.

When the expediency principle is applied in its negative form, each infringement of the law is in itself a sufficient reason for the initiation of a prosecution, so that the prosecutor must justify his decision to waive a prosecution. That is, he must analyze the case in order to find reasons for non-prosecution.

When the principle is applied in its positive form, an infringement of the law is not, in itself, a sufficient reason to initiate prosecution; the prosecutor must analyze the case in order to find reasons necessitating prosecution.

Although this distinction between the two possible interpretations of the expediency principle appears to be of a purely academic nature, it, in fact, may have considerable impact on the position of the prosecution service as an actor in shaping crime control policy. When the principle is applied in its negative form, the formal concept of crime seems to be taken as the initiating point for the administration of justice. It is the legislature which decides, by enacting penal law, that the enactment must be administered as a matter of principle. Within this context, the application of the expediency principle is an instrument in alleviating the consequences of the strict application of the legality principle by the prosecution service. The contribution of the prosecution service to the shaping of crime control policy is a restricted one in this framework. Within this form, the prosecutor must therefore adhere to the specific rules formulated by the legislature for the administration of justice.

When the principle is applied in its positive form, the expediency principle may be used by the prosecution service as a main instrument in shaping crime control policy. The legislature, by enacting penal law, merely provides the legal basis for such a policy. The prosecutor then acts as a central figure in the determination of the practical prosecutorial policy. It is up to the prosecution service to decide, within the legal framework delineated by the legislature, how the administration of justice is carried out. In this form, prosecution is one out of many avenues in achieving the goal of crime control.

3. The decision to adopt either one of these principles as the basis for the prosecutorial practice has been made in all of the European countries.

In some, this decision was made over a century ago, at times after extensive theoretical and political discussions, as was the case in the German Reich after its establishment in 1871. Prior to its establishment in some of the German states (Länder), particularly in the south (e.g. Bavaria),

the prosecutor was legally bound to prosecute whenever there was sufficient evidence to obtain a conviction. In other German states, including Prussia, the prosecutor was given wide discretionary power to decide whether to prosecute. In Prussia, the prosecutors used the criminal law in a one-sided manner to prosecute opponents of the regime in the context of the 1848 revolution.

After the establishment of the German Reich, various Parliamentary representatives criticized heavily the practical application of this broad discretionary power, and consequently chose, in order to avoid any political abuse of power, the legality principle, which prohibited the prosecutor from using any discretionary power.

Other important reasons for this choice were the influence of liberal ideology and Kant's doctrine of the rule of law. Part of this ideology notes that the statutory norm, interpreted without the intrusion of politics and in accordance with the formal science of law, is the primary guarantee against state interference in the administration of justice. Criminal law should be administered by general rules, and it must not be influenced by considerations of equity. Charging decisions should never be based on considerations of equity, or of policy, but remain solely a matter of legal sufficiency.

In other countries, the principle has only recently been expressed in law (The Netherlands 1926, France 1958). In France, since the enactment of the Napoleonic Code d'instruction criminelle in the early 19th century, the expediency principle has been the governing principle for the prosecutorial practice, after an unsuccessful experiment with the legality principle during the 1789 revolution. Although the expediency principle was not explicitly expressed in the Code d'instruction criminelle as the governing prosecutorial principle, in 1826, the French Supreme Court (Cour de Cassation) decided the following:

"The legislature had not the intention to force the public prosecutor to prosecute all detected and investigated offences, even the insignificant ones or those which did not offend the public order. Offences on complaint by the victim in order to satisfy his passions, his private hate against the offender, his self-interest or in order to obtain compensation in a penal trial at state expense without any benefit for the social order, may be waived by the prosecutor".

Statistics on the administration of justice illustrate that in 1839, the prosecution service in France waived 13,793 cases, 204 of which were cases involving swindle, 1973 cases of defamation, 542 cases of public indecency, 210 cases of threat, and 542 cases of insult of an official.

We will not attempt to point out all the reasons for the adoption of one or the other principle in the European countries. Any examination of the topic would immediately reveal the influence of various factors on the adoption

decision, such as those of the general philosophy of law, constitutional theory and state policy, or the actual political state of the nation at the time of the adoption.

Two principal reasons may be given for the adoption of the legality principle: the principle of legality is a basic prerequisite for the safeguarding of the principle of equality before the law, and it is a basic prerequisite for the upholding of the concept of general deterrence. The guarantee that all offenders will be tried and that no offence will remain unpunished would be important means by which to uphold the trust of the general population in law enforcement, and in the proper administration of justice. Since the *jus puniendi* is not vested in private citizens or victims of crimes, the State has the duty to ensure that proper enforcement of the law takes place on their behalf.

On the other hand, strict adherence to the legality principle can cause difficulties. An absolute administration of justice and law enforcement endangers the normative value of penal norms, because if all breaches of law are punished, offences can lose their exceptional character. An offence is no longer perceived as deviant behaviour, and becomes behaviour which is socially accepted. It is argued that rigid adherence to the legality principle demonstrates the weaknesses of the normative effects of penal laws which endanger the normative system. Consequently, it is emphasized that a flexible application of the legality principle, through the creation of the expediency principle, is a basic prerequisite for the proper administration of justice.

The main reason for the adoption of the opportunity (expediency) principle has been the wish to avoid the negative counter-effects of the strict application of the legality principle, which, under certain circumstances, could lead to injustice.

Recently, increases in crime rates have led to a much wider application of the discretionary power inscribed in the expediency principle. To a greater extent, the expediency principle has been used as a means to reduce the heavy caseload of the judiciary, and the co-existing backlog of cases before the court. Although the adoption of the principle was initially based on reasons advocating the improvement of justice, it seems that it has been utilized as a method for reducing public expenditures. Since the use of wide discretion as a means to save money is heavily criticized, new crime control policies are set out in various countries adhering to the expediency principle, which aim at coping with the increasing crime rates through means other than widening the application of this principle.

In most of the countries studied, however, the decision is neither of present concern nor the topic of legal discussion. Switzerland and Italy appear to be an exception to this general observation.

In Switzerland, the discussion concerning these two principles began shortly after the enactment of the new Federal Penal Code in 1946. As legislation on substantive penal law is a federal matter, while legislation on procedural law is a cantonal matter, the choice between the two principles appears to be an issue of considerable importance. In the substantive penal law, the Federal legislator expresses a number of legal values which he sees worth enforcing. The question is whether the cantonal legislator is competent to interfere with this, by adopting procedural law reflecting the expediency principle and stressing that those legal values, under certain circumstances, may not be enforced in some cantons. Cantons such as Bern, Luzern, Grisons Glaris, Zurich and Thurgovie, have denied this competence, and have opted for the legality principle as the basic rule governing prosecution. Others, such as Geneva, Vaud, and Neuchâtel, however, have recently chosen the expediency principle.

The question of competence has also been dealt with by the Swiss courts, but recent court decisions concerning this question appear controversial and conflicting. The Constitutional Court has decided that adherence to the expediency principle does not offend the Federal laws, while the Supreme Court, on the other hand, has decided that the rule of law requires adherence to the legality principle, which may only be deviated from on occasion, and in strict, regulated cases. Even today, the choice is an issue of discussion due to the fact that some cantons, applying the expediency principle in their daily practice, have not explicitly adopted this principle into their codes of criminal procedure. This may be intentional, in order to provide the prosecution service with room to waive cases for reasons of expediency, and to avoid confrontation of the conflicting standpoints expressed.

The legality principle is also presently under discussion in Italy. It is stressed that such a principle is abstract, and hides the actual use of discretion, without political accountability. This is undesirable, if one is concerned with uniformity in the practical prosecutorial policy. It is also noted in these discussions that the present obligation to prosecute does not allow adequate prosecution of the most serious crimes.

4. It is impossible to draw a demarcation line through Europe, separating those countries which have adopted the legality principle from those which have chosen the expediency principle as the normative basis for their prosecutorial practices. The same principle does not even apply in all the countries which have adopted the French model of prosecution service (for example Belgium and the Netherlands, which adhere to the expediency principle, and the Federal Republic of Germany and Portugal, which utilize the legality principle).

However, the laws of some countries express reasons for non-prosecution which are both so specific and so similar, that their similarity cannot merely be a coincidence. Indeed, a closer examination of these systems reveals that close cooperation must have existed between these countries during the preparation of their respective codes.

This similarity is apparent in the Greek Code and the Code of the Federal Republic of Germany in their exceptions to the generally adopted legality principle. In the early 1930s, the German legislature inserted two exceptions to compulsory prosecution into its Code of Criminal Procedure, stated in sections 154c and 154d. Section 154c reads as follows:

"if extortion or coercion is committed by threatening to reveal a previous offence by the victim, and the victim reports the threat to the authorities, the prosecution may refrain from prosecution of the victim for the prior offence unless the seriousness of the offence makes punishment necessary."

Section 154d, in turn, protects the prosecutor from being forced to decide questions concerning private or public law which should be left to the court or an administrative agency to deal with. In a case involving this question, the prosecutor may insist that the complainant apply for a judicial decision in civil or administrative proceedings. If the question is not decided upon within a given period of time fixed by the prosecutor, he may then drop the case.

In Greece, the public prosecutor can drop a case on precisely the same grounds. It is apparent that both of these grounds for the prosecutorial waiver are very specific, and deal with situations which are quite rare. An examination of the backgrounds to these two exceptions to the legality principle in the two countries makes it clear that historical links exist between the German code of criminal procedure, and the Greek procedural code. It was Georg Ludwig von Maurer, a Bavarian lawyer, who drafted the text of the Greek code of criminal procedure and the Greek penal code in the beginning of the 19th century. Although a new procedural code was enacted in 1950 in Greece, the German procedural code still served, to a large extent, as a model for this new code, and the influence of the German doctrine is still observable.

An examination of other European codes of criminal procedure makes it apparent that close links exist between some of these codes. For example, the Napoleonic Code d'instruction criminelle (which is, in its updated version, still in force in France), has served as a model for the codes of many European countries, such as Belgium and the Netherlands. Similarly, the Turkish code of 1929 is a copy of the German code of criminal procedure, and the Spanish code of 1882 was influenced by the Austrian, the French and the German procedural codes.

5. The following sections of the present report attempt to accomplish three tasks. Firstly, we will list those countries which have adopted the legality principle, and those which have opted for the expediency principle. Secondly we will examine the question of whether the principle is explicitly expressed in the legal regulations of the country in question. Thirdly, we shall note some exceptions existing, both in law and in practice, to the general principle followed in a country.

The following countries have chosen the legality principle as the general basis for prosecutorial practice:

- Albania (information not available)
- Austria (sect. 34 CCP)
- Bulgaria (sect. 2 CCP)
- Czechoslovakia (sect. 3 CCP)
- the German Democratic Republic (sect. 97 of the Constitution)
- the Federal Republic of Germany (sect. 152 CCP)
- Finland (sect. 15 Decree on Enforcement of the PC)
- Greece (sect. 36 CCP)
- Hungary (sect. 2 CCP)
- Italy (sect. 112 of the Constitution)
- Ireland (no provision, see no. 4 below)
- Liechtenstein (sect. 14 CCP)
- Poland (sect. 5 CCP)
- Portugal (sect. 1 CCP)
- Romania (sec. 235 CCP)
- Spain (sect. 124 of the Constitution)
- Sweden (chapter 20 sect. 6 Code of Judicial Procedure)
- Switzerland (the majority of the 29 cantons; e.g. sect. 1 CCP of Bern)
- Turkey (sect. 148 CCP)
- Russian Soviet Federative Socialist Republic (sect. 3 CCP)
- Yugoslavia (sect. 18 CCP)

The expediency principle has been adopted by:

- Belgium (no provision, see no. 6 below)
- Cyprus (sect. 113 of the Constitution)
- Denmark (sect. 723 Procedural Code)
- France (sect. 49 CCP)
- Great Britain (see no. 6 below)
- Iceland (no provision, see no. 6 below)
- Luxembourg (no provision, see no. 6 below)
- the Netherlands (sect. 167 CCP)
- Norway (sect. 69 Act on Criminal Proceedings)
- Switzerland (some cantons, e.g. sect. 8 CCP of Neuchâtel)

It is apparent that in the majority of the countries dealt with in this report, the legality principle governs the existence and the utilization of the prosecutorial power.

Although less information was available regarding the procedural law applicable to juveniles, and a literature search

on this item indicated that the administration of juvenile justice differs considerably from one country to another, it seems that almost all countries have one characteristic in common: crimes committed by juveniles are, as a rule, governed by the expediency principle, even in countries which, overall, adhere to the legality principle.

This decision appears to have been made by the legislators in order to realize the provision and utilization of various types of diversion or alternatives to prosecution which are perceived as more appropriate responses to juvenile delinquency.

6. In almost all of the countries, the prosecution principle is explicitly expressed in law, usually in the code of criminal procedure, sometimes in the Constitution, as, for example, in Italy (legality principle), and Cyprus (expediency principle). Section 112 of the Italian Constitution states: "The public prosecutor is obliged to initiate a prosecution" (Il ministero pubblico ha l'obbligo di iniziare l'azione penale). In turn, section 113 of the Cyprian Constitution reads:

"The Attorney General of the Republic shall have power, exercisable at his discretion in the public interest, to institute, conduct, take over and continue or discontinue any proceedings for an offence against any person in the Republic. Such power may be exercised by him in person or by officers subordinate to him acting under and in accordance with his instructions".

In countries such as Iceland, Ireland, Great Britain, Luxembourg, and Belgium, the law does not provide information about which principle has been adopted. With respect to these countries, we must examine other sources of information, such as guidelines, court decisions, or the actual prosecutorial practice, in order to gain knowledge about the governing principle of the prosecutorial practices.

In Iceland, the prosecution principle is not clearly expressed in law. There are indications that the legality principle forms the legal basis for prosecution, but the practice shows that Iceland is closer to the expediency principle than to the legality principle.

In Ireland, although the Director of Public Prosecutions occupies a position of independence enabling him to adopt any prosecutorial policy he wishes, the prosecution agency appears, in practice, to adhere to the legality principle, and therefore we listed Ireland as a country which operates on the basis of the legality principle in its prosecutorial practices.

It is acknowledged in England and Wales that the police and other enforcement agencies (and since 1986, the Crown prosecution service), must be allowed to use some measure of discretion. Authority allowing the use of discretion, both

in deciding whether to report offences and whether to prosecute after investigation, can be found in a statement by a former Home Secretary, Sir John Simon, who, in 1935, noted that

"the practice of dealing with alleged offences of a minor character by warning instead of by prosecution is of long standing and is based on the view that in the case of minor infractions of law it is possible to maintain due observance of law without subjecting members of the public to Police Court proceedings in all cases and at the same time to reduce the burden of both Magistrates and the Police. I am not aware of any express statutory authority for this practice but it has been reviewed by the High Court and no exception was taken to it".

The 1983 guidelines for prosecution, following this viewpoint, state that it has never existed, as a rule, within their prosecutorial practice that a suspected criminal offence must automatically be prosecuted. The fact that the police may utilize cautions instead of initiating prosecution in a given case, and thereby exercise discretion, signifies the practical application of the expediency principle.

There is no reason to expect that this standpoint will be revised as a consequence of the 1985 Prosecution of Offences Act. This Act has created the Crown Prosecution Service, which exists independent of the police. The Crown prosecutor, instead of the police, will now decide whether a case should proceed, or the charge be changed or withdrawn. One of the objectives of the service is to continue prosecutions when, and only when, they are in the public interest, and to make prosecution effective, efficient, and economical. This is in line with the recommendations of the Royal Commission on Criminal Procedure (1981 Cmnd 8092), which recommended that the police should retain the initial discretionary power over whether prosecution should follow the alleged offence, or whether a formal caution should be administered, or no further action should take place, and that the Crown prosecutor should have discretion to drop a case which the police has decided to prosecute.

In Scotland, prosecutorial practice is based on the common law and practice, dating back 300 years. It has been expressed in several court decisions that the expediency principle is the basic principle for prosecution. For example, it has been expressed that "prosecutors must use their good sense as regards the enforcement of statutory regulations which are out of date and unrelated to modern conditions".

Belgium has also adopted the expediency principle. The Napoleonic Code of Criminal Procedure (1808), although considerably amended, is still in force in the country. It has been noted in several decisions of the Supreme Court that although the expediency principle is not explicitly expressed in the Napoleonic Code, it nevertheless forms the

basis for the prosecutorial practice.

Some references are made in recent Belgian legislation to the right of a prosecutor to waive a case. In the 1962 Act on Court Language, it is stated that "after the phase of enquiry is terminated, the public prosecutor transfers the files to the court unless he waives the case...".

The application of the expediency principle is also based on a long tradition in Luxembourg.

6. The wording used in the regulations of the European countries to denote the existence of one or the other of these principles, and especially those formulated to confine the utilization of prosecutorial discretionary power, varies considerably from one country to another. The following is a sample of the various sections in which the recognition of the legality principle as the basis for the prosecutorial practice is expressed:

- section 15 of the Decree on the Enforcement of the Penal Code of Finland: "The public prosecutor shall prosecute for an offence which is subject to public prosecution even if the complainant has not reported it for prosecution. If the complainant himself prosecutes for such an offence, the public prosecutor, however, shall be obliged to supervise the use of the State right of prosecution."
- section 3 of the Code of Criminal Procedure of the Russian Soviet Federative Socialist Republic: "a court, procurator, investigator, and agency of inquiry shall be obliged within the limits of their competence, to initiate a criminal case in every instance in which indicia of a crime are disclosed, and to take all measures provided by law for ascertaining the occurrence of the crime and the persons guilty of committing it and for punishing them."
- section 2 paragraph 3 of the Code of Criminal Procedure of Czechoslovakia: "except as otherwise provided by law, the prokuratura is obliged to initiate a prosecution in all cases of criminal acts it is informed about".

It is apparent from these examples that significant differences do not exist in the wording of the sections expressing the recognition of the legality principle as the basis for the prosecutorial practice.

In contrast, the sections which declare the expediency principle appear in quite different forms, as demonstrated by the following sample:

- section 40 of the Code of Criminal Procedure of France: "the public prosecutor collects the complaints and official files and decides how to proceed."

- section 167 of the Code of Criminal Procedure of the Netherlands: "the public prosecutor decides to prosecute in the case a prosecution seems to be necessary regarding the result of the investigations. Proceedings can be dropped for reasons of public interest."
- section 69 of the 1981 Act on Criminal Proceedings of Norway: "proceedings may also be waived where special circumstances exist, such that the Public Prosecution Authority, after evaluation of all the relevant factors, finds that the balance indicates that the waiving of proceedings is appropriate."

In these sections, the utilization of prosecutorial discretionary power is either not confined at all, or is outlined in such broad and general terms that no specified grounds for a prosecutorial waiver are noted. Consequently, one of our tasks is to analyze the grounds for non-prosecution in countries where such general regulations exist. This will be done in Chapter IV.

7. In most of the countries where the legality principle serves as the basis for the prosecution policy, various exceptions have been made to that principle over the years. Therefore, the prosecution agencies can exercise, in some measure, discretion in these countries as well. It is impossible to summarize all of the existing exceptions to the legality principle within the context of this report, due to their very detailed and specific contents. Therefore only a few examples will be provided.

- section 148 of the Code of Criminal Procedure of the German Democratic Republic allows the public prosecutor to refrain from preferring a public charge if conditions prevail under which the court could refrain from imposing a punishment, or if the punishment or measure of prevention and reform in which the prosecution might result is negligible in comparison to the punishment or measure of security and reform which has been imposed on the accused by a previous final judgment (i.e. if an offender has already been convicted and sentenced for a crime, and there are, in addition, other crimes left to be dealt with, but the additional penalty from these crimes would be insignificant in comparison to the already imposed punishment, there is no prosecution).
- section 27 of the Penal Code of Poland allows the public prosecutor to utilize a conditional waiver when the offence is socially dangerous, but the level of social danger presented by the offence is not significant. The range of application of this rule, however, is limited to those offences which are punishable by deprivation of liberty for not more than 3 years, and where the suspect is a first offender whose personality traits, life situation and general character indicate a possibility of future abstinence from criminality.

In Sweden, chapter 20, section 7 of the Code of Judicial Procedure permits a waiver of prosecution in the following four situations:

- 1 if it may be presumed that the offence would not lead to any other sanction than a fine;
- 2 if it may be presumed that the sanction would be a conditional sentence and there are special reasons for waiver of prosecution;
- 3 if the suspect has committed another crime and, in addition to the sanction given for that crime, no sanction is required due to the present offence; and
- 4 if it is obvious that the offence was committed under the influence of the kind of mental abnormality described in chapter 33, section 2 of the Penal Code, psychiatric care, or care which is in accordance with the law (1967:940) concerning the care of the mentally retarded is initiated without criminal proceedings.

Additional possibilities are provided in section 7, paragraph 2 of the Swedish Code of Judicial Procedure for waiver of prosecution in exceptional cases. This regulation states that a waiver of prosecution may be applied if special reasons make it obvious that no sanction is required to prevent the suspect from engaging in further criminal activity, and that, in view of the circumstances, no other consideration warrants the initiation of prosecution. These matters may only be dealt with by the Prosecutor General, and by the higher prosecutorial authorities.

These examples make it clear that, generally speaking, the exceptions to the legality principle are formulated in more detail than the general regulations based on the principle of expediency over the prosecutorial power.

9. In most of the countries which adhere to the legality principle, as well as in those which have adopted the expediency principle, the prosecution agency can exercise some discretion in making the prosecutorial decision. In recent years, the legal exceptions to the legality principle have been widely extended in some countries, or a more extended application of the existing exceptions has been permitted. However, this does not mean that no difference now exists between the two systems. Although the systems have been approaching each other, the main difference in the utilization of this power between these countries is that in those countries adhering to the expediency principle, the utilization of the discretionary power is, generally speaking, very loosely confined or restricted. In contrast, where the legality principle has been adopted, the utilization of the discretionary power is confined to the exceptions specified in law. However, the exercise of discretion in these cases specified is not necessarily strictly confined, as the wording of the exceptions to the legality principle are sometimes as vague as the wordings utilized to express the expediency principle. Expressions such as "when the degree of

social danger of the act is not substantial" (section 27 Polish Penal Code), or "if the offender proves by means of serious efforts, commensurate with the seriousness of the punishable act, toward elimination of, and indemnity for, its harmful effects, or by means of other positive accomplishments, that he has drawn fundamental lessons for a conduct as a conscientious member of the community, and can therefore be expected to adhere to Socialist legality" (section 25 Penal Code GDR in connection with section 148 Code of Criminal Procedure GDR) do not seem to strictly confine the public prosecutor's exercise of discretion.

In this respect, there is no difference between the confinement of the discretionary power based on the expediency principle, and that based on the exceptions to the legality principle.

The difference can be found mainly in the fact that under the expediency principle, the discretionary prosecutorial power is exercisable over all crimes and in all circumstances, while this power exists only with respect to certain specified cases and circumstances under the legality principle.

The fact that the discretionary prosecutorial power is exercisable with respect to all crimes and in all circumstances under the expediency principle does not mean that no limit exists to this discretion, either explicitly laid down in legislation, or accepted and applied in practice. For example, a refusal to prosecute may be a breach of duty when prosecutorial policy has not been kept within reasonable limits.

This can be illustrated, for example in England and Wales, by the judgment of the Court of Appeal in "The Queen vs. Commissioner of Police of the Metropolis, Ex parte Blackburn" (1968) 2 QB 118.

In 1966, the Commissioner of Police of the Metropolis decided, as a matter of policy, that police would no longer enforce a part of the Betting, Gaming and Lotteries Act (1963) in the gaming clubs of London. Mr. Blackburn, a member of the Parliament, became dissatisfied with this policy, and applied to the Divisional Court for an order of mandamus to compel the commissioner to enforce the law. The Divisional Court refused his application, and the case went to the Court of Appeal. It was argued on behalf of the commissioner that he had the right to use absolute discretion in his decision-making, but the Court of Appeal held that the commissioner owed a duty to the public to enforce the law, a duty which he could be compelled to perform. The judges clearly accepted the right of the police to exercise considerable discretion in carrying out their duties, but a decision to do nothing was viewed as illegal. The court therefore determined that the prosecution agency may decide whether to proceed with a prosecution, but it is regarded as objectionable that a directive is issued which notes that,

as a matter of policy, no action should be taken against any breaches of a certain law.

In general, it can be said that even in systems which utilize the expediency principle in a generous manner, the division of power (trias politica) does not allow the executive power (the prosecution service) to interfere with the legislative power by not administering a law which is in force. That is, a waiver of prosecution should not become so extensive that it would equal the practical decriminalization of a criminal act.

The right to criminalize or decriminalize acts rests with the legislature, not with the other agents of the criminal justice system.

Another point must be stressed. The legal reality that the expediency principle allows for the use of discretionary prosecutorial power in all types of crimes without exceptions does not mean that this opportunity is, in fact, used in practice. Indeed, a wide range of crimes, particularly the more serious ones, seem to be excluded from the application of the expediency principle in the everyday administration of justice. The law enforcement of certain types of crimes (such as drug trafficking, offences which are generally of dangerous nature, crimes against life and liberty, etc.) are offences for which prosecution should, due to the nature of these offences, be instigated. Therefore, no considerable practical difference appears to exist between countries adhering to the legality principle, and those which recognize the expediency principle. The theoretical difference becomes apparent in rare cases, in which the special circumstances surrounding a crime may lead to a waiver in systems adhering to the expediency principle, and, in systems adhering to the legality principle, might be taken into account in the court decision, such as by mitigating the punishment.

10. In contrast to countries where discretionary prosecutorial power is granted, certain countries allow no discretionary prosecutorial practice, as is the case in Spain and Italy. These systems are now examined, in order to determine whether all detected crimes are indeed prosecuted and tried by the courts.

Section 112 of the Italian Constitution states that the public prosecutor has the duty to prosecute all cases. Although the Constitution states the existence of compulsory prosecution whenever the legal prerequisites and sufficient evidence exist in a case, the prosecutorial decision is, in practice, influenced by how, when and in what case it is made. The prosecutor can decide how to organize his work, and he is consequently able to give priority to certain cases.

The growing number of penal procedures, as well as the increasing complexity and social relevance of many of the cases, has made prioritization necessary. In 1977, the Supreme Council of the Magistracy (the prosecution service in Italy exists subject to this council, while being independent of the Minister of Justice) put forward a recommendation regarding the prosecution service, emphasizing the necessity of giving priority to procedures concerning the crimes of social significance. This, in effect, could lead to the elimination of the low priority cases through the lapse of the limitation period, or through the eligibility of the case for probable future amnesties. Such prioritization is not generally perceived as a violation of the rule of compulsory prosecution.

Therefore, exceptions to compulsory prosecution may exist in practice, despite their absence from the written procedural code, as demonstrated by Italy.

Alternately, the prosecutor may waive prosecution in Spain only when the evidence is weak, the act is not a criminal one, or when legal justifications exist for the criminal act. It seems, however, that strict adherence to the legality principle in the daily practice does not exist. When a prosecutor is of the opinion that prosecution appears inexpedient in a case, he is likely to waive prosecution on the basis of weak evidence. A waiver of prosecution due to the weakness of evidence may therefore be a disguise for the use of discretionary power for expediency. It is often expressed in Spanish literature that a gap does exist between the legally defined strict adherence to the legality principle, and the factual and practical application of this legal mandate.

11. The last topic dealt with in this chapter is the legal nature of a prosecutorial waiver.

Whether or not a waiver is binding varies between countries. Some countries explicitly express the legal nature of prosecutorial waivers in their laws. For example, the Swedish Code of Judicial Procedure, chapter 20, section 7b, explicitly notes that any decision made not to prosecute may be withdrawn if sufficient grounds for such a decision cease to exist.

In a number of other legal frameworks, however, no information can be found on the legal nature of prosecutorial waivers, but it is commonly held that a decision is usually revocable, as is the case in Finland.

In Belgium, the decision to waive prosecution has always been of a provisional character, as it is not a judicial, but an administrative act. This is also the case in France and Luxembourg. The prosecutor can revoke his decision to waive prosecution at any time, up to the time when the time limit bars, whenever new circumstances or new facts favour

the withdrawal of the prior decision.

In the Netherlands, where the prosecutorial decision is seen as an administrative one, and where the Code of Criminal Procedure does not contain regulations prohibiting the revocation of a simple waiver, the Supreme Court has recently ruled that a communication from the prosecution service to a defendant to the effect that there would be no prosecution in his case does restrict the freedom of the prosecutor to initiate a prosecution. According to the Court, the general concept of due process of law implies that agencies responsible for the administration of justice shall not act in an arbitrary fashion, but shall be bound by justified expectations raised by themselves, unless there are compelling reasons why, in a particular case, this rule should not apply.

In Scotland, the prosecutor may decide to change his original decision if new information becomes available suggesting that he do so. However, if the prosecutor has advised the accused of his decision not to prosecute the case, or has publicly relinquished the right of prosecution with respect to a certain individual for a particular offence, he is barred by law from initiating prosecution.

The fact that the waiver is an administrative and not a judicial act also means that a confession is not necessary for prosecution.

In countries where the interested party can lodge an appeal with the court against a waiver based on the lack of evidence, and where the court can order the prosecutor to revoke his decision - a topic dealt with in chapter I - the prosecutorial decision is of a provisional nature.

CHAPTER III - EXTENDING OR REDUCING THE SCOPE OF NON-PROSECUTION

1. The scope of the use of non-prosecution is not static. It is constantly evolving and developing. A wide range of influences can either extend or curtail the legal and/or practical use of non-prosecution. Some of these influences lead to an immediate observable effect, while others lead to a change in the use of non-prosecution which can only be noticed after a long time. The latter occurrences are particularly hard to analyze in this report; the report will indeed only provide a description of the legal or practical measures aimed at the extension or reduction of the use of non-prosecution, in as far as they are explicitly manifested in the various countries. In this chapter, the main measures which have been recently used to widen or reduce the scope of the use of non-prosecution are dealt with.

2. In some of the European countries, particularly in those which adhere to the legality principle, the legal scope of prosecutorial discretionary power has been recently extended. This extension has manifested itself in at least four ways:

- legislation has been provided which has noted that the principle of legality no longer forms the governing principle for the prosecutorial practice in regard to certain specified crime(s);
- new grounds have been introduced for non-prosecution in legislation, or the threshold for the application of the existing rules has been lowered;
- the legislature has deleted restraints which previously existed with respect to the use of the discretionary prosecutorial power; and/or
- the judiciary, controlling prosecutorial decisions, has accepted an extended interpretation of regulations concerning the use of discretionary power.

3. Illustrations of the first form can be found, for example, in the Federal Republic of Germany, Sweden, and Finland.

In 1968, the procedural code of the FRG was amended, allowing the Federal Attorney General not to prosecute even the most serious political crimes, such as high treason or espionage, in cases in which he believed that the prosecution would be disadvantageous for the FRG, or that an important public interest would present obstacles to prosecution (section 153 CCP). Prior to this amendment, prosecutors were obliged to prosecute such crimes. Since this amendment, the prosecutorial decisions of the Federal Attorney General have been governed by expediency considerations.

In Finland, the legality principle was modified in 1966 by the introduction of a new section into the Decree on the Enforcement of the Penal Code, which permitted the waiving of prosecution under certain limited circumstances. The amendment allowed for prosecutorial waiver in cases where the offence in question was petty, and where the public interest did not require prosecution.

One major change that was of great practical importance was made in 1981 in Sweden, with the introduction of a provision allowing the prosecutor, under certain conditions, to close a criminal investigation, or to even refrain from initiating one, if it could be foreseen that the investigation would only result in a decision to waive prosecution.

Illustrations of the second form of extending prosecutorial discretion can be found in Sweden and the Federal Republic of Germany.

The 1975 amendment of the procedural code of the Federal Republic of Germany extended the number of legal grounds for non-prosecution. Since this amendment, a conditional waiver has existed in the German procedural legislation. With the consent of the judge, the prosecutor may now decide to waive a case, subject to the condition that the damage is compensated by the offender, or that the offender performs some community service, or other activity which is for the benefit of either a public or a private institution.

In Sweden, the rules concerning prosecutorial waiver were altered considerably in 1985. The applicability of these rules was extended, not by introducing new principal grounds for a waiver, but by lowering the threshold for the application of the existing rules. This was done by changing the general prerequisites for the waiving decision. It was expressed in the old provision that a waiver was possible when the public interest did not require prosecution. The new provision notes that the prosecutor may decide to waive prosecution, provided that no important public or private interest is neglected.

The third method or way of extending discretionary power, through the deletion of existing restraints, was used in the 1978 amendment of section 153 of the procedural code of the Federal Republic of Germany. According to this section, the prosecutor could waive prosecution of petty misdemeanors when the guilt of the offender was minor, and when the public interest did not require prosecution. The prosecutor, however, could not waive a case without the consent of the judge who would try the case (if it would be proceeded with). This requirement of judicial consent was a restraint on the prosecutor's discretionary power. Since the amendment, a judicial consent is no longer required for a waiver of prosecution in a case which involved a regular property offence, if the damage caused by the offence is minor. Since the prosecutor can now make an independent prosecutorial decision, his discretionary power has been extended.

The utilization of prosecutorial discretionary power depends, to a large extent, on judicial consent in the Federal Republic of Germany. Refusal to permit the dropping of a case is rare; consent by the judge to the waiver of a case appears to be a routine requirement. In important cases which have caused widespread public unrest, or which have received wide public attention, it may happen that the judge provides a written statement as to the reasons for his consent/lack of consent to a waiver. In such statements, the judge may, at times, give an actual interpretation of the wording of the provisions which allow the use of prosecutorial discretionary power. In the "Thalidomide" case, which was discontinued by the court after the trial had gone on for two and a half years, the court, in its decision, gave an interpretation of the conditions which are needed for the closing of a case. These conditions, minor guilt and a minor public interest, also apply to the decision by the public prosecutor to waive a case. The court held that the guilt of the defendants was minor, that they had been exposed to a long, highly-publicized trial, and that the defendants had offered to pay over 100 million German marks into public trusts for the victims. The court considered the public interest subordinate to the victim's in the financial settlement. This decision indicates that the conditions of minor guilt and public interest are susceptible to flexible interpretation, and that through their wide interpretation, the legal scope of discretionary power can be extended.

4. This extension of discretionary prosecutorial power may also result from changes in the prosecution service's organizational structure, or from changes in the policy of the prosecutorial service.

The organizational structure of the prosecution service indeed has a great impact on the practical use of the discretionary power.

In some countries, such as Belgium and France, control over the prosecutor's decision is exercised by the head of the local prosecution service, by personal contacts, or by the review of the files.

In other countries, the hierarchical structure of the prosecution agency seems to be a contributing factor in the attempt to attain consistency in the prosecution policy. This is the principal reason why an independent prosecution service was recently established in England and Wales. The 1985 Prosecution of Offences Act established a national prosecution service, headed by the Director of Public Prosecutions (who is a senior member of the civil service), under the superintendence of the Attorney General (who is a member of the Government). The local prosecutors now have the responsibility for the conduct of all proceedings which, before 1986, were prosecuted by or on behalf of the police.

The prosecution service is therefore independent, which means that the prosecutor is no longer bound by the views of the police. Despite the fact that the initial decision as to whether prosecution should be initiated will remain with the police, the prosecutor has complete discretion with respect to the decision whether or not to proceed with the charge. Guidance for prosecutorial decision emanates from the center of the service, the Director of Public Prosecutions.

In the legal systems adhering to the expediency principle, directives, guidelines or explicitly formulated objectives of a prosecution policy seem to be used as instruments for widening or curtailing the practical use of discretionary power. For example, the increase in the proportion of waivers on policy grounds in the Netherlands is a consequence of the policy principle, applied over the past twenty-five years, that prosecution should be based on the consideration that it serves a concrete social purpose. The rule that a case should be dropped unless the public interest requires prosecution, increasingly became the leading principle for the prosecution policy during the last decade, without altering a single word in the legal regulation concerning the use of discretionary power.

5. The reduction of the scope of prosecutorial discretionary power can take place through the utilization of the same instruments as those mentioned for the extension of the discretionary power.

The reduction of discretionary prosecutorial power seems to be an item which is only of interest in legal systems which adhere to the expediency principle, or in systems which allow exceptions to the legality principle. It must be emphasized that a reduction in the scope of prosecutorial discretion can not only be the result of explicit legal restrictions, but also of new legislation offering alternative ways of dealing with crime. This can particularly be the case where the criminal justice system offers two procedural extremes, the waiving of criminal cases, and the bringing of a case to court. When legislation provides other solutions for such a dilemma, these solutions seem to affect, to some extent, the utilization of prosecutorial discretionary power.

In many European countries, a popular opinion exists that the interests of justice do not demand that every offender be brought before the court and, if guilt is not disputed, there may be no need to adopt formal court procedures. Therefore, many countries have adopted alternatives to the formal court procedures.

In the market economy countries, the general motive for the adoption of such alternatives is that they aid in maintaining an acceptable level of law enforcement within the available resources, and thereby prevent the law from being

brought into disrepute. In addition, they are helpful in reducing delays in the processing of cases through the courts, not only by removing a significant number of cases from the courts, but also by affording prosecutors and judges more time to deal with cases meriting court prosecution.

In some of the socialist countries, such as the German Democratic Republic, alternatives are introduced in order to improve the possibilities of achieving their socio-political and criminal-political goals.

6. Many European legislations contain one or more of the following types of diversion:

- a transaction procedure, known, for example, in France, Greece, Turkey, Belgium, the Netherlands and Norway, which consists of a voluntary payment of a certain sum of money to the public prosecution service, or another organ or judicial administration, in order to settle a case and to avoid a trial. In general, this procedure is used for petty offences, but may also cover crimes in some countries. This is the case in Belgium and the Netherlands, for example, where the transaction procedure may be applied to avoid a prosecution of crimes which could be punished according to the law, which carry a penalty of six years of imprisonment. Through the extension of the range of choices, the utilization of prosecutorial discretionary power will, in fact, be reduced, as one of the effects of these proceedings appears to be that the transaction procedure is applied by the public prosecutor in cases which he used to waive.
- a simplified procedure, which is a criminal procedure without a public hearing in court, or without a public trial, is known in a number of European countries in some form and to some extent. This procedure exists in countries such as the Federal Republic of Germany, Norway, the German Democratic Republic, Sweden, Austria, Finland, Hungary and Czechoslovakia. The extent to which such simplified procedures are permitted varies considerably from country to country. It was born out of the desire to prosecute punishable acts without unnecessary effort, without involving the public, and without putting too much strain on the accused. The simplified procedure appears to be attractive to those criminal justice systems which are under particular administrative strain, and in which fines play a major role in the criminal policy.

These simplified procedures exist in various forms. To illustrate such a procedure, we will deal with one such form, the penal order procedure, which exists, for example, in Hungary.

This penal order procedure is applicable in cases involving misdemeanors, which fall within the jurisdiction of a

single judge. This procedure plays a major role in this country, since by such a summary arrangement it is possible to avoid lengthy and costly proceedings. When a draft writ of accusation is found to satisfy the material and formal legal requirements, the court issues a penal order. Once served to the suspect, it becomes enforceable, unless the latter lodges a notice of non-acquiescence (a kind of an appeal) with the court within eight days from the day of service of the order. Accordingly, criminal proceedings are shortened considerably in such cases, since no court proceedings are required. The penal order must include the charge(s), the evidence, and the determined penalty; information is also given concerning the closing date for, and the mode of, the aforementioned notice. If the suspect lodges a notice, the case is dealt with at the court session. The penal order then serves as a summons. The suspect is required to appear in court, and if he does not do so, his notice will be held to have been withdrawn (section 350-355 Code of Criminal Procedure of Hungary).

- a referral to a social or a comrade court, or to a statutory judgment commission. This form of diversion exists in many of the socialist countries, such as Bulgaria, the USSR, the German Democratic Republic, and Romania.

In the German Democratic Republic, the transferral is used as an alternative measure in over 20% of all cases.

In Bulgaria, such matters as petty theft and petty assaults may be transferred to comrade courts for adjudication, and premeditated offences, which by law are punishable by imprisonment of up to one year, may be dealt with by public voluntary agencies at the place of work if the alleged offender so requests.

Romania has statutory judgment commissions which are civil organs with influence and jurisdictions which enable the masses to participate in the enforcement of the rule of law, and in the socialist education of citizens. These commissions are empowered to deal with offences involving little social danger, and with labour disputes. One-third of the cases submitted to the commissions are settled by conciliation, and therefore do not go to court.

Almost all other European countries have provision for diverting cases from the court. These forms of diversion restrict the utilization of prosecutorial power. The same can be said about the methods which reduce strict adherence to the principle of legality. This method consists of widening the scope of complainant offences. This was recently used in Italy, in order to encourage settlement of private disputes, and in order to avoid court proceedings.

7. In the light of the above discussion, one general conclusion can be drawn: the practical utilization of discretionary power by prosecution agencies can not be seen as an

activity in itself, but as one which depends, to a large extent, on the legal framework within which it exists. Decriminalization, depenalization, diversion, the range of complainant offences, transaction procedures, referral to bodies other than the criminal courts, or other alternatives to prosecution, all have an impact on the actual utilization of prosecutorial discretionary power.

CHAPTER IV - GROUNDS FOR WAIVER OF PROSECUTION

1. Since this report deals with utilization of prosecutorial discretionary power by the public prosecutor, we must exclude all cases in which the decision of non-prosecution is made without the use of any discretion. We must therefore examine the legal conditions, the prerequisites for or the hindrances to prosecution. These conditions must be met before the question of prosecution can arise; when they are not met, the prosecutor has no choice but to drop the case.

Accordingly, the cases in which the public prosecutor decides to waive prosecution can be divided into two types:

- those in which he cannot prosecute; and
- those in which he will not prosecute.

In a case which falls into the first category, the prosecutor should not utilize any discretionary power; in the second type, prosecution is waived due to the prosecutor's use of prosecutorial discretion.

The prosecutorial decision consists of three "sub-decisions":

1. whether the conditions necessary for prosecution are met in the case;
2. whether there is sufficient evidence for prosecution in the case; and
3. whether prosecution is expedient in the case.

The first decision is made on objective grounds, by examining the applicable law, without any subjective interpretation. The second decision is both objective and subjective; it is based on objective criteria which can be interpreted subjectively by the prosecutor. On the basis of these two decisions, the prosecutor then makes the third decision, subjectively determining whether prosecution would be expedient in the case.

However, the issue of the sufficiency of evidence may be influenced by the issue of expediency. The interpretation of the facts of the case for the purpose of deciding on the sufficiency of the evidence can be affected by the prosecutor's opinion as to the expediency of the prosecution. In this way, the prosecutorial decision with respect to the sufficiency of the evidence is partly of a discretionary nature.

A number of empirical studies conducted in various European countries, such as Sweden, the Federal Republic of Germany, Belgium, Finland and the Netherlands, aimed at determining the factors influencing the public prosecutor's decision-making as to whether to prosecute, show that discretionary power is also utilized in deciding whether sufficient evidence exists. It has been demonstrated that, especially in complicated cases, the prosecutor does not make a detailed evaluation of each evidentiary fact in order to determine

the sufficiency of the evidence. Instead, he is more likely to read through the report once or twice, and to make his preliminary decision in a more or less intuitive fashion. When he then begins his preparatory work on the prosecution of the case, his closer study of the case is directed at finding, at least subconsciously, reasons to support his preliminary decision.

It has been shown that different prosecutors may well decide differently in identical cases. It has also been shown that the same prosecutor may decide differently in virtually identical cases at different times.

Personal factors, such as age, the number of years of professional experience, and personal interests, amongst other factors, make it difficult to examine objectively certain types of crimes dealt with by prosecutors. As long as decision-making is "man-made" work, personal factors influencing the decision-making process cannot be excluded totally.

The fact that expediency plays a role in deciding on the sufficiency of evidence is also demonstrated by the guidelines of England and Wales. The public prosecutor, according to these directives, seems to be able to initiate prosecution in cases which have caused wide-scale public unrest and outcry, even when doubts exist as to the sufficiency of evidence for a conviction. Had the case not caused a public disturbance, the prosecutor would probably have waived prosecution in the case.

The 1983 Attorney-General's Guidelines on criteria for prosecution in England and Wales take into account this public interest in the decision concerning the sufficiency of evidence. The following is a quotation from these guidelines, quoted in its entirety in order to avoid any possible misinterpretation:

(4.) When considering the institution or continuation of criminal proceedings, the first question to be determined by the prosecutor is whether the evidence is sufficient to justify a prosecution. The Director of Public Prosecutions does not support the proposition that a bare prima facie case is enough, but rather applies the test of whether there is reasonable prospect of a conviction; or, put another way, whether a conviction is more likely than an acquittal before an impartial jury properly directed in accordance with law.

(5.) An even higher standard is set if an acquittal would or might produce unfortunate consequences. For example, if a man who has been convicted of some offence is subsequently acquitted of having given perjured evidence at his trial, that acquittal might be seen as casting doubt on the original conviction. Likewise an unsuccessful prosecution of an allegedly obscene book will, if the trial has attracted publicity, lead to a considerable increase in

sales.

(6.) In such cases the Director of Public Prosecutions is hesitant to prosecute unless he thinks that the prospects of a conviction are high. He also tends to adopt a similar high standard if the trial is likely to be abnormally long and expensive and if the offence is not especially grave.

(7.) In reaching his decision as to sufficiency of evidence, the Director considers such factors as: availability, credit and credibility of witnesses and their likely impression on a jury; the admissibility of any admissions, if necessary having regard to the age and intelligence of the defendant; the reliability of any identification; and will draw on his experience to evaluate how strong the case is likely to be when presented in Court.

This, however, does not mean that a public prosecutor may initiate a prosecution when no reasonable prospects of a conviction exist due to the weakness of evidence, even in cases which cause public unrest and outcry.

In general, procedural laws do not provide criteria for the sufficiency of evidence in Europe, nor have courts developed clear guidelines for its determination. Most of the laws, however, express some basic principles for fair criminal procedure, such as the presumptio innocentiae, the in dubio pro reo -rule, and other such rules. This, however, does not mean that prosecutions would not take place which are based on doubtful evidence. In most of the countries, however, legal remedies for such situations exist. In some countries, a judge must evaluate *ex officio* the prospect of a conviction before a trial may commence; in others, the defendant may lodge a complaint against a charge with the court, in order to prove the sufficiency of the evidence. If the evidence is too weak to make a conviction likely, the court must terminate the proceedings. The mere fact that a prosecution is in the public interest, without taking into account the sufficiency of the evidence, would be incompatible with the present systems of criminal justice in the European countries. In some of these countries, this rule is explicitly expressed in directives. We quote from a recent directive issued by the Irish Director of Public Prosecutions:

"... the mere fact that a person is killed or severely injured by a road traffic accident is not in itself a reason for prosecution. In this as in all areas of the criminal law, there must always be available before charge evidence of a criminal act or omission, in these cases evidence of a standard of driving which warrants a criminal as distinct from a merely civil sanction. Prosecutions to enable an accident "to be investigated by the Courts" or to "clear the air" are incompatible with the present system of criminal justice in this country and should be avoided."

2. We will not attempt to list all of the prerequisites for prosecution which are included in the penal or procedural codes of the countries dealt with in this report. This is due to the fact that, on one hand, we lack sufficient information on this item for all of the countries, and on the other hand, the information available shows that some of the conditions exist in some countries and not in others, as may be illustrated by the following examples:

- The so-called complainant offences exist in all European countries. Such an offence cannot be prosecuted ex officio, but instead only after the prosecutor has received an official complaint from the aggrieved party. The content of these offences is not always identical. Assault, for example, is a complainant offence in the Federal Republic of Germany, while in Austria it is an official offence which can be prosecuted without the consent of the complainant. A mixed system can also exist, as in Finland, where two provisions were adopted in the 1970s which dealt with sexual offences and the invasion of privacy. The public prosecutor has the right to prosecute, ex officio, these complainant offences when this is in the public interest.
- Some of the conditions attached can be very particular to their countries of application. For example, a theft between spouses, although a crime, cannot be prosecuted at all in the Netherlands; prosecution is barred by the marriage between the involved persons. Similarly, in the Netherlands a "hit and run" case cannot be prosecuted as such if the offender, before the detection of the crime, but within 24 hours of its commission, informs the police about the accident.
- In Austria, criminal liability is absent in cases involving property offences, according to the penal code, if reparation occurs before the prosecution service has been informed of the offence (so-called active repentance).

However, there are some general conditions which seem to be to a large extent the same in all of the countries. The following conditions seem to be required for the initiation of a criminal case:

- according to the law, the act must be, prima facie, a criminal case.
- the criminal offence must fall within the jurisdiction of the criminal law of the country in which the prosecution will take place.
- the person who committed the criminal offence must be of an age at which he can be held criminally responsible.
- the person who committed the offence must be alive at the time of the prosecutorial decision.

- the statute of limitations may not bar prosecution.
- the person who committed the criminal offence has no immunity.
- prosecution cannot be commenced against a person for a criminal offence for which he has already been sentenced, and for which the judgment has already taken legal effect (prohibition against double jeopardy, ne bis in idem).
- with respect to the offender, there was, under the same accusation, no unrevoked decree of the prosecution agency to terminate the case.
- a complaint must be lodged in cases which can only be initiated on a complaint.

When a hindrance to prosecution is present, or when a prerequisite for prosecution is absent, prosecution cannot take place, and in the case that it has already commenced, it must be terminated.

In order to clarify the point that prosecutorial waivers which occur due to the presence of legal hindrances or the absence of legal prerequisites are not covered by this report, we must reformulate our working definition of non-prosecution. Therefore, non-prosecution, within the context of this report, is understood as

any decision by a prosecutor or a corresponding official according to which he does not bring a prima facie criminal case to court for adjudication, despite the existence of prerequisites and the absence of legal hindrances for prosecution, and despite the availability of evidence regarding the guilt of a specified person.

In a number of the European countries, a decision to prosecute does not necessarily mean that the judiciary is liable to deal with the case until a final verdict is reached. In many systems, the law vests the judiciary, the examining judge, or the trial judge, with the power to discontinue the proceedings in the course of the trial or the pre-trial phase. The grounds for the discontinuance may be similar to the grounds for non-prosecution. This decision to discontinue the proceedings does not, however, fall within our definition of non-prosecution, and will not therefore be dealt with within the context of this report.

3. In some of the European countries, the law explicitly lays out, sometimes with great detail and specificity, the grounds for a prosecutorial waiver. In others, more or less general rules are provided by law for non-prosecution.

The most detailed regulation seems to exist in the Federal Republic of Germany in the Code of Criminal Procedure, which contains the exceptions to the legality principle otherwise

adhered to (sections 153-154d StPO).

The most general regulations seem to exist in the criminal procedural codes of those countries which have adopted the expediency principle. In these countries, the boundaries for the existence and the utilization of the prosecutorial discretionary power by the public prosecutor are widely drawn. For example, the French 'Code de Procedure Pénale' (section 40) reads: "The public prosecutor collects the complaints and the official files and decides how to proceed." No further directives are provided for the public prosecutor for the prosecutorial decision.

A detailed and an intensive study of the major French procedural law textbooks did not provide more information about the practical application of this principle, except for general statements such as "the reasons for a waiver are numerous". In general, only the legal and theoretical aspects of the expediency principle were dealt with in these texts.

Fortunately, some studies have been published on the practical application of the prosecution principles. The published grounds for non-prosecution are generally based on an analysis of prosecutorial decisions, or on personal experiences. Such a list can be found, for example, in A.F. Wilcox's book The Decision to Prosecute. The author, as a former chief constable of Hertfordshire, provides twenty reasons for non-prosecution, which apply even in cases where prima facie evidence of guilt exists. The reasons mentioned by the author are the following:

1. Obsolete laws, not repealed but out of tune with modern thought.
2. Technical breaches of the letter of the law.
3. Trivial contraventions, not worth the effort of prosecution.
4. Complexity of the law, where the offender could not reasonably be expected to know that he was committing an offence.
5. Controversial laws, where legislation is being debated or is awaiting implementation.
6. Unpopular laws, which public opinion does not wish to see enforced.
7. Prosecutions which in the past have been discouraged by the courts.
8. Vexatious, oppressive and malicious prosecutions.
9. Prosecutions which will attract ridicule or bring the law into contempt.

10. Stale offences, detected after a lapse of years or where unreasonable delay has occurred in bringing a prosecution.
11. Prosecutions which will bring harm or suffering to witnesses, especially children.
12. Prosecutions against the wishes of the injured party.
13. Where the accused has already suffered enough.
14. Where the mental condition of the accused suggests treatment rather than prosecution.
15. Where a prosecution would bring disproportionate consequences to the accused who has a good character and reputation.
16. Where the youth or old age of the offender deserves consideration.
17. Where the evidence has been obtained by unfair means.
18. Where a witness agrees to give evidence for the prosecution. (sic)
19. Prosecutions which will enable the accused to pose as a martyr or turn the trial into a propaganda exercise.
20. Where alternatives to prosecution are available - mitigated penalties, prohibition notices, seizures, or handing the culprit over to disciplinary authorities.

In this section, we will attempt to divide the reasons for non-prosecution mentioned in the regulations, guidelines and available literature on non-prosecution, into main categories. The divisions are based on an analysis of the reasons existing for non-prosecution in the various countries. Five main categories seem to exist. Each of the categories has been divided into subcategories. For each ground, we will mention the country (or countries) where it is used as a reason for prosecutorial waiver. In some particular cases, we will provide an example of its application in practice. We must, however, take into account the fact that in many cases, the decision not to prosecute is based on a combination of reasons, the most typical seeming to be the combination of a minor offence and a first offender.

4. Prior to commencing an examination of the existing grounds for non-prosecution, it is important to recall the so-called material concept of crime which exists in the socialist countries. In countries such as Czechoslovakia, Bulgaria, Poland, Yugoslavia, and the U.S.S.R., an act which is legally defined as a crime, and which has the features of

a crime, is not considered to be one if it causes only negligible danger to society. In Hungary, punishability is excluded in such a case.

For example, article 7 of the Criminal Code of the Russian Soviet Federative Socialist Republic states that:

"an action or an omission to act shall not be a crime, although it formally contain the indicia of an act provided for by the official part of the present code, if by reason of its insignificance, it does not represent a social danger".

Section 8, paragraph 2 of the Yugoslavian Criminal Code excludes the existence of a criminal offence as well in the case when, though all the characteristics of a criminal offence which are defined by law exist, the act presents only a slight danger to the community because it is of little importance and because of the slightness or absence of harmful consequences.

An act is considered to be of a relatively small social danger when it is a minor breach of the law, or when the damage caused by it is small.

In some of the socialist countries, such as Hungary, the degree of social dangerousness depends on objective factors, such as the importance of the protected interests affected by the act, or the consequences of the act.

In other countries, such as Poland, Czechoslovakia, and the German Democratic Republic, subjective factors, such as the motives of the offender, his intentions, his social and moral behaviour, his previous behaviour, the negligibility of guilt, and other individual and personal factors and circumstances are also considered when deciding on the social danger of a act. If the appropriate authorities decide that the particular breach of law does not constitute an offence, or if the nature of the act committed and the personality of the perpetrator allow his rehabilitation through social impact or administrative reprimand (without criminal punishment), the person is relieved of criminal responsibility.

The fact that the act is not perceived as an offence implicates that there can be no prosecutorial decision.

If administrative or disciplinary liability exists in the case, in some countries the case may be transferred to some other court or a body outside the criminal justice system, such as a comrades' court or a trade union, which then deals with the matter through administrative or educational measures.

This means that another procedure is used to replace the criminal procedure. In the Russian Soviet Federative Socialist Republic, for example, a case may be terminated against

an offender, and one of the following decisions may be made:

1. the person is subjected to administrative responsibility.
2. the case is submitted to the comrades' court for consideration.
3. the person is taken on bail by a social organization or a workers' collective.

These alternatives are replacing the criminal procedures, and apply under conditions specified by law.

The breaches of law for which, and the circumstances in which transfer occurs are comparable to those which lead to a decision of non-prosecution in the other European countries.

The decision over whether or not an act is of only slight social danger is left for the prosecutor to decide. This power to estimate the social danger of an act provides the public prosecutor with a legal alternative in the prosecutorial decision-making, an alternative which contains some of the characteristics of the expediency principle. Likewise, the court can also make this decision, and subsequently grant an acquittal, through which the same result is achieved; a legal sanction is omitted, despite the fact that the act constituted a formal breach of the law.

Therefore, it does not appear out of place to compare the decision of transfer with the decision of prosecutorial waiver. We will deal with the transfer in this chapter, due to its similarity to a prosecutorial waiver.

In Hungary, the legal consequence of the determination of the lack of social dangerousness differs from that which exists in most of the socialist countries. No punishment is inflicted on a person whose act, at the time of its perpetration, represented so slight a danger to society that even the mildest punishment which could be applied appears unnecessary. The prosecutor is free to assess the extent of the act's dangerousness to society. If he is of the opinion that the danger is so slight that the act requires no punishment, or that the social danger has diminished during the interval between the perpetration and the processing of the offence, he may refrain from bringing charges before the court.

Due to the vagueness of the concept of "slight social danger", the decision not to prosecute a charge appears to be based, to some extent, on the use of discretion.

5. The following are the five main categories of the grounds for waiver of prosecution.

I. REASONS CONNECTED WITH THE GENERAL LEGAL ORDER.

This category can be divided into six subcategories:

I.1. State interest

A waiver of prosecution can be expedient in the interest of the State (Cyprus, Greece, Belgium, France, Luxembourg, the Netherlands, the Federal Republic of Germany). The "interest of the State" is a general phrase which includes: internal safety and order, security of the State, wish to avoid social or economic unrest, and wish not to harm foreign relations through the prosecution of a crime.

For example, during and after the students' riots in France in 1968, numerous offenders were not prosecuted as prosecution would have caused a further escalation of unrest.

In England and Wales, and in Greece, prosecution may be waived in the interest of the State when the cost of proceeding with the trial seems too expensive.

I.2 Prospect of decriminalization

The public prosecutor can waive prosecution while new legislation is introduced, which would decriminalize an act (or acts) (Iceland, Ireland, the Federal Republic of Germany, the Netherlands).

In Ireland and the Netherlands, prosecution has been waived under this disposition in recent years. In Ireland, this reason has applied to the non-prosecution of the sale of contraceptives, and the unlawful baking of bread, while in the Netherlands, prosecution has been waived on this ground in cases falling under the 1956 Inventory Sale Act which was recently, in fact, withdrawn.

Similarly, when the laws concerning adultery and homosexuality between consenting adults were repealed in the Federal Republic of Germany in 1969, no prosecution was brought with respect to these offences in the last months preceding the change in the law.

I.3. Lack of sufficient national interest

Prosecution can be waived when no sufficient national interest exists in the prosecution of the crime. Such lack of interest can exist in cases which involve a foreign offender who will be expelled from the country, or who will be tried before his own national criminal court, or in cases where the crime was committed abroad, or the penalty for the crime was already served abroad (Denmark, the German Democratic Republic, the Federal Republic of Germany, Austria, Greece, and Yugoslavia).

I.4. Obvious injustice

Waiver of prosecution can occur when the prosecution would result in an obvious injustice either to the convicted person(s) or to the State. It is sometimes clear that certain legislation is so complex that one cannot speak of a more or less uniform sentencing policy by the judiciary even in similar cases.

This was, for example, the case in Ireland, where the 1968 alcohol and road traffic legislation often resulted in an injustice to the accused, and the Director of Public Prosecutions finally decided not to prosecute under this legislation.

I.5. Lack of significant contribution to law enforcement.

In cases involving a number of crimes, the public prosecutor can waive prosecution against crimes which are relatively unimportant, or limit prosecution to a select sample of all the crimes, if the prosecution of the selected acts provides a sufficient basis for the imposition of a punishment which can be deemed as adequate for all of the offences committed. A prosecution of all of the crimes would be an unreasonable burden on the State and its agencies (such as the police, the public prosecutor, and the judiciary).

Merely upholding the idea of law enforcement, without any significant contribution to the aim of law enforcement, cannot be in the interest of the State; it only constitutes a waste of time, energy and money (Denmark, Sweden, Yugoslavia, Greece, the Federal Republic of Germany, the German Democratic Republic, Norway, Hungary, Ireland, the Netherlands, and Austria).

I.6. Lack of significant contribution to the punishment.

The prosecutor may also waive a case if the penalty in which the prosecution could result in is negligible in comparison to the penalty which the accused has already received, or which he is expected to receive (Czechoslovakia, the Federal Republic of Germany, Sweden, and the Netherlands).

II. REASONS CONNECTED WITH THE CRIME ITSELF.

This category can also be divided into five subcategories:

II.1. Minor offence

Waiver of prosecution can take place if the offence is so minor that it is only a negligible breach of the law, or the damage caused by it is so small that prosecution would be disproportionate to the nature of the offence. This ground differs from category I.5. in that in the latter, the offence to be waived was unimportant in comparison with the other act(s) committed, although the offence in itself could

be a serious one; however, here the offence itself is minor.

An example of this type of a minor offence is shoplifting of goods worth less than a few dollars (Austria, England and Wales, Hungary, Iceland, Ireland, Sweden, Denmark, the Federal Republic of Germany, Greece, Belgium, France, Switzerland, Luxembourg).

II.2. Minor contribution to the offence

The contribution of the offender to the offence, which he committed with other persons, is so small that his prosecution would be disproportionate to the extent of his participation in the crime.

For example, the Director of Public Prosecutions in Ireland has occasionally granted amnesty to a person who has had a minor part in a crime, usually under duress, when that person is an essential witness for the prosecution (Ireland, the Netherlands, the Federal Republic of Germany, the German Democratic Republic, Denmark).

II.3. Offence almost justified

Prosecution can be waived with respect to a criminal act where, although no justification for the act exists in a strict legal sense, the circumstances surrounding it are so close to a justification that prosecution would be disproportionate to the act (Norway, Iceland, Belgium, the German Democratic Republic, the Netherlands).

II.4. Staleness of the offence

The statute of limitations bars prosecution after a certain period of time. In such a case, no discretionary power over prosecution exists. However, it sometimes occurs that an offence has been committed a long time ago, and although the end of the limitation period has not been reached, there is a staleness of the case which bars prosecution. This bar can be moral, human, or practical. In such cases, prosecution would be unjust and ineffectual (England and Wales, Iceland, Yugoslavia, Norway, Switzerland).

Prosecution carried out after a long period has lapsed since the commission of the offence may violate the sense of fair play. Particularly in countries which have ratified the European Convention on Human Rights, the lapse of time between the detection of the crime and its prosecution can, to some extent, bar prosecution. The European Convention prescribes that the offender has the right to be tried without undue delay. National judges may decide that prosecution of a stale offence may violate this rule.

II.5. Ideological conflict

Some offences have their origins in social, economic, or political conflicts which are based on ideological differences. It is difficult to reach the aims of punishment in such cases, and prosecution can consequently be waived, unless the severity of the offence demands otherwise.

For example, squatting (the unauthorized use of empty buildings as a residence) is an offence in certain European countries; however, when this act is an expression of a social or a political conflict, prosecution can be waived.

Another example of the utilization of this ground for non-prosecution can be found in the Netherlands, where prosecution of a refusal to cooperate with the provisions of the so-called Census Act was waived, because such a refusal was seen as a political protest against a far-reaching interference of the State into people's private lives (Belgium, France, the Netherlands, Denmark).

III. REASONS CONNECTED WITH THE OFFENDER.

This category can be divided into eight subcategories. In the following cases, prosecution is considered disproportionate with reference to the characteristics of the offender.

III.1. First offender

Prosecution of a first offender may be inappropriate. The mere shock of being caught by the police for committing the offence, being interrogated by the authorities, and participating in the criminal proceedings, is sometimes as effective in deterring the offender from further criminality as the imposition of a penalty.

Prosecution in such a case may be considered disproportionate, particularly when the probation service has become involved in the case (Finland, Sweden, France, and Luxembourg).

III.2. Age of the offender

Not only can the age of the offence affect the prosecutorial decision; in many of the European countries, the age of the offender is also one of the decisive factors in the prosecutorial decision.

In most of the criminal law systems, the penal codes set out a minimum age of criminal responsibility. This age varies considerably from country to country (for example, Belgium, 17; USSR, 16; Romania, 14; the Netherlands, 12). None of the systems, however, set a maximum age of criminal responsibility.

If the offender is very young or very old, some of the criminal justice systems are likely to waive prosecution, despite the fact that the offender is liable (England and Wales, Ireland, Switzerland, Luxembourg, Austria, Finland, the Federal Republic of Germany, Denmark).

III.3. Recent punishment

If the offender was recently punished for offences committed after the offence for which a prosecutorial decision must be made, this fact can be taken into account in the decision-making process. The recent punishment is perceived as a proper and an effective reaction to restrain the offender from further criminality, without the necessity of imposing punishment upon him for the previous offence. If the act in question was committed before the punishment, there is no reason not to take into account the recent punishment in deciding on the question of prosecution (England and Wales, Sweden, Denmark, Norway, Greece and the Netherlands).

III.4. Offender as a victim of his crime

Waiver of prosecution can be considered when the offender has become a victim of his own offence.

In some situations, and under certain circumstances, the offender is in fact punished by the consequences of the crime he has committed. For example, due to his reckless driving, he may have been seriously injured, or he may have lost his wife. It is explicitly noted in some of the European penal codes (i.e. section 60 of the Penal Code of the Federal Republic of Germany, and section 302 of the Penal Code of Greece), that the judge can refrain from imposing a penalty in such cases, as a penal reaction is overly severe. In some of these countries, the public prosecutor can waive prosecution in view of the high likelihood of this judicial reaction. This practice is known in Iceland, Ireland, Sweden, the Netherlands, Denmark, Switzerland, Austria, the Federal Republic of Germany, and England and Wales.

III.5. Poor health of the offender

The health of the offender can also be considered in the prosecutorial decision. When the offender's physical or mental health is poor, prosecution may appear inhumane and inappropriate (England and Wales, Ireland, Sweden, and Yugoslavia).

III.6. Probation

Prosecution can be waived if probation is implemented, with the condition that the offender obtains treatment. It seems that rehabilitation can sometimes be achieved without criminal proceedings, and it is wise to refrain from prosecution in such cases. This ground for a prosecutorial waiver is used, for example, in the Federal Republic of Germany with drug-addicted offenders who have sought help

for their drug dependency (Sweden, Belgium, the German Democratic Republic).

III.7. Positive change in offender's behaviour

Prosecutorial waiver can take place if the offender demonstrates a change in his behaviour in the period between the occurrence of the crime and the prosecutorial decision. In the Federal Republic of Germany, for example, the Federal Attorney-General is authorized to withhold prosecution of serious political crimes, such as high treason or espionage, if the offender has helped to avert an imminent danger to the State by dissuading other offenders from continuing with the illegal activity, or by disclosing the offence to the authorities before the consequences of the crime are complete, and before he knows of the detection of the offence. Such actions on the part of the offender are viewed as signs of repentance, and are considered as a sufficient reason for waiving prosecution (Sweden, the German Democratic Republic).

III.8. Untraceable suspect

Prosecution can be waived when the known suspect cannot be traced. In such situations, prosecution is, at times, a waste of time and money (Denmark, the Netherlands).

IV. REASONS CONNECTED TO THE RELATION BETWEEN THE VICTIM AND THE OFFENDER.

This category has five subcategories:

IV.1. Compensation

It can be wise to abstain from prosecution in situations where the offender pays for the damage caused by the offence, or otherwise has an active part in solving the conflict between himself and the victim. In such cases, prosecution might only renew the problems (Ireland, Belgium, France, the Netherlands, Denmark).

IV.2. Provocation.

Sometimes, it is the victim who provoked the offender, which then resulted in the crime. An example of this would be a fight between two customers in a bar after heavy drinking and subsequent disputing. Prosecution of the offender would then be inappropriate, as the victim can also be blamed for the offence (the Netherlands, Belgium, Austria).

IV.3. Conflicting interests

Prosecution can be contrary to the interests of the victim. The victim may wish for a prosecutorial waiver for a number of reasons. For example, he might not want to be mentioned in connection with the case. The interest of the victim is

often a reason for non-prosecution in cases involving illegal sexual intercourse between a man and an underaged female, where a pregnancy results, and the two parties marry or establish a common dwelling. Despite the fact that the man has committed an offence, prosecution might only cause more harm in the situation (Greece, the Netherlands).

IV.4. Close victim - offender relation

The fact that the victim and the offender are closely associated or live near each other (family, neighbours, etc.) can make non-prosecution preferable, as prosecution could damage or sever the ties between the individuals to a greater extent than the crime itself has (England and Wales, Belgium, France, the Netherlands).

IV.5. Restitution

Although a criminal offence has been committed - such as embezzlement - it is sometimes preferable to waive prosecution in order to obtain restitution for the damages through a civil suit or a civil settlement (Belgium, the Federal Republic of Germany, Greece).

V. REASONS CONNECTED WITH THE USE OF ALTERNATIVE MEASURES.

The last category consists of reasons connected with the fact that measures other than criminal ones can sometimes be more suitable. The measures can be of a legal nature (civil, tax, or administrative measures), or they may be related to disciplinary or social welfare proceedings (Greece, Ireland, Denmark, Finland).

6. This list of reasons for non-prosecution and the inclusion of countries in which such reasons are applied by the public prosecutor could lead to the conclusion that in the countries that are not mentioned, the reasons given do not play any role in the administration of criminal justice. This conclusion, however, is unwarranted. In many countries, one or more of the reasons mentioned play an important role, but not necessarily in connection with the prosecutorial decision.

Particularly in the socialist countries, it seems that reasons of expediency for a prosecutorial waiver are very rare. However, in the application of substantive penal law, some of the above mentioned reasons play an important rôle. The following provide examples of this:

- the old Roman maxim 'de minimis non curat praetor' (see reason II.1) seems to be expressed in the penal codes of the socialist countries in provisions stating that an act which does not cause social danger does not constitute a criminal offence.

- the reasons for non-prosecution mentioned in I.2. and II.3. seem to be expressed in the penal code provision that an act does not constitute a criminal offence, or that punishability is abolished by the reduction or abolition of the act's social danger (for example, the Hungarian penal code, sections 32 and 36).
- many acts constituting criminal offences in the market economy countries are classified as administrative infractions in the socialist countries, so prosecution is out of the question, as there is no prosecutorial procedure which would apply in cases of administrative infractions.
- the reasons mentioned in III.7. may be considered as a cause excluding punishability in some of the socialist countries.
- the reason mentioned in III.8. may lead to the suspension of investigation in some of these countries.
- the reasons mentioned under IV.3. and IV.4. play a role in cases which are prosecuted only on a private complaint in some of the countries.

It appears that the procedural laws of the socialist countries contain rather few exceptions to the legality principle, and that the prosecution service has a rather restricted scope for the utilization of discretionary power in these countries. On the other hand, it seems that means to avoid an inexpedient prosecution are provided in the substantive penal laws in these countries, means which are provided in the procedural laws of the market economy countries.

CHAPTER V - CONDITIONAL WAIVER OF PROSECUTION

1. Many European countries have implemented a conditional waiver in their codes of criminal procedure or penal codes. Accordingly, the public prosecutor waives a case if the offender agrees to obey conditions attached to a prosecutorial waiver. The conditional waiver may be seen as diversion with mediation. The conditional waiver we deal with is the procedural equivalent of a suspended sentence; the prosecutor suspends his final prosecutorial decision until the end of the probation period, during which time the offender must comply with general and/or special conditions imposed by the public prosecutor.

2. The conditional waiver of prosecution is explicitly expressed in the legal regulations of the Federal Republic of Germany, Bulgaria, Iceland, Norway, Denmark, Luxembourg and Poland. However, its absence from the legal regulations of other European nations does not exclude the possibility of its practical existence in these legal systems. In Scotland and the Netherlands, for example, no regulations concerning conditional non-prosecution can be found in the laws, but it is, nevertheless, used in everyday practice by the prosecution service. This practice is based on the reasoning that as the more extensive right of a general prosecutorial waiver is allowed by law, such a right is inclusive of a conditional waiver of prosecution. Similarly, in Luxembourg, where regulations concerning conditional non-prosecution exist only in relation to the use of drugs by drug-addicts (it is specified that prosecution can be waived under the condition that the offender voluntarily accepts treatment), it has been used for other crimes for a long time. However, in most countries where no explicit regulations exist with respect to conditional non-prosecution, such waiver is also absent from the actual prosecutorial practice. This is the case in Finland, Switzerland, Yugoslavia, Cyprus, Italy, Czechoslovakia, and Spain.

In some of these countries, however, prosecution may be avoided through the payment of a certain amount of money to the State treasury (transaction). This possibility seems similar to a conditional waiver.

In other countries, the feasibility of the conditional waiver is presently being discussed. In Czechoslovakia, for example, the prosecutor should be authorized to waive prosecution when the act in question is of minor danger to society, if in view of the nature of the offence and the characteristics of the offender, there are grounds to expect him to be a law-abiding citizen. The decision to waive prosecution could involve the imposition of certain conditions.

3. When the right to decide on a conditional waiver of prosecution is explicitly stated in, and regulated by, law, the penal or procedural code defines the general and special conditions which can be attached to the waiver. These conditions must then be fulfilled for the decision of non-prosecution to become final; their imposition demands their fulfillment.

In most penal systems, the general condition attached to conditional non-prosecution is that the accused will not commit further offences during the probation period. Such a probation period is a common condition attached to a conditional waiver of prosecution, its length varying from one system to another.

In Norway and Poland, it is two years from the day of the non-prosecutorial decision, but lasts no longer than the term prescribed for the instigation of prosecution for the offence.

In the Federal Republic of Germany, the length of the probation period depends on the special conditions attached; the average probation period is six months, but it may be longer in alimony cases. The maximum probation period is one year and three months.

4. In addition to the general conditions which are always attached to the conditional waiver of prosecution, special conditions may also be imposed. Such conditions usually aim at compensating society for the harm caused by the offence, or at changing the offender's future behaviour. Where conditional non-prosecution exists, such special conditions are usually included in the penal or the procedural code. However, in countries such as Luxembourg, Belgium, and the Netherlands, this is not the case, despite the practical use of conditional non-prosecution. In the Netherlands, where no explicit written conditions for non-prosecution exist, the prosecutor may, in practice, impose the same conditions for non-prosecution as those used by a judge in the framework of a conditional suspended sentence. Some of these conditions are specified in the penal code, such as an offender's duty to compensate for the damages caused by an offence, or the condition that the offender undergo medical treatment. Besides these conditions originally formulated for suspended sentences, but also utilized by the public prosecutor for conditional non-prosecution, the prosecutor is free to impose other conditions at his discretion, provided that these conditions aim at improving the offender's behaviour, and that they do not violate his political or civil rights.

5. In general, a strong similarity appears to exist between the suspended sentence and conditional non-prosecution in most of the criminal justice systems studied. The regulations governing the utilization of the suspended sentence seem to have served as a model for the regulations of,

and/or the practice of, conditional non-prosecution, as was the case, for example, in Iceland, Norway, the Federal Republic of Germany, and Denmark.

In Norway and the Federal Republic of Germany, prosecutorial waiver is, at times, dependent upon the observation of certain specified conditions, which, in fact, are those implemented for the use of the conditional sentence. In these countries, all of the conditions which may be imposed on a prosecutorial waiver are noted in the relevant regulations, to which the public prosecutor must adhere. Therefore, the public prosecutor has no freedom to attach conditions to the waiver, other than those explicitly expressed.

In Denmark, where the conditions for a suspended sentence also apply to the utilization of conditional non-prosecution, the legal conditions do not restrict the prosecutor's right to use his discretion in the imposition of other conditions which he sees to be appropriate.

6. Information about the conditions which may be imposed by the public prosecutor is available for some of the countries involved in this study. They are presented as examples of conditions which may be attached to non-prosecution.

The Norwegian penal code contains nine special conditions for suspended sentence, which, through a reference in the procedural code, are also applicable to conditional non-prosecution. The offender must accordingly comply with directives concerning:

- his place of residence, leisure time activities, education, employment, or association with certain persons;
- the management of his income and capital, and the fulfillment of his financial obligations;
- abstinence from the use of alcohol, narcotics or other drugs;
- treatment for abuse of alcohol, narcotics or drugs, even in a hospital or a special institution, if seen necessary;
- psychiatric treatment;
- treatment in some other institution;
- compensation for any loss caused by the offence;
- payment of alimony; and
- compliance with a probation order.

The conditions recognized in Denmark are similar to those listed above, and also exist as conditions for suspended sentence, which are likewise used for conditional non-prosecution.

The Code of Criminal Procedure of the Federal Republic of Germany lists four conditions which, copied from those applying to suspended sentences, note that the offender may be required to:

- perform some work in order to compensate for the damage caused by the offence;

- pay a certain amount of money to a non-profit organization, or to the State treasury;
- do some community service or other work for the benefit of public interest; and
- pay money to fulfill an obligation of maintenance to dependents.

The Polish penal code (section 27) also contains conditions which may be attached to the waiver of prosecution:

- compensation for the damage caused by the offence;
- execution of services or works for the benefit of the community; and
- an offer of apology to the injured person.

Compensation for damages caused by an offence is also an important condition for conditional non-prosecution in Luxembourg and the Netherlands.

Besides such general and specific conditions which may be imposed on an offender, some countries (France, the Federal Republic of Germany, Portugal, and Luxembourg) have recently issued special regulations concerning the conditional non-prosecution of crimes committed by drug-addicts, particularly the use of drugs. The public prosecutor may, under certain circumstances, waive prosecution in such cases, provided that the offender is undergoing, or plans to undergo, treatment for his drug problem.

In Austria, the Narcotic Drugs Act contains a provision for a mandatory waiver of cases where only the acquisition or possession of a small quantity of a drug for private use is in question. If the offender voluntarily accepts to undergo medical treatment, or agrees to be supervised by a probation officer, the prosecutor must discontinue the prosecution for a probation period of two years. Some special conditions for the suspended sentence may be applied by a provision contained in the Narcotic Drugs Act, to this discontinuation of the proceedings.

The various conditions attached to conditional non-prosecution are utilized to various extents in everyday practice. For example, in the Federal Republic of Germany, in nearly 98% of all cases concerning conditional non-prosecution, the offender is ordered to pay a sum of money to a charitable organization, a primary conditions attached to a prosecutorial waiver. Compensation to a victim was ordered in only 0.5% of the cases.

7. It must be noted that conditions attached to a prosecutorial waiver may, in fact, resemble a penalty, and be at times severe. Due to this possible similarity between a condition and a penalty, this form of diversion from the court system is facing growing criticism.

Three points of criticism are mentioned here.

Firstly, the use of conditional non-prosecution touches on the issue of the constitutional allocation of legal powers. It is explicitly noted in a number of European Constitutions that judicial power, as far as the imposition of penalties is concerned, is only exercisable by judges. Although conditions attached to non-prosecution are not penal sanctions according to the penal code, they nevertheless denote the exercise of a judicial power by the public prosecutor in actual practice, and therefore resemble the imposition of a penalty by him.

Secondly, adherence to the principle of equality by the public prosecutor cannot be guaranteed when conditional non-prosecution is used. If a penalty-like sanction is applied to an offender at the discretion of the public prosecutor, without an objective and legal examination of the facts of the case, such conditions may be imposed on one, but not another offender for a crime of similar nature. The diversity in the characters of the public prosecutors could therefore endanger the principle of equality before the law.

Thirdly, it appears difficult to avoid undue pressure on the offender in the application of conditional non-prosecution; the individual has no freedom to refuse a condition if he desires to avoid prosecution. The condition is therefore accepted under undue pressure, that of prosecution and its possible consequences.

On the other hand, it should be noted that the absence of a possibility to waive prosecution on the basis of such conditions would reduce the number of individuals able to avoid the stigmatization of court appearances, and of the subsequent penalties, a possibility which could, in turn, hinder any chance of the offender's rehabilitation.

This is the main reason why the Portuguese draft bill on Criminal Proceedings, which was recently given to the Parliament, has noted the possibility of a conditional waiver for crimes punishable with a prison sentence up to three years. The offender must comply with directives concerning his behaviour, or pay compensation for damages caused by his offence.

Conditional non-prosecution appears to be of special importance in cases involving minor crimes, for which the public interest to prosecute is based on the fact that they are committed to such an extent that legal reaction cannot be dismissed, but which, in themselves, do not demand prosecution.

It can be concluded that a sufficient and a satisfying answer to this dilemma concerning the existence and the utilization of conditional waiver of prosecution is difficult to formulate.

8. Conditional waivers are used in various European countries, sometimes to a great extent, and it seems that their use will continue to increase. This increase is strongly connected with the tendency to vest the prosecution service with power which earlier belonged to the trial judges.

Particularly in countries where a prosecution policy is pursued in order to relieve courts of a heavy caseload through an increased use of waivers, the limit of non-prosecution may be reached. A conditional waiver would then seem to be an appropriate instrument for the improvement of the administration of justice. Especially for the large number of frequently committed minor offences, such as petty fraud, shoplifting, issuing an uncovered cheque (writing a cheque with insufficient funds), or family offences, which do not require, per se, a public trial, but which can not be waived without any reaction either, a conditional waiver may be an appropriate instrument for attaining the goal of crime control.

Particularly with respect to the position of the victim, a waiver, under the condition that the offender must pay compensation for his crime, may at times be preferable to a prosecution. However, it must be stressed that the legal position of the offender may be worse when a conditional waiver is used than when he is prosecuted.

Therefore, the law should explicitly express that the offender must consent to a conditional waiver, or that he has the right to reject the suggestion that the matter be disposed of by a waiver, if he prefers his case to be tried by a judge in a public trial; that is, if he prefers prosecution to a conditional waiver.

CHAPTER VI - GUIDELINES FOR THE WAIVER OF PROSECUTION

1. A relation appears to exist, theoretically, between the issues of who is vested with the right to prosecute, and which principle is adopted as the basis for the prosecutorial policy. Therefore, the combination of the expediency principle and the right of everyone to initiate a criminal proceeding, or the legality principle and state monopoly over prosecution, seem to be the most appropriate choices for the safeguarding of equality before the law.

When a system has adopted the expediency principle, it could be expected that the law contains possibilities for the victim to challenge the prosecutorial waiver. This might lead to a review of the decision by the judiciary, or by a superior official in the prosecutorial hierarchy. Either an independent or a subsidiary prosecutorial power is granted to private individuals, or the law provides a possibility to lodge an appeal with an independent court, or with the prosecutor's superior against the prosecutor's decision to waive a case.

When a legal system has adopted the legality principle, state monopoly over prosecution could be expected, without any possibility to challenge the prosecutorial decision. No need to provide remedies against prosecutorial decisions seems to exist, as the legality principle, in theory, prevents partiality or inequality before the law.

The "pure" combinations mentioned rarely exist in Europe. The number of exceptions to these basic combinations is great. Indeed, some theoretically unorthodox combinations exist.

In Spain, for example, the legality principle is combined with the right of anyone to initiate criminal proceedings. The reason why the legislature has opted for this combination can be traced back to the 19th century, to an antagonism between liberal and conservative ideas which existed at the time in Spain. The liberals were fascinated by the English criminal justice system, in which everyone was vested with the prosecutorial right, and the liberals were consequently unlikely to vote for the continuation of a state monopoly over prosecution. The conservatives, on the other hand, were in favour of a state prosecution office which would have an obligation to prosecute all crimes, as they were afraid that the efficiency of state prosecution would otherwise no longer be ensured. Consequently, both ideological forces manifested themselves in the law, although their combination was illogical, and a useless extension of the scope of the prosecutorial power.

Another unusual combination exists in Norway. The expediency principle is combined with a State prosecutorial monopoly, without any possibility of challenging a prosecutorial waiver.

The latter combination in particular may result in a weak legal position for the victim, and lead to partiality in the application of the expediency principle.

In all countries, equality before the law and the uniform application of legal rules are a focal concern.

Various ways exist to improve the uniform application of the law. All countries appear to be aware of the danger of inequality, and have accordingly taken appropriate measures to prevent its existence, such as building a hierarchical prosecution service with regular internal supervision, holding regular meetings where the actual prosecution policy is discussed, and issuing internal directives or guidelines aiming at consistency in the prosecution policy. The issue of equality before the law will be dealt with in this chapter, as guidelines seem to form an instrument for assuring the uniform application of the law.

The guidelines we deal with in this chapter are instructions to prosecutors regarding their prosecutorial tasks, particularly the initiation of the prosecutorial waiver. Various synonyms are used for guidelines, such as "instructions", "directives", or "circulars". Whatever the term used, we will deal with the guidelines as far as they contain written instructions to members of the prosecution agency.

2. A guideline can be defined as a codification of a specially defined rule of conduct, which the members of a certain agency are expected to observe when exercising a legally recognized or de facto autonomous power under an internal organizational order.

Prosecutorial guidelines serve as indicators of the existence and the possible use of discretionary prosecutorial power within a country. These guidelines manifest themselves in two main forms:

- those which give directives as to the carrying out of prosecution, and
- those which contain directives for the waiving of prosecution.

A concurrent existence of these two forms is also possible, and exists in certain European countries, such as in England and Wales (see the Attorney-General's guidelines on criteria for prosecution, 14 February 1983), and in Sweden (see the 1985 Prosecutorial instructions concerning regulations on waiver of prosecution and limitations in preliminary investigation, RÅC I: 105 and RÅC I: 106).

It must be emphasized that the presence of prosecutorial guidelines within a legal system indicates the presence of the possible use of prosecutorial discretion.

Even in countries which have adopted the legality principle, guidelines or instructions sometimes seem necessary for the uniform application of the law. In Poland, for example, since the enactment of the new Penal Code (1970), the Procurator General has issued instructions concerning the application of the conditional discontinuance of proceedings, and the appraisal of the degree of the act's social danger.

The same kind of guidelines, in which new legislation is explained to attain the uniform application of the law, also exist in France and Belgium.

In certain countries, the utilization of prosecutorial discretionary power is not allowed. This is the case in Italy, where section 112 of the 1947 Constitution specifically states that a public prosecutor is obliged to prosecute, and has no discretion in the matter. In these countries, prosecutorial guidelines do not appear to be present.

3. Prosecutorial guidelines exist mainly for the purpose of avoiding arbitrariness and lack of uniformity in the use of prosecutorial discretion. The requirement for directives, in order to achieve this end, depends on three subsidiary factors:

- the explicitness of the regulations expressing the granting of the discretionary power;
- the extent of the granted power; and
- the number of persons possessing the power to decide on prosecution.

These three factors carry a danger of arbitrariness in decision-making, and of the consequent lack of uniformity. The less explicit the regulations granting the discretionary power are, the wider the extent of their application, and the greater the number of persons actually exercising discretion, the greater this danger is. The guidelines aim at avoiding such danger by confining and structuring the exercise of this power to certain situations and/or cases. This is done, or at least should be done, by

- interpreting words contained in law which are too vague for application without their explicit clarification, as is the case in the Federal Republic of Germany, where the Code of Criminal Procedure (section 154c) allows the public prosecutor to waive prosecution of an offence when the offender is, due to an offence he committed, a victim of extortion, where the threat is reported to the police by the victim, unless prosecution is perceived as indispensable in view of the seriousness of the offence committed by the victim. The guidelines (no. 102 of the Uniform Rules of Criminal Procedure) clarify the last component of this section by noting that non-prosecution of the victim/offender is appropriate only if the offence of coercion or extortion is more serious than his offence. For example, waiver of prosecution would likely occur in a case involving sexual relations between an adult male and a

male under the age of 18 (which is prohibited by law), as this sexual offence would not be perceived to be more serious than the extortion.

- restricting the application of the discretion to certain crimes or types of offences and/or offenders, and/or excluding certain crimes. For example, the application of the discretionary power expressed in section 15 of the Decree on the Enforcement of the Penal Code of Finland is excluded in the case of shoplifting and restaurant and taxi frauds; and
- attaching certain conditions to the situations in question and/or the waiver or prosecution itself, as in Ireland, where prosecution may be waived in the case of a juvenile if he is a first offender, and if the victim of the offence agrees to the use of a caution (an alternative to prosecution), and if compensation is paid to the victim.

It may be concluded that the guidelines define, to some extent, the discretionary use of prosecution through the specification and clarification of the existing law.

In some countries, such as France, the prosecutorial guidelines aim to establish a desired criminal policy. The guidelines present the possible means for achieving set policies, to realize their actual practice in the criminal justice system. They may, in other words, serve as an instrument for attaining certain goals which await their practical application and realization.

4. Most guidelines governing the discretionary use of prosecutorial power are issued by the top authorities of the prosecutorial hierarchy, such as the Assembly of the five Attorneys-General and the Minister of Justice in the Netherlands, the Prosecutor General in Sweden and in Poland, the Attorney-General in England and Luxembourg, the Minister of Justice in Belgium and France, and the Minister of Justice or the Attorney-General in Denmark. In Scotland, they are issued under the Lord Advocate's authority.

Due to their formulation by such authorities, guidelines must be consistently and uniformly followed by those vested with prosecutorial power. The existence of the guidelines implies an explicit duty for the prosecutor to apply them in practice. Guidelines therefore primarily deal with the presence and the use of the prosecutorial power at the individual level. However, they may also prescribe a duty for the prosecutor to seek the approval of a higher authority for the use of this power in certain cases. In Belgium, for example, higher authority must be consulted in cases which involve factors capable of influencing the country's international relations. Similarly, the consent of the Assembly of Attorneys-General is required for the prosecution of euthanasia in the Netherlands. As well, the Director of Public Prosecutions in Ireland has issued a

practice directive requiring the police to consult one of the Director's professional officers in cases involving homicide or any sexual offence, as well as in cases of driving with an excess blood alcohol level.

Although, as already noted, the guidelines generally require strict adherence, the specificity of a particular case or a situation may demand deviation from this practice. Indeed, some of the existing guidelines explicitly express the individual and professional responsibility of a prosecutor to do so in unique cases; the introductory remarks to the guidelines formulated in the Federal Republic of Germany, the so-called Uniform Rules of Criminal Procedure, state that:

"because of the complexity of life, the guidelines are only to be followed in average (common) cases. Thus, in every case the public prosecutor shall independently, and conscious of his responsibility, prove what measures must be taken, and he can deviate from the guidelines because of the special character of the individual case".

The general guidelines may therefore be deviated from in cases which involve facts and factors which distinguish them from the average cases falling within the range of the application of the directives.

5. Guidelines may exist both at the national and the regional level. Just as the national guidelines are issued by the top hierarchical authorities of the prosecution agencies or services, the regional ones are similarly formulated by the authorities at the top of the regional prosecutorial agencies. The need for regional, or even local, guidelines appears to be growing, as experience has demonstrated that national guidelines do not, at times, adequately accommodate the local differences and needs.

A study conducted by the Dutch Research and Documentation Centre of the Ministry of Justice states that the fact that guidelines are formulated at the national level affects the content of the directives, and the subsequent procedures. With regard to the content of such directives, local aspects of crime policy are necessarily ignored within a national guideline. For example, the criminal policy on petty crimes in the Netherlands is, or at least is supposed to be, extensively determined by considerations of local requirements. However, general, national guidelines may present an obstacle to such a reality, as such local needs are not necessarily included in the directives. In addition, national guidelines usually provide a general classification of cases, with little or no detailed content needed for their effective implementation at the regional or the local level. Procedurally, national guidelines complicate any adjustment-process, the required decision-making often lasting several months. These factors, together with the fact that practising prosecutors rarely have any say as to the content of the national guidelines, make their use problematic in the everyday local practice.

The optimum situation would be realized through the concurrent fulfillment of both the needs of uniformity and the local needs. However, this is often impossible to accomplish, and consequently emphasis is usually given to one or the other of these aims.

In the Federal Republic of Germany, the existence of national guidelines indicates that the need for uniformity has been perceived to be the stronger need of the two. Despite the fact that every one of the eleven states in this country has an independent prosecution service, and that each of them has the right to formulate its own prosecutorial guidelines, they all operate under the federal uniform directives, which are fairly general and broad in their content. The German states have placed emphasis on the need for uniformity and harmony amongst themselves in their prosecutorial practices, as is manifested in the existence of these national procedural guidelines (the Uniform Rules of Criminal Procedure).

6. The contents of the existing guidelines for waiver of prosecution vary among the European nations. Some guidelines address certain specific crimes, and/or factors which are required for a prosecutorial waiver. In the Federal Republic of Germany, for example, the guidelines apply to minor offences, such as shoplifting, use of the public transport system without paying, and petty traffic offences. In addition, these guidelines specify that certain requirements must be met in order for a waiver to occur. For instance, section 229 of these directives specifies that prosecution may be waived in cases involving an insult where the act had no substantive effect on the victim. If only the individual's feelings (honour) are wounded, but the act is not objectively perceived as an insult, carrying no significant consequences for the victim aside from the damage to his honour, prosecution may be waived.

Similarly, the Netherlands have provided guidelines which address certain specified crimes, such as those involving fire arms, drugs, fraud, pornography, and illegal broadcasting. A Dutch guideline issued in 1967 illustrates the possible specificity of a directive in terms of its field of application: it used to be illegal to show a pornographic movie in a theater, unless, as the guideline specified, the theater contained less than 50 seats. As the Supreme Court has recently decided that showing a pornographic movie constitutes a crime only when a visitor involuntarily attends a showing and without previous warning about its contents, this guideline has become useless. Today, sex cinemas "warn" their clients about the hard core pornographic content of a movie.

The Danish directives as well specifically note that a waiver of prosecution should occur in cases of certain breaches of the law. For example, in cases which involve the

use of marijuana, it is stated that a warning suffices.

The Swedish guidelines provide general information on the 1985 revision of chapter 20 section 7 of the Code of Judicial Procedure, in which the grounds for non-prosecution are expressed, and which deal with the interpretation of the words in this section, such as "essential public interest" and "essential private interest". In addition to this general information, each of the grounds for non-prosecution are dealt with in detail. With respect to offences mentioned in the penal code, the scope of non-prosecution is explicitly outlined. As to crimes of violence, and offences against liberty and peace (chapters 3 and 4 of the Swedish Penal Code), it is stated:

"(These crimes) are by their nature offences, for which prosecution should be instituted. If a minor assault or molestation is committed due to strong provocation, or if an assault has led only to slight injuries or in petty cases of illegal threat and illegal trespassing, there should be some room for waiving prosecution. Crimes like disturbance of domiciliary peace normally imply such a strong offence against personal integrity that prosecution should be instituted".

In other countries, such as Luxembourg, guidelines for prosecutorial waiver exist on a more general level. These guidelines do not define specific crimes and/or factual situations, but provide an overall general directive for the waiving of prosecution.

In Finland, section 15 of the Enforcement of the Penal Code Decree allows the prosecutor to waive prosecution in petty offences, where the offence was committed due to forgivable heedlessness, thoughtlessness or ignorance, and where the public interest does not demand prosecution. This provision does not define "petty offence"; instead, general guidelines are provided as to the necessary prerequisites for the applicability of section 15 (2). For instance, a property offence is to be considered as minor if only minor damages resulted from the offence.

The recently published guidelines of England and Wales (1983) also represent directives which are general. In them, general considerations are listed for the waiving of prosecution, including youth, mental illness, staleness of the case, and the complainant's attitude. In addition to these guidelines issued by the Attorney-General, the Association of Chief Police Officers has formulated directives addressing traffic offences on a general level, which have then been adopted for everyday application at the local level. Similarly, Luxembourg has formulated general guidelines for non-prosecution, adding an obligation for those with prosecutorial power to forward, from time to time, the files of some cases to the Attorney-General, in order to ensure the uniform and proper application of these directives.

Certain countries, such as the Federal Republic of Germany, have guidelines which have general as well as specific directives. Most directives are general, offering broad instructions for the utilization of the discretionary prosecutorial power. For example, guideline 94 (the Uniform Rules of Criminal Procedure) states that:

"in cases falling within section 153 C(1) of the Code of Criminal Procedure (waiver of prosecution in cases involving crimes committed abroad but which could be prosecuted in the Federal Republic of Germany), the public prosecutor can waive prosecution after consideration based on professional standards, in particular, if the grounds mentioned in section 153 C(2) are present, when a prosecution would lead to a punishment of inappropriate severity, and where public interest no longer demands it."

This guideline exemplifies the generality of some of the directives, as it uses a wording which is open to interpretation.

7. In some of the countries involved in this study, the question arose as to whether the guidelines had to be made public, or whether they should remain only for internal knowledge and use.

A few of the countries, such as the Federal Republic of Germany, France, Sweden, and the Netherlands, have made some of their guidelines issued by the top authorities of the prosecutorial hierarchy public. Most of the guidelines issued at the regional level have not been published.

In the discussion on the forementioned question, arguments both pro and contra were expressed. The following summarizes the main arguments presented.

Several arguments support the internal characterization of the guidelines, and hence the idea of their restriction to internal knowledge and use within the prosecutorial agency or service. It has been expressed that the general availability of the guidelines concerning the utilization of prosecutorial discretion could promote the commission of the crimes mentioned in the guidelines, in cases where a waiver would be probable or certain. For example, if shoplifting up to a value of 15 USD was an offence for which prosecution could be waived for first offenders, knowledge of such a practice could promote the occurrence of the crime.

Another argument for restricting knowledge of the directives to the scope of the prosecutorial authorities is one pointing to the possible generalization of its contents if they were made public, resulting from the public's expectation that the guidelines would be uniformly applied, without exceptions. The guidelines could therefore become more rigid if their contents were made public. Their formalization to the point of publication could reduce their flexibility and adjustability to the changing requirements of the

prosecutorial authorities. As well, the public might interpret the directives as norms of tolerance, expecting them to have the same legal standing as regulations contained in the law itself.

Opposing arguments in support of the general availability of the guidelines have also been voiced. It has been pointed out that the accountability and political responsibility of those holding the prosecutorial powers are realized through the publication of the applicable guidelines. Adherence to the directives by the prosecution agencies, in other words, is ensured through the common knowledge of the guidelines contents.

It has also been noted that knowledge of the guidelines utilized is necessary for the realization of legal fairness and equality before the law. One must be able to know what rules and regulations he is subjected to, as the withholding of such information is contrary to the legal concept that criminal procedure can only take place in accordance with known legal rules and regulations. If one is to be held accountable for his actions, one should be fully informed of their legal and practical consequences.

It is also conceivable that general ignorance as to the contents of the guidelines could enhance the danger of their arbitrary violation. If only those entrusted with the discretionary prosecutorial power would possess knowledge of the directives, deviation from them would be easier.

In support of the publication of the guidelines, it could be argued that the officiality and immediacy of legal procedures are the basic principles of the criminal procedures utilized in the European countries, and directives for the waiver of prosecution should accordingly be public.

7. As noted earlier, the main purpose of prosecutorial guidelines is the achievement of uniformity in the utilization of the discretionary power. A relevant question is whether this aim can be realized in practice. Comparative knowledge in this area, for the purposes of this report, is lacking, as this issue was not part of the inquiry distributed to the participating countries. However, relevant information is available for the Netherlands, and the following discussion is presented for the purpose of offering some information on the topic, as some of the countries involved in this report may now, or in the future, wish to examine and deal with this issue.

In the Netherlands, national guidelines have been issued since the early 1970s. A few years ago, doubts arose as to whether these guidelines, in fact, effectively contributed to the harmonization of the discretion utilized by the public prosecutors. Until that time, the positive effects of the directives were broadly stated in legal publications. These statements, however, were based on impressions

and subjective opinions, not on findings of objective research. Once empirical studies were carried out on the issue by the Research and Documentation Centre of the Ministry of Justice, it became clear that judicial decision-making could not, for intrinsic reasons, be standardized by such general prosecutorial guidelines as were then used. In addition, the results of these studies revealed that a resistance towards the guidelines existed amongst the public prosecutors, due to the fact that the guidelines were issued by the authorities at the top of the prosecutorial hierarchy. Consequently, using regression analysis of prosecutorial decision, information was obtained about the factors which actually influenced prosecutorial decisions. In other words, the analysis revealed factors which, in actual practice, were the basis for the prosecutorial decisions. For example, in cases involving simple theft, the analysis singled out the following factors:

- the value of the stolen property;
- the number of isolated incidents in a series of crimes (e.g. several incidents of shoplifting committed in a sequence);
- a previous criminal record; first offenders were found more likely to have their case waived than repeat offenders;
- the age of the accused; young adult offenders had a greater chance of being prosecuted than older ones;
- drug addiction was found to be strongly correlated with unemployment. The readiness of prosecutors to prosecute thefts by drug addicts was based on the perception that it was necessary in order to obtain treatment for their addiction.

Due to the influence of these factors on the prosecutorial decision, it was thought that they should be formulated into guidelines. Subsequently, the value of the regression coefficients of the various considered factors were transformed into the following point system:

1. recidivism:	no previous record	0
	one previous sentence	4
	more than one previous sentence	7
2. drug addict:	no	0
	yes	6
3. age:	18-21	2
	22-30	4
	31-60	2
	over 60	0

4. number of crimes committed:	one	0
	several	5
5. value of stolen property:	under 50 guilders	0
	50-150 guilders	1
	151-250	2
	over 250	3

(1 USD= 2.5 guilders, March 1986)

In this system, the more points accumulated by a suspect, the greater the chances that he will be prosecuted, and conversely, the less points he obtains, the stronger the inclination of the prosecutor to waive prosecution. Therefore, once a certain standardized number of points is reached, a strong possibility of prosecution exists.

The utilization of this point-system is now in the experimental stage, and is applied, in various forms, to five frequently committed crimes. The use of these guidelines promises to harmonize the use of prosecutorial discretion, representing a more rational and an efficient directive for the prosecutorial services.

CONCLUSIONS

It has become clear that in all of the European countries mentioned in this report, the prosecution service is vested with discretionary power to divert criminal cases from the courts.

The motives for vesting the prosecution service with this right vary considerably from country to country, but they have one thing in common: it is generally accepted that a proper administration of justice does not require that all breaches of law are dealt with by the criminal courts. The proper administration of justice may also be achieved through alternatives to the court proceedings.

The question as to what level of official processing of cases is needed is difficult to answer. Socio-political, economic, and cultural factors, for example, seem to determine the appropriate scope of the administration of justice. It is obvious that in a country which has already achieved the goal of decriminalization, the possible use of discretionary power through non-prosecution is much more restricted by law and/or in practice than in countries in which the decriminalization process has only recently begun.

The extent to which discretionary power is used in practice varies considerably as well. Although the statistical data provided for this report can not be compared with other countries, and no general conclusions can be drawn due to the lack of uniformity in the legal systems studied, there appears to be a general tendency in a number of European countries to increase the utilization of prosecutorial waiver, and to use alternative ways to deal with criminal offences.

The report demonstrates that non-prosecution, with no consequence following the offence, is infrequent. In most cases where prosecution is waived, some kind of intervention, such as compensation, treatment, transfer to agencies outside the criminal justice system, and transactions, follows the prosecutorial waiver.

Even in countries where strict adherence to the legality principle is prescribed by law, prosecutors, nevertheless, exercise discretion in their prosecutorial decision-making. The issue of the sufficiency of the evidence for the initiation of a prosecution appears to be the vehicle used in these countries for the avoidance of inexpedient prosecutions.

The issue of discretionary power is closely connected with the issue of impartiality.

In various European countries, such as Poland, England and Wales, the Federal Republic of Germany, Finland, the Netherlands, and Belgium, empirical studies have been carried out

examining the functioning of the prosecution service. All studies which have dealt with the issue of the uniform application of discretionary power have shown that, in practice, considerable impartiality exists, regardless of whether the country adheres to the legality or the expediency principle. Therefore, in most of the European countries, efforts have been made to reduce arbitrariness in the prosecutorial decision-making. Various means have been used to achieve this end.

The widening of the scope of non-prosecution has made it necessary to pay more attention to the legal position of the offender and the victim.

The fact that a prosecutor deals with an offence outside a public trial may weaken the legal position of the offender. Particularly in cases where the decision to waive is attached to certain conditions, it appears necessary to improve the legal position of the offender.

One right appears to be vital to the offender; the right to have his case tried in a public court. This right should never be violated.

Another important right is to be clearly informed of the consequences of one's choice to accept a conditional waiver or another alternative to prosecution, for example, regarding the consequences of non-compliance with the conditions imposed, the question of whether or not this alternative is recorded in the criminal record, and the possible absence of legal aid.

A decision to waive a case should not curtail the essential rights of the victim.

The content of these essential rights differs amongst the jurisdictions studied.

In jurisdictions where a strong state monopoly over prosecution exists, the victim's right to moral and psychological compensation does not seem to be regarded by the law to be as essential as in countries where prosecution may be initiated by everyone. Particularly in the latter countries, a waiver of prosecution does not lead to a weakening of the victim's legal position, as he can initiate a prosecution himself.

In jurisdictions where the victim's rights are weak, a waiver of prosecution, with a condition to compensate for the material damage, may improve his position.

One right for the victim seems to be vital; the right to challenge the individual prosecutorial decision to waive a case, either through lodging an appeal with the court, or through the review of the decision by a higher ranked prosecutor.

RECOMMENDATIONS

On the basis of the thoughts expressed in this report, and considering the given definition of a waiver, the following recommendations seem appropriate:

1. Review of the decision on prosecution

1a. Unless the possibility of private prosecution or a previous approval of a judge exists, a party with an interest in the prosecution of an offence should be provided with the possibility of having a waiver of prosecution reviewed by the judiciary or another independent body or agency.

1b. In systems adhering to the principle of mandatory prosecution, the review of prosecution referred to in 1a. may be purely legal, the issue being the proper application of the law.

1c. In systems adhering to the expediency principle, the review of prosecution should also consider whether the decision is in line with the general prosecutorial policy.

1d. The judiciary or the independent body vested with the power to control prosecution decisions should be provided with copies of any written internal instructions on prosecution.

1e. The judiciary or the independent body vested with the power to control prosecution decisions should be empowered to order the initiation of prosecution, if it is of the opinion that a public prosecutor has misused his power of discretion.

2. Large-scale waivers of prosecution

2a. The legislator should review the possibility of decriminalizing an offence which, in accordance with the general prosecutorial policy, is waived to a large extent.

2b. Should decriminalization not be feasible in the case referred to in 2a, alternatives to prosecution should be developed.

3. Conditional waiver of prosecution

3a. The prosecutor should have the possibility of waiving prosecution on the basis of conditions binding upon the suspected offender.

3b. Legislative or administrative rules should be developed in order to establish the conditions which may be attached to a decision not to prosecute.

3c. The primary purpose of such conditions should be an improvement of the behaviour of the offender and the compensation of any victim of the offence.

3d. The conditions imposed should not restrict the political or civil rights of the suspect, nor should they be of a punitive nature.

3e. The conditions which may be attached to a waiver should be similar to those which may be imposed within the framework of a conditional or suspended sentence.

3f. Particularly in the case of drug or alcohol related offences, the possibility of undergoing medical treatment or submitting to supervision should be considered as a possible condition.

4. In no case should the use of alternatives to prosecution interfere with or delay other measures such as decriminalization.

5. Instruments should be developed to improve the safeguarding of equality before the law in the use of discretionary prosecutorial power.

Helsinki, 29th of March, 1986.

BIBLIOGRAPHY

- Cautioning by the Police - A Consultative Document, Home Office, London, June 1984
- Dejudiciarisation et Mediation. Acte du Colloque International tenu á Tokyo, Japon 14-16 Mars 1983. Association Internationale de Droit Pénal. Special issue of Revue Internationale de Droit Pénal 1984, pp. 893-1203
- Effective, Rational and Humane Criminal Justice. Report of the European Seminar held in Helsinki, Finland, 31 May - 3 June 1984. Helsinki Institute For Crime Prevention and Control, affiliated with the United Nations (HEUNI). Publication Series no. 3, Helsinki 1984
- Phase (la) préparatoire du procès pénal en droit comparé. Actes du Séminaire International organisé par l'Institut Supérieur Internationale des Sciences Criminelles de Syracuse et tenu à Noto (Italie) 26 septembre - 1 octobre 1982, Revue International et de droit pénal, 1985, nos 1-2
- ASHWORTH, A. "Influences on the creation of criminal law and criminal policy in England", Anglo-American Law Review 1984, pp. 1-13
- ASHWORTH, A. "Prosecution, police and public. A guide to good gate-keeping?", The Howard Journal of Criminal Justice 1984, pp. 65-87
- ASHWORTH, A.J. "Prosecution and procedure in criminal justice", Criminal Law Review 1979, pp. 480-492
- ATKINS, B., POGREBIN, M. (eds.) The invisible justice system: discretion and the law, Anderson Publishing Co., Cincinnati 1978
- BAFIA, J. La politique de repression des délits poursuivis sur accusation privée de la victime (Polityka karania przestępstw sciganych na skutek skargi pokrzywdzonego), Warszawa 1968 (resumé en français)
- BARRY, D., GREER, A. "Sentencing versus prosecutorial discretion: the application of a new disparity measure", Journal of research in crime and delinquency 1981, pp. 254-271
- BARRY, D.B., FELDBRUGGE, F.J.M., GINSBURGS, G., MAGGS, P.B. (Eds.) Soviet Law After Stalin - Part III: Soviet Institutions and the Administration of Law, Sijthoff & Noordhoff, Alphen aan den Rijn (the Netherlands) 1979
- BARTON, S. "Staatsanwaltliche Entscheidungskriterien: die Konstruktion von Realität durch Akten", Monatschrift für Kriminologie und Strafrechtsreform 1980, pp. 206-216
- BATES, J.V. The Prosecutor's Handbook, Oyez, London 1980
- BECKMANN, W. Das Bagatelldelikt und seine Behandlung im Strafgesetzbuch der Schweiz, Nomos Verlagsgesellschaft, Baden-Baden 1982
- BENCIK, M. "Rechtliche und gesellschaftliche Verantwortlichkeit für geringfügige Kriminalität", Neue Justiz 1984, pp. 223-224
- BENJAMIN, Mich. Der Ausschluss der strafrechtlichen Verantwortlichkeit bei geringfügigen Handlungen, Deutscher Zentralverlag, Berlin 1962
- BERTEL, CH. Grundriss des österreichischen Strafprozessrechts, Manz, Wien 1984

- BEYER, K.-H., ORSCHEKOWSKI, W., SEIDEL, D. "Vorbeugung und Bekämpfung von Straftaten gegen das sozialistische Eigentum und die Volkswirtschaft", *Neue Justiz* 1982, pp. 62-65
- BLITZ, H. "Rationelle Gestaltung des Strafverfahrens in der ungarischen Volksrepublik", *Neue Justiz* 1983, pp. 323-324
- BOTTOMLEY, A.K. *Decisions in the penal process*, Martin Robertson, London 1973
- BUNT, H.G. VAN DE, JONGE, G. DE, KOOPS, H.J., MICHEL, J.H. (Eds.) *De macht van het O.M.*, *Ars Aequi Libri*, Nijmegen (the Netherlands) 1983
- BUTLER, W.E. *Soviet Law*, Butterworths, London 1983
- CASEY, J.P. *The Office of the Attorney General in Ireland*, Dublin 1980
- CHARLES, R. "Over het Openbaar Ministerie", *Rechtskundig Weekblad* 1982, pp. 881-920
- CISMARESCU, M. *Einführung in das rumänische Recht*, Darmstadt 1981
- CLERC, F. "Opportunité ou légalité des poursuites?", *Schweizerische Zeitschrift für Strafrecht* 1982, pp. 276-286
- CLOSE, F. "Les Parquets ont-ils une politique pénitentiaire?", *Revue de Droit Pénal et de Criminologie* 1983, pp. 335-372
- ČOK, V. "Conciliation councils in Yugoslav judicial system", *Yugoslav Law*, 1982 vol. 9, no. 3, pp. 20-42
- CORSTENS, G.J.M., TAK, P.J.P. *Het Openbaar Ministerie*, Tjeenk Willink, Zwolle (the Netherlands) 1982
- D'HAENENS, J. *Belgisch Strafprocesrecht - Deel 1*, E. Story-Scientia P.V.B.A., Gent 1980
- DAHN, R. "Willkür in der Strafverfolgungspraxis der BRD", *Neue Justiz* 1979, pp. 29-31
- DAMASKA, M. "The Reality of Prosecutorial Discretion: Comments on a German Monograph", *The American Journal of Comparative Law* 1981, pp. 119-138
- DAUN, W. "Die Notwendigkeit von Reformen in der Staatsanwaltschaft", *Kriminalistik* 1977, pp. 479-482
- DAVID, R., BRIERLEY, J.E.G. *Major Legal Systems in the World Today*, London 1968
- DAVIS, K.C. *Discretionary Justice in Europe and America*, University of Illinois Press, Urbana Chicago London 1976
- DE NAUW, A. "Kontrolle oververvolgung en seponering", *Liber amicorum Hermann Bekaert*, Gent 1977, pp. 75-95
- DE NAUW, A. "De politieke verantwoordelijkheid voor het vervolgingsbeleid in België", *Delikt en Delinkwent* 1978, pp. 239-253
- DESCAMPS, E. *Traité des fonctions du ministère public*, Bruxelles 1980
- DESSEMONTET, F., ANSAY, T. (Eds.) *Introduction to Swiss Law*, Kluwer Law and Taxation Publishers, Deventer (the Netherlands) 1983
- DIJK, J. VAN "The Use of Guidelines by Prosecutors in the Netherlands", in: SHAPLAND, J. (Ed.), "Decision Making in the Legal System", *Issues in Criminological and Legal Psychology*, no. 5, 1983, pp. 38-49
- DIJK, J.J.M. VAN "The victim's willingness to report to the police: a function of prosecution policy?", Paper presented at the Third International Symposium on Victimology, September 3-7, 1979; Research and Documentation Center, Ministry of Justice, The Hague 1979
- DUPONT, L. "Hoe minnelijk is de minnelijke schikking?", *Panopticon* 1984, pp. 469-476

- EÖRSI, G. Introduction au droit de la république populaire hongroise, Ed. Pedone, Paris 1974
- ESER, A., HUBER, B. (Hrsg.) Strafrechtsentwicklung in Europa, Landesberichte 1982-1984 über Gesetzgebung, Rechtsprechung und Literatur, Freiburg i.B. 1985
- EVENSEN, A. Social Defence in Norway, The Ministry of Social Affairs in collaboration with the Ministry of Justice, Oslo 1982
- FELDBRUGGE et al. Encyclopedia of Soviet Law, 2nd rev. ed., Martinus Nijhoff Publishers, Dordrecht/Boston/Lancaster 1985
- FELTES, T. "Die Erledigung von Ermittlungsverfahren durch die Staatsanwaltschaft als 'Herrin des Ermittlungsverfahrens' anhand einer Analyse von Staatsanwaltschaftsstatistiken", Kriminologisches Journal 1984, pp. 50-63
- FORREGER, E. "Le nouveau droit pénal autrichien", Revue de Science Criminelle et de Droit Pénal Comparé 1975, p. 657
- FRIEDRICH, P.M. Kriminalpolizei und Strafverfahrensrecht dargestellt am Beispiel des deutschen, französischen und italienischen Rechts, Bonn 1939
- FUNKE, W. Die Stellung und Aufgaben der Staatsanwaltschaft in der sowjetischen Besatzungszone Deutschlands, Köln 1960
- GÖLZÜKLÜ, F. The Turkish Code of Criminal Procedure, Sweet Maxwell, London 1962
- GAMMELTOFT-HANSEN, H., GOMARD, B., PHILIP, A. (Eds.) Danish Law - A General Survey, G.E.C. Gads Publishing House, Denmark 1982
- GEILKE, G. Einführung in das Sowjetrecht, Darmstadt 1983
- GEILKE, G., JESSEL, C. Einführung in das Recht der bulgarischen Volksrepublik, Darmstadt 1975
- GEISLER, W. "Stellung und Funktion der Staatsanwaltschaft im heutigen deutschen Strafverfahren", Zeitschrift für die gesamte Strafrechtswissenschaft 1981, pp. 1109-1146
- GOTTFREDSON, M.R., GOTTFREDSON, D.M. Decisionmaking in Criminal Justice: Toward the Rational Exercise of Discretion, Ballinger Publishing Company, Cambridge Mass. 1980
- GOYET, F. Le ministère public en matière civile et en matière répressive et l'exercice de l'action publique, 3 ed., Paris 1953
- GROSMAN, B.A. The Prosecutor, University of Toronto Press, Canada 1969
- GUCETIC, V.G. Public prosecutors, offprint from Yugoslav Survey, 1977
- HARRLAND, H. "Aufgaben der Staatsanwaltschaft zur Unterstützung der gesellschaftlichen Gerichte", Neue Justiz 1984, pp. 38-40
- HARROLD, B., WHITE, A. Summary Process and Prosecution, Butterworths, London 1974
- HAUPTMANN, W. Der öffentliche Anklager vor Bezirksgerichten. Ein Beitrag zur Reform des Strafverfahrensrechts, Leykam Verlag, Graz 1971
- HAUSER, R. Grundzüge des Strafprozessrechts. Dargestellt am Beispiel der Kantone Zürich, Appenzell A.R. und S.G., St. Gallen und Thurgau unter Berücksichtigung des Bundesrechts, St. Gallen 1977
- HAUSER, R. Kurzlehrbuch des schweizerischen Strafprozessrechts, Basel & Stuttgart 1984
- HERRMANN, J. "The Rule of Compulsory Prosecution and the Scope of Prosecutorial Discretion in Germany", The University of Chicago Law Review 1974, pp. 468-505

- HERRMANN, J. "Diversion und Schlichtung in der Bundesrepublik Deutschland", Zeitschrift für die gesamte Strafrechtswissenschaft 1984, pp. 455-484
- HEYDEN, F. Begriff, Grundlagen und Verwirklichung des Legalitätsprinzips und des Opportunitätsprinzips, H.Schellenberg, Winterthur 1961
- HUBER, B. "The dilemma of decriminalization: dealing with shoplifting in West Germany", South African Journal of Criminal Law and Criminology 1982, pp. 35-42
- JACKSON, R.M. Enforcing the law (rev. ed.), Pelican Books 1972
- JANIK, E. Das polnische Strafverfahrensgesetzbuch. Gesetz vom 19. April 1969 mit ergänzenden Vorschriften, Walter de Gruyter & Co., Berlin 1977
- JESCHECK, H.H. "The Discretionary Powers of the Prosecuting Attorney in West Germany", The American Journal of Comparative Law 1970, pp. 508-517
- JESCHECK, H.H., LEIBINGER, R. (Eds.) Funktion und Tätigkeit der Anklagebehörde im ausländischen Recht, Nomos Verlagsgesellschaft, Baden-Baden 1979
- JOHNSON, E.L. An Introduction to the Soviet Legal System, Methuen & Co. Ltd., London 1969
- JOUTSEN, M., KALSKE, J. Prosecutorial Decision-Making In Finland - The Results of a Simulation Study, National Research Institute of Legal Policy, publication 67, Helsinki 1984
- KAHANE, S. "Synthèse du nouveau code de procédure pénale de la République socialiste de Roumanie", Revue Roumaine des sciences sociales 1969, pp. 19-34
- KERCKVOORDE, J. VAN "Le ministère public et la poursuite du vol à l'étalage. Une étude empirique", Deviance Societé 1978, pp. 365-383
- KERCKVOORDE, J. VAN "O.M.-optreden ten aanzien van de rijder onder invloed. Een onderzoek naar de hantering van een aantal afhandelingsmodellen op parketniveau", Tijdschrift voor Criminologie 1979, pp. 29-43
- KERCKVOORDE, J. VAN "Beleid van parketmagistraten: een mozaiek van individuele afhandelingspatronen? Over de conditionering van de beleidsruimte van parketmagistraten en over de harmonisering van haar aanwending", Panopticon 1980, pp. 107-118
- KERCKVOORDE, J. VAN Afhandeling van strafzaken door het Openbaar Ministerie, Leuven 1980
- KILL, F. Die Stellung der Staatsanwaltschaft im französischen und deutschen Strafverfahren, Bonn 1960
- KIRALY, T. Criminal Procedure, truth and probability, Budapest 1979
- KUNZ, K.-L. "Die Verdrängung des Richters durch den Staatsanwalt: eine zwangsläufige Entwicklung effizienz-orientierter Strafrechtspflege?", Kriminologisches Journal 1984, pp. 39-49
- LARGUIER, J. Droit pénal général et procédure pénale, Dalloz, Paris 1982
- LECLERQ, J. "Le procureur général près la cour d'appel. Quelques aspects de sa fonction", Revue de Droit Pénal et de Criminologie 1984, pp. 161-198
- LEIGH, L.H., HALL WILLIAMS, J.E. The Management of the Prosecution Process in Denmark, Sweden and the Netherlands, James Hall, Great Britain 1981

- LIDSTONE, K.W., HOGG, R., SUTCLIFFE, F. Prosecutions by private individuals and non-police agencies, Her Majesty's Stationery Office (London) 1980, Royal Commission on Criminal Procedure Research Study No. 10
- LIEBEHENTZE, A. Opportunitätsprinzip und Legalitätsprinzip in England, Marburg 1971
- LITHNER, K. Åklagararbete och åklagarroll. With a summary: prosecutor's work and role, Stockholm 1983
- LUTHER, G. Einführung in das italienische Recht, Darmstadt 1968
- LUTHER, H. (ed.) Strafverfahrensrecht - Lehrbuch, Staatsverlag der Deutschen Demokratischen Republik, Berlin 1982
- LUTOV, K. "Loi sur la Prokouratura", Droit Bulgare, Legislation no. 7. Sofia-Press, 1983
- MacCONVILLE, M., BALDWIN, J. Courts, Prosecution and Conviction, Clarendon Press, Oxford 1981
- McCLUSKEY "The Prosecutor's discretion", International Journal of Medicine and Law 1979, pp. 5-9
- MALJAROW, M.P. (Hrg.) Die staatsanwaltschaftliche Aufsicht in der UdSSR, Aktuelle Beiträge der Staats- und Rechtswissenschaft, Heft 137, Potsdam-Babelsberg 1976 (3 Bände)
- MERTEN, K.H. "Das Verhältnis Staatsanwaltschaft-Polizei", Polizei 1979, pp. 390-392
- MEZGER, E., SCHÖNKE, A., JESCHECK, H.H. Das ausländische Strafrecht der Gegenwart, Teil VI, Duncker & Humblot, Berlin 1982
- MOIJAART, A., LEEDEN, M. VAN DER "De sepotbeslissing van de officier van justitie: een beslissingsmodel", Tijdschrift voor Criminologie 1983, pp. 293-302
- MUELLER, G.O.W., LE POOLE GRIFFITHS, F. Comparative Criminal Procedure, University Press, New York 1969
- MÜLLER, F. Aktuelle Probleme der Gesetzlichkeitsaufsicht (Allgemeine Aufsicht) der Staatsanwaltschaft, Potsdam-Babelsberg 1976
- MÜLLER, F. "Zur koordinierenden Tätigkeit der Staatsanwaltschaft bei der Bekämpfung und Vorbeugung der Kriminalität", Staat und Recht 1978, pp. 77-78
- MÜLLER, F., FRITZSCHE, H. Gerichtsverfassungsrecht Staatsanwaltschaftsrecht, Potsdam-Babelsberg 1982
- MURRAY, D.F. "A survey of criminal procedure in Spain and some comparisons with criminal procedure in the United States", North Dakota Law Review, 1964, Volume 40, pp. 7-56 and 131-153
- NISSMAN, D.M., HAGEN, E. The prosecution function, Lexington Books, Lexington Mass. 1982
- NORTH, K.E. "Policy guidelines - exercise of prosecutorial discretion", Prosecutor 1979, pp. 132-136
- NOWAKOWSKI, F. "Die Behandlung der Bagatellkriminalität in Österreich. Unter besonderer Berücksichtigung der Stellung der Staatsanwaltschaft", Zeitschrift für die gesamte Strafrechtswissenschaft 1980, pp. 255-294
- PALIWODA, J. Prokuratorska Kontrola Przestrzeganla Prawa (Staatsanwaltliche Kontrolle der Rechtsbeobachtung) (Allgemeine Aufsicht der Staatsanwaltschaft, Zusammenfassung in der deutschen Sprache), Warszawa 1970
- PANDELIDES, A. Der Attorney General in England, Zypern und die Staatsanwaltschaft in Deutschland. Ihre Stellung im Rahmen der Verfassung und in der Lehre der Gewaltenteilung im Bezug auf das Strafverfahren, München 1975

- POPIUCIUC, M. Die Grundprinzipien der rumänischen, deutschen und französischen Strafprozessordnung, Freiburg 1947
- PUTTAERT, M., KERCKVOORDE, J. VAN "Seponeringsbeleid van het openbaar ministerie in jeugdzaken", Panopticon 1982, pp. 291-306
- RÖSTAD, H. "The Principle of Opportunity (or Expediency). Considerations on Waiving of Prosecution related to the procedural system of Norway", Cahiers de Defence Sociale 1985, pp. 27-35
- RASSAT, M.-L. Le ministère public entre son passé et son avenir, Librairie Générale de Droit et de Jurisprudence, Paris 1967
- ROLLAND, M. "Le ministère public en droit français", Jurisclasseur périodique 1955 - I, 1271; - I, 1281
- RUPING, H. "Das Verhältnis von Staatsanwaltschaft und Polizei. Zum Problem der Einheit der Strafverfolgung", Zeitschrift für die gesamte Strafrechtswissenschaft 1983, pp. 896-917
- RYAN, E.F., MAGEL, PH.P. The Irish Criminal Process, Mercier Press, Dublin and Cork 1983
- SAETTLER, A. Die Entwicklung der französischen Staatsanwaltschaft, Regensburg 1956
- SAMUELS, A. "Shoplifting", Justice of the Peace 1984, pp. 54-58
- SANDERS, A. "Prosecution Decisions and The Attorney-General's Guidelines", Criminal Law Review 1985, pp. 4-19
- SANDERS, A., COLE, G.F. "The prosecution of 'weak' cases in England and Wales", Criminal Justice Review 1982, pp. 23-33
- SCHMIED, E. Gesetze über Strafverfahren und Gerichtsverfassung in der Tschechoslowakischen Sozialistischen Republik, Walter de Gruyter, Berlin 1966
- SCHRAM, G. "The obligation to prosecute in West-Germany", The American Journal of Comparative Law 1969, pp. 627-633
- SCHULTZ, H. "Poursuite pénale et réinsertion sociale", Revue de Science Criminelle et de Droit Pénal Comparé 1981, pp. 529-539
- SESSAR, K. "Empirische Untersuchungen zur Funktion und Tätigkeit der Staatsanwaltschaft", Zeitschrift für die gesamte Strafrechtswissenschaft 1975, pp. 1033-1062
- SESSAR, K. "Ein bürokratischer Faktor im Prozess der Verbrechenskontrolle: Staatsanwalt", Monatsschrift für Kriminologie und Strafrechtsreform 1979, pp. 129-139
- SHEEHAN, A.V. Criminal Procedure in Scotland and France, Her Majesty's Stationery Office, Edinburgh 1975
- SIGLER, J.A. "Public Prosecution in England and Wales", Criminal Law Review, 1974, pp. 642-651
- SPECKERT, X. Legalitätsprinzip und Opportunitätsprinzip, Juris-Verlag, Zürich 1951
- STEMMER, A. Organisation Aufgaben und Stellung der italienischen Staatsanwaltschaft, Bamberg 1967
- STENDA, D. Die Gesetzlichkeitsaufsicht der Staatsanwaltschaft in der DDR, Würzburg 1976
- STOTT, D. To prosecute or not to prosecute, Chichester & London 1980
- STRÖMHOLM, S. (Ed.) An Introduction to Swedish Law, Vols. 1 & 2, Kluwer, Deventer (the Netherlands) 1981
- STRAELEN, F.W.M. VAN, DIJK, J.J.M. VAN "Equality before the law and decisions not to prosecute: The practice of public prosecutors in The Hague appeal court jurisdiction", Research Bulletin of the Ministry of Justice - The Netherlands, The Hague 1982

- STRAELEN, F.W.M. VAN, WERFF, C. VAN DER "Gelet op de ernst van het gepleegde feit", Tijdschrift voor Criminologie 1977, pp. 3-17
- STRAELEN, F.W.M., VAN, DIJK, J.J.M. VAN Rechtsgelijkheid en sepotpraktijk, Staatsuitgeverij, 's-Gravenhage 1981
- STREIT, J. "Aktuelle Aufgaben der Staatsanwaltschaft", Neue Justiz 1980, pp. 434-436
- SZABO, T.N. The unification and differentiation in socialist criminal justice, Akademia Kiado, Budapest 1978
- SZABO, T.N. Introduction to the Statutes of the Hungarian People's Republic, Act I of 1973 on Criminal Procedure, Ministry of Justice, Budapest 1976
- TAK, P.J.P. "Einige Aspekte des Opportunitätsprinzips bei der Strafverfolgung nach niederländischem Strafprozessrecht", Zeitschrift für die gesamte Strafrechtswissenschaft 1972, pp. 220-253
- TAK, P.J.P. Het vervolgingsbeleid in de Duitse Bondsrepubliek, W.E.J. Tjeenk Willink, Zwolle 1973
- TAK, P.J.P., KALMTHOUT, A.M. VAN Dienstverlening en sanctiestelsels in: Denemarken, Zweden, Noorwegen, Frankrijk, Duitsland, Ministerie van Justitie, Staatsuitgeverij, 's-Gravenhage 1985
- TAYLOR, D. "Instead of prosecution", Justice of the Peace 1980, pp. 279-281
- TIMASHEFF, N.S. "The Procurators' Office in the USSR", in: SZIRMAI, Z. (ed.), Law in Eastern Europe, pp. 8-15, A.W. Sijthoff, Leiden 1958
- TOMIC-MALIC, M., TAK, P.J.P. "La politique criminelle aux Pays-Bas", Revue Pénitentiaire et de Droit Pénale 1983, pp. 129-146
- TREYVAUD, D. Légalité ou opportunité de la poursuite pénale? Etude de droit suisse et de droit comparé, Imprimerie La Concorde, Lausanne 1961
- TSCHELZOW, M.A. Der sowjetische Strafprozess (Übers. von L. von Lingen), Deutscher Zentralverlag, Berlin 1958
- TURI, L. "Der organisatorische Aufbau der Staatsanwaltschaft der Ungarischen Volksrepublik", Kriminalistik und Forensische Wissenschaften 1979, pp. 101-113
- UGLOW, S. "Independent prosecutions", Journal of Law & Society 1984, pp. 233-245
- ULRICH, H.-J. "Die Durchsetzung des Legalitätsprinzips und des Grundrechts der Gleichheit aller vor dem Gesetz in der Praxis der Staatsanwaltschaften", Zeitschrift für Rechtspolitik 1982, pp. 169-172
- UOTILA, J. (ed.) The Finnish Legal System, Finnish Lawyers Publishing Company Ltd., Helsinki 1985
- VANDUYNE, P.C. Beslissen in eenvoud. Hoe officieren van justitie over strafzaken beslissen, Gouda Quint, Arnhem 1983
- VERHEGGE, G.J.Y. "Beschouwingen bij het beleid van het openbaar ministerie", Rechtskundig Weekblad 1983, pp. 1345-1374
- VOLKMANN-SCHLUCK, TH. Der spanische Strafprozess zwischen Inquisitions- und Parteiverfahren, Nomos Verlagsgesellschaft, Baden-Baden 1979
- VOUIN, R. "The role of the prosecutor in French criminal trials", American Journal of Comparative Law 1970, pp. 483-497

- WAGNER, J. "Legalitätsprinzip und politischer Prinzip", Teil 1 & 2, Kriminalistik 1982, pp. 253-278 and 306-327
- WALDEN-GOODWIN, C. "Shoplifting - a solution from Belgium?", Security Gazette 1983, pp. 30-31
- WALKER, N. Sentencing in a rational society, Middlesex 1969
- WEBER, H. "Krise der Strafverfolgung in imperialistischen Ländern", Neue Justiz 1984, pp. 315-318
- WEIGEND, E. "Die bedingte Einstellung des Strafverfahrens in Polen - zugleich ein Beitrag zur Diskussion um par. 153a StPO", Recht in Ost und West 1980, pp. 186-194
- WEIGEND, T. Anklagepflicht und Ermessen. Die Stellung des Staatsanwaltes zwischen Legalitäts- und Opportunitätsprinzip nach deutschem und amerikanischem Recht, Nomos Verlagsgesellschaft, Baden-Baden 1978
- WEIGEND, T. "Strafzumessung durch den Staatsanwalt? Lösbare und unlösbare Probleme bei der Verfahrenseinstellung unter Auflagen (par. 153a StPO)", Kriminologisches Journal 1984, pp. 8-38
- WILCOX, A.F. The decision to prosecute, Butterworths, London 1972
- WILDE, L. DE "Het sepotbeleid", Panopticon 1982, pp. 501-517
- WILLIAMS, GL. "The power to prosecute", Criminal Law Review 1955, pp. 596-604 and 668-679
- WILLIAMS, GL. "Discretion in Prosecution", Criminal Law Review 1956, pp. 222-231
- WITT, W. Die Rechtsstellung des Staatsanwaltes in Frankreich, Tritsch, Würzburg-Aumühle 1939

ANNEX I

NATIONAL REPORTS WERE PROVIDED BY THE FOLLOWING EXPERTS:

Austria

Mr. Harald Tiegs, Bundesministerium für Justiz, Vienna

Belgium

Mr. E.Frencken, Ministry of Justice, Brussels

Bulgaria

Dr. Baicho Panev, Procurator General's Office, Sofia

Cyprus

Ms. Eleni Loizidou, Ministry of Justice, Nicosia

Czechoslovakia

Professor Jiří Nezkusil, Director, and JUDr. Oldřich Suchý, Výzkumný ústav kriminologický při generální prokurature CSSR, Prague

Denmark

Mr. Jørn Vestergaard, University of Copenhagen

England and Wales

Mr. Roger Tarling, Home Office, Mr. Andrew Sanders, University of Birmingham, and Professor J.E.Hall-Williams, London School of Economic and Political Sciences

Federal Republic of Germany

Dr. Prof. Joachim Herrmann, University of Augsburg

Finland

Mr. Matti Joutsen, HEUNI, and Mr. Jorma Kalske, Office of the Chancellor of Justice, Helsinki

France

Dr. Prof. Renée Koering-Joulin, University of Strasbourg

German Democratic Republic

Dr. Prof. Horst Luther, Humboldt-Universität zu Berlin

Greece

Dr. Prof. Constantin Vouyoucas, Université Aristote de Thessalonique

Hungary

Ms. Márta Bittó, Scientific Officer, Academy of Sciences, Budapest

Iceland

Prof. Jónatan Thórmundsson, University of Iceland, Reykjavik

Ireland

Mr. Simon P.O'Leary, Senior Legal Assistant, Directorate of Public Prosecutions, Dublin

Italy

Mr. Vladimiro Zagrebelsky, Magistrate, Torino

Luxembourg

Mr. Charles Elsen, Conseiller de Gouvernement, Ministry of Justice, Luxembourg

the Netherlands

Dr. Prof. Peter Tak, University of Nijmegen

Norway

Mr. Justice Helge Røstad, Supreme Court, Oslo

Poland

Dr. Prof. Jan Skupiński, Academy of Sciences, Warsaw

Portugal

Mr. Fernando João Ferreira Ramos, Procuradora Geral da República, Lisbon

Scotland

Ms. Jacqueline Tombs, Scottish Home and Health Department, Edinburgh

Soviet Union

Dr. Natalia Yakubovits, Institute of State and Law, Academy of Sciences, Moscow

Sweden

Ms. Gunnel Lindberg and Mr. Jan Andersson, Research Officers, National Swedish Council for Crime Prevention, and Mr. Uno Hagelberg, Riksåklagarens kansli, Stockholm

Switzerland

Dr. Prof. Pierre-Henri Bolle, University of Neuchatel

Turkey

Mr. Turgut Aydin, Direction Generale des Affaires Pénales, Ankara

Yugoslavia

Dr. Prof. Peter Kobe, University of Ljubljana

Helsinki Institute for
Crime Prevention and Control,
affiliated with the United Nations

ANNEX II

TRANSNATIONAL STUDY ON THE SCOPE OF THE USE OF NON-PROSECUTION

QUESTIONNAIRE

Please note:

The purpose of this questionnaire is to supplement the data provided in the interim report by Dr. Prof. Peter Tak of 7 June 1985, entitled "The Scope of the Use of Non-Prosecution in the European Countries".

The following questions are related to the topics covered in this report. If the relevant data relating to your country is appropriately included in the report, you need not respond to the items in question.

1. Introduction

Scope of discretion

1.1. To what extent has the discretionary power in prosecution been expanded in your country over the past twenty years, in law and/or in practice? What do you consider the primary reasons for this tendency? Are there any opposing tendencies to restrict the amount of discretion?

Discretion by the police

1.2. To what extent can the police utilize discretion by not filing (officially recording) criminal offences known to them? Does this discretionary power of the police exist also with respect to offences which have been reported by individual complainants? Is this discretionary power of the police expressed in law? If this discretionary power is utilized in practice, is it covered by any restrictions, and who formulates and issues these restrictions?

Consideration of charges

1.3. Can the public prosecutor in your system charge an accused with a less serious offence (i.e. manslaughter), even when there is sufficient evidence to charge the accused with a more serious crime (i.e. murder)? To what extent can this discretion be used?

Alternative forms of discretion

1.4. Are there other forms of diversion in the criminal justice system away from the courts, which are not formally considered as waivers of prosecution, but which are, in your opinion, comparable with such a waiver? Please provide information on these alternative forms of diversion.

2. Chapter I

Monopoly over prosecution

2.1. Does the prosecution agency have the exclusive right to prosecute criminal offences in your country?

2.2. If not, is this right granted to other State bodies? Please give some examples.

2.3. Is the right to prosecute granted to private individuals or bodies? If so, is this right granted to any representative of the public, or just to those with special interest in the prosecution (such as the victim, or one who has otherwise suffered a loss through the offence)? Please provide some examples.

2.4. Is the right of private prosecution referred to in 2.3. restricted to certain types of crimes? If yes, to which crimes?

2.5. If the right of private prosecution exists, can you provide some data on its practical application? (from 1980 onwards).

Administrative and judicial control over prosecution

2.6. Can a judge examine the prosecutorial decision of a public prosecutor in your country? If yes, is this power available ex lege, or only on the request of the party who has a legal interest in the prosecution? If such examination is possible, is it purely legal, or does it also examine whether or not the decision is in line with the general prosecution policy?

2.7. Is it possible, in your system, to request the prosecution agent to reverse his prosecutorial decision? If yes, is this possibility expressed in the law?

3. Chapter II

The legality principle and the expediency principle

3.1. Is the basic prosecution principle explicitly laid down in written law in your system? If yes, in which one, and in which section(s)? Please provide a copy of the text, preferably in French, German, or English.

Restrictions on the basic principle in written law

3.2. Is the prosecutorial discretionary power of the public prosecutor confined by restrictions set out in written law? If so, please provide a copy of the text, preferably in French, German, or English.

Other expression of the basic principle

3.3. If the prosecution principle referred to in 3.1. is not explicitly expressed in written law, on what basis does it rest?

Exceptions to the basic principle

3.4. a) If your system has adopted the legality principle, please give the main reasons for the implementation of each of the exceptions to this principle in your country.

b) If your system has adopted the expediency principle, please give the main reasons for the implementation of each of the exceptions to the discretionary power.

Discussion regarding the basic principle

3.5. Is the prosecution principle which your country has adopted, presently under discussion?

4. Chapter III (chapter IV final report)

Use of discretion in the public interest

4.1. Does your system allow a prosecutor to prosecute a case where there is only weak evidence of the guilt of the suspect, if there is public unrest and outcry about the given case?

4.2. Does the applicable written law contain any criteria for the sufficiency of evidence?

Conditions for the undertaking of prosecution

4.3. Which legal conditions (prerequisites and hindrances), other than those mentioned in Chapter III, must be met in order for prosecution to be possible in your system? Which of the conditions mentioned in Chapter III are not relevant to your system?

Grounds for waiver of prosecution

4.4. What grounds, other than those mentioned in Chapter III, are used a waiver of prosecution? Are these grounds explicitly laid down in the law? If not, where can they be found?

Other waiver of prosecution

4.5. If besides the examples of non-prosecution mentioned in this report, examples of waivers exist in your country which are very particular to your system, please provide examples of them.

5. Chapter IV (chapter V final report)

Conditional waiver of prosecution

5.1. Does conditional waiver of prosecution, or its equivalent (e.g. transaction) exist in your system?

5.2. If so, is it stipulated in written law, or does it exist on the basis of practice? If it is stipulated in law, please provide a copy of the text, preferably in French, German, or English.

5.3. If no conditional waivers exist, is it specifically prohibited by law?

5.4. Is the feasibility or present use of conditional waiver presently under discussion in your country?

Conditions for waiver

5.5. If conditional waiver is possible in your country, what conditions can be imposed? Please list them, and refer to the appropriate sections of the law.

5.6. Is the prosecutor restricted in imposing other conditions than those listed in the law, which he deems as necessary? If yes, to what extent is he restricted?

6. Chapter V (chapter VI final report)

Prosecutorial guidelines

6.1. Do prosecution guidelines (or equivalent directives) exist in your country? Please provide some examples of such guidelines or directives.

Content of guidelines

6.2. If guidelines or equivalent directives exist, do they deal with the waiving of specific types of crimes? If yes, which crimes? If not, do these guidelines provide an overall general direction for the waiving of prosecution?

Authority issuing guidelines

6.3. Who formulates and issues the guidelines or equivalent directives?

Adherence to guidelines

6.4. Is strict adherence to the guidelines required? If not, do the guidelines allow the prosecutor some free discretion not to apply the guidelines? If yes, in what cases?

Regional applicability of the guidelines

6.5. Do the guidelines exist only on the national level, or do they also exist on the regional and/or local level?

Publication of the guidelines

6.6. Are the guidelines published? If yes, are they published in their entirety, or in a summarized form?

6.7. a) If the guidelines are not published, are the reasons for this similar to those expressed in the report? If they are not similar, what other reasons for non-publication can be mentioned?

b) If the guidelines are published, are the reasons for the publication similar to those expressed in the report? If not, what other reasons for publication can be mentioned?

Other means of harmonization of prosecution

6.8. If no guidelines exist in your system, what other measures exist to avoid arbitrariness, and what means are used to reach a harmonization of the utilization of discretionary power?

Research on harmonization

6.9. Have evaluative studies been conducted in your country on the harmonization of the utilization of discretion? Can you summarize the main results of those studies?

GENERAL QUESTION

Are there any important issues which exist with respect to the utilization of discretionary prosecutorial power in your country, but which were not dealt with in the context of this report? If yes, what are they?