

Jörg-Martin Jehle
Marianne Wade

Coping with Overloaded Criminal Justice Systems

The Rise
of Prosecutorial Power
Across Europe



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Jörg-Martin Jehle · Marianne Wade

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The Rise of Prosecutorial Power Across Europe

With contributions by
Bruno Aubusson de Cavarley, Martine Blom,
Teodor Bulenda, Beatrix Elsner, Beate Gruszczynska,
Jörg-Martin Jehle, Andrzej Krempleski,
Christopher Lewis, Julia Peters, Paul Smit,
Piotr Sobota, Marianne Wade, Josef Zila

Professor Dr. Jörg-Martin Jehle
Dr. Marianne Wade

Universität Göttingen
Institute for Criminal Law
& Criminal Justice
Department of Criminology
Platz der Göttinger Sieben 6
37073 Göttingen
Germany

abtkrim@gwdg.de
mwade@jura.uni-goettingen.de

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Coping with Overloaded Criminal Justice Systems

Preface

The comparative study documented here was supported by the Fritz Thyssen Stiftung and the European Commission. It examined prosecution services in different European countries intending to understand their national role and function within the respective criminal justice system and thereby to highlight common features and important differences between European systems. The prosecution service is regarded as a part of the criminal justice system; a coherent system under pressure to deal with high numbers of cases. Within this system the prosecution level is increasingly becoming the decisive stage reducing its workload by means of simplified methods and proceedings.

The research was carried out by a network of experts from England and Wales, France, Germany, the Netherlands, Poland and Sweden in order to develop common questions and data collection concepts and to gather the country-specific information required to allow comparison. The study deals with an area in which little research has been done and which is increasingly becoming the central, decision-making level of evolving criminal justice systems, with far-reaching consequences for society and the fundamental principles of criminal law.

The roots of our study lie in a project which generated the European Sourcebook of Crime and Criminal Justice Statistics. In 1996 the Council of Europe commissioned a group of specialists chaired by Martin Kilias to prepare a collection of criminal justice data for the whole of Europe; since then the European Sourcebook has been established and published in several editions. The production of the chapter on public prosecution for which Jörg-Martin Jehle and Bruno Aubusson de Cavarlay had particular responsibility highlighted a lack of comparable statistical and legal information. Thus the idea for this indepth study was born.

Our project partners are criminal justice system experts and experienced comparative researchers, e.g. through their membership of the European Sourcebook group and other international committees: They are Chris Lewis for England and Wales, Bruno Aubusson de Cavarlay for France, Paul Smit and Martine Blom for the Netherlands, Beata Gruszczynska together with Teodor Bulenda, Andrzej Kremplewski and Piotr Sobota for Poland, Josef Zila for Sweden and the German project management and research team consisting of Beatrix Elsner, Jörg-Martin Jehle, Julia Peters and Marianne Wade.

Due to the extraordinary commitment of all the partners to our joint venture, the research instruments could be developed and the outcome be validated in intensive sessions and bilateral discussions. All results presented in this volume are the product of the joint efforts of the group as a whole. We are deeply grateful for such unusually close partnership and friendship growing increasingly in the course of cooperation. We would also like to express our gratitude to the Fritz Thyssen Foundation which generously supported the completion of our project.

The project results were presented and discussed at an international conference held at Göttingen University in October 2005. We are very much obliged to Mazen Houssami, Hans-Jürgen Kerner, Harald Range, Andrew Sanders, Henk-Marquardt Scholz, Peter Tak and Thomas Weigend for their additional papers reflecting on and complementing the study results. We are indebted to the European Commission for funding the conference and the publication of this volume through the AGIS Programme.

Concerning the preparation of the print publication Beatrix Elsner and Julia Peters made invaluable contributions to the production of the synoptic tables and graphs. Thies Doerpmund and Axel Litty did an excellent job mastering the difficult technical setting work. We also like to thank our publisher Springer for good cooperation. Last, but not least, we express our gratitude to all the staff at the Göttingen Department of Criminology, especially to Heike Amouei and Marion Heinze. Their help was a great contribution to the success of this project.

Göttingen, in May 2006

Jörg-Martin Jehle, Marianne Wade

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Part I

Varying Structures and Convergent Trends in Prosecution within Europe

A European Six-Country Comparison

The Function of Public Prosecution within the Criminal Justice System

Aim, Approach and Outcome of a European Comparative Study

Jörg-Martin Jehle

1 Aim and Approach

The study supported by the Fritz-Thyssen Foundation and the European Commission examined prosecution services in different European countries with the intention to understand their national role and function within the criminal justice system and thereby to highlight common features and important differences. By this means convergent trends in dealing with high criminal justice system workloads can be identified.

In order to achieve these aims the project examined the prosecution services from two perspectives:

1. From a criminological point of view the prosecution service is regarded as a part of the criminal justice system as a whole. A system under pressure to deal with ever rising numbers of cases in which the prosecution level is increasingly becoming the decisive (de-)criminalisation stage. An organisational-sociological point of view is integral to this; investigating how the prosecution services manage to deal with the rising number of cases and proceedings in terms of reducing their workload by means of simplified methods and proceedings.
2. A critical analysis of the shift of competences to the prosecutorial level made from a legal viewpoint. Raising questions concern the principles of legality and opportunity, procedural guarantees and the protection provided for the accused person's human rights.

The research was carried out by a network of experts from different European countries and lead by the Department of Criminology of the University of Göttingen's Law Faculty. Researchers there worked with partner institutions in England and Wales, France, the Netherlands, Poland and Sweden in order to develop the common questions and data collection concepts and to gather the country-specific

information required to allow a comparison. The study draws on experience gained in producing the European Sourcebook of Crime and Criminal Justice Statistics. In this way it provides for the development of European harmonisation suggestions and future supra-national solutions where these are regarded as necessary. At the same time the study deals with an area in which far too little research has been done and which is increasingly becoming the central, decision-making level of the evolving justice system, with far-reaching consequences for society and the fundamental principles of states bound by the rule of law.

2 Basic Concepts and Assumptions of the Study

2.1 The Function and Structures of Prosecution

In the history of criminal law the institution of a prosecuting authority is a relatively new feature. It first appeared in the wake of the French revolution after which it, step by step, took up its position as a central institution in the legal systems of continental European law. It is only in the past few decades that it has become established as a feature of common law systems. In modern day Europe all prosecuting authorities have a statutory basis and in some countries, e.g. Belgium, Hungary, Poland, Spain, and France, their existence is constitutionally based. They are frequently connected to the executive through the ministry of justice or are seen as part of the judiciary. The majority of countries, however, allow prosecutors to be given both general and specific instructions by the head of the prosecution authority hierarchy in order to direct the country's general criminal policy. At the same time prosecuting authorities have a duty to ensure that proceedings are fair for all parties, the common law countries being the exception.¹

Naturally the prosecuting authorities' specific structures and functions differ greatly from country to country. In order to facilitate comparison, especially of a statistical nature, the term prosecution is used pragmatically; defined as an intermediary stage between the police and court levels. The process as a whole usually begins with an offence being reported to the police and the identification, sooner or later, of a suspect. Once this has happened, in almost all of the criminal justice systems dealt with here a decision has to be made whether or not the case should be brought before a court, i.e. whether to prosecute or not. Making this decision is the main task of the legal body known as the prosecuting authority, which is to be found either in the form of a public prosecutor and/or an investigating judge.

There are, however, some deviations from the ideal type of a separate prosecution authority.

In some countries this intermediary stage is not (always) easily discernible as the police themselves make prosecution related decisions. From beginning (pre-

¹ For information on prosecuting authorities within Europe see: The report of the Committee of Experts on the role of the Public Prosecution in the Criminal Justice System commissioned by the European Committee on Crime Problems. Strasbourg PC-PR (97) 1 Rev. 3.

charge) to end (case brought before a court) responsibility for a case rests with the police, e.g. in Norway in particular minor cases and in England and Wales prior to the introduction of the Crown Prosecution Service. Furthermore the police may also have the ability to end a case by imposing some kind of sanction, e.g. cautioning in England and Wales.

In some countries the prosecuting function is not carried out by one prosecuting authority alone, but is divided between e.g. a public prosecutor's office and, for certain cases, investigating judges (*juge d'instruction*). The responsibility for the decision to prosecute or not lies either with the public prosecutor or the *juge d'instruction*.

Independent of this, even in cases where a prosecution authority in the classic form of a public prosecutor is in charge of a case, the courts have a role to play in cases where the prosecuting authority uses certain investigative measures, namely in protecting the suspect's civil rights. With regards to the central topic of this study, namely decisions about the progression or the disposal of cases, this overlapping of competence is of minor importance.

2.2 High Workload as a Challenge Facing Criminal Justice Systems

If one looks at the numbers of offences and suspects recorded one can observe that for decades an enormous rise in crime has taken place in Western Europe, even if in some countries the crime rates have stabilized or are slightly declining in the last years. Increasing crime figures can also be seen in Central and Eastern European countries for the last 15 years. In particular the so-called mass-crimes, i.e. traffic offences and thefts, have risen strongly. How does the criminal justice system react to this growth? It is obvious that the prosecution services and criminal courts cannot deal with the increased load unless the number of staff or the working mechanisms are changed. In principle there are three possible ways of dealing with the increased number of criminal proceedings:

1. In accordance with the principle of legality all cases are, as before, prosecuted by the prosecution service and brought to charge in front of a criminal court and the judge deals with all cases in an oral hearing. In this case, however, the prosecution service and court personnel will have to be considerably increased. Understandably this option, which is connected with considerable additional costs, is not the one chosen. Realistically there are only two alternatives.
2. A decriminalisation of material law. In this case the threat of a criminal sanction is removed for less serious breaches of the law. Either minor offences, especially traffic offences, are defined as "administrative" offences and a reaction ensues by administrative proceedings and fines; this was the partial solution used, for example, in Germany and the Netherlands. Alternatively or in addition minor offences in the "classic" field are decriminalised. For example a 100 Euro minimum could be introduced for thefts; only above this boundary will the theft be defined as behaviour, which has to be crimi-

nally sanctioned. Below this boundary non-criminal sanctions are made available. This option was in part chosen by the Central and Eastern European countries. In Western Europe, on the other hand, predominantly the third option was chosen:

3. Discretion used by the police or prosecution service and simplified criminal procedure rules. Today criminal proceedings can be dropped, e.g. if the accused's guilt is of a minor nature and there is no public interest in a prosecution, without an oral hearing before a criminal court. The flood of criminal proceedings is mastered by procedural short cuts and simplifications. In this case the prosecution service often plays the central role and becomes the "judge before the judge".

Thus it is clear that prosecution services are gaining increasing importance within Europe and playing a vital role in the criminal justice systems as they are given more responsibility to decide how to deal with suspected criminals.

2.3 PPS as Part of Criminal Justice as a Coherent System

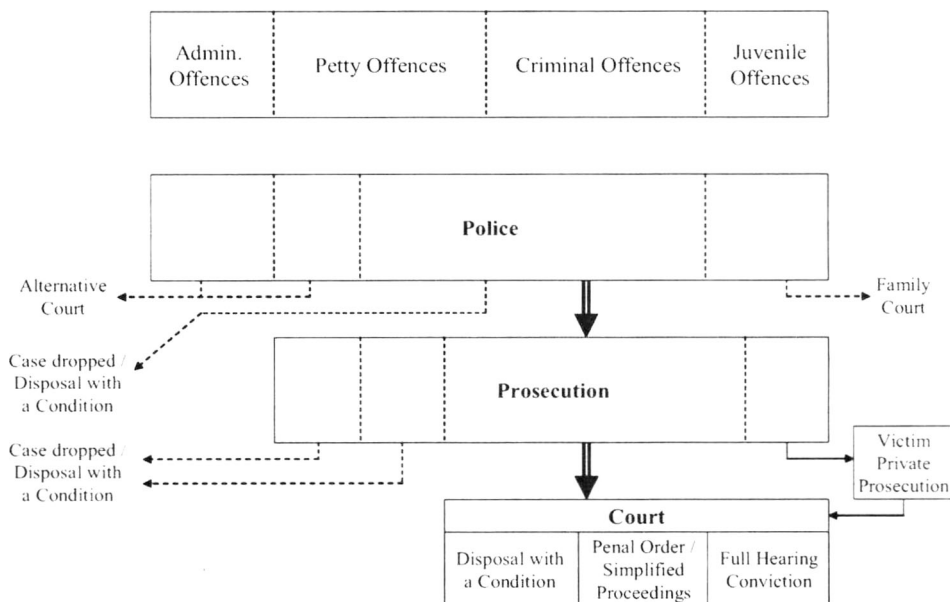


Fig. 1. Stages of Diversion and Discretion within the Criminal Justice System
– Fictional Model –

In order to understand the different national criminal justice systems (cjs) and to establish a basis for comparison it is necessary not only to consider the prosecution service level, but to regard the criminal justice system as a unit and to evaluate the role and competence of the prosecution service within the system as a whole. The options available to reduce the number of cases dealt with by a court can be seen in Fig. 1.

This diagram is a fictional model made up of the various decriminalisation and de-penalisation options and the possibilities of discretion at police and prosecution service level as we find them in various countries. Naturally the detail of national legal systems cannot be depicted. But at least the rough, ideal-type structures can be compared. The number of cases to be dealt with by the prosecution service is decisive. If a large proportion of cases is decriminalised, subject to a final decision by the police or dealt with outside of the criminal justice system, the prosecution service can concentrate on more serious offences and thus requires less discretionary powers. If – on the other hand – the police hand all offences on to the prosecution service, the criminal justice system will have to create “vents” at the prosecution level and allow considerable discretion.

3 Previous Studies

So far there have been only a few attempts to view the prosecutorial level comparatively in Europe. A legal comparison of western European countries was carried out in the early 1970's (Jescheck 1979) which dealt with the different legal structures for prosecution. It did not include any details of practice and is, naturally, no longer up to date.

A similar attempt can be seen in the recent study by Tak (2005) in which the legal structures of different European countries are described according to a standardised pattern. Detailed information on working rules, cases dealt with by the PPS and disposals as well as statistical data are not included. The same is true of further studies by *inter alia* Ambos (2000) and Vander Beken (2000).

In 1998 the Council of Europe collated the results of a questionnaire on prosecution services which posed a number of questions about the positions, structures and working practices of prosecution services. Unfortunately answers were not received from many countries and the detail provided also varied considerably. Furthermore the relationship between legal and practical aspects was also not taken into consideration.

3.1 Data from the European Sourcebook of Crime and Criminal Justice

An empirically oriented attempt has been made by the project “European Sourcebook of Crime and Criminal Justice Statistics”. At its 45th plenary session in June 1996 the European Committee on Crime Problems commissioned the group of

specialists² which had previously produced the “European Sourcebook of Crime and Criminal Justice Statistics: Draft Model” to prepare a collection of criminal justice data for the whole of Europe, presenting data for the years 1990–1996. Data were collected by use of a network of national correspondents who provided data from national statistical sources. Thus one person, required to be an expert in crime and criminal justice statistics, was responsible for the collection and initial checking of the data. This structure was reinforced by certain members acting as regional co-ordinators overseeing collection and double checking the data. The questionnaires used to collect the figures, which were completed by 36 countries, not only requested statistical data but also required information as to legal and statistical definitions to be provided. The data were checked and corrected and then put onto a database. The final version was published in 1999. A further edition based upon the same procedure of data collection was published in 2003, the third edition is in print.³

Prosecution Data

Despite the challenges of doing so, the European Sourcebook group dedicates the second chapter of the European Sourcebook to comparing the structures of prosecution in Europe. Chapter 2 of the Sourcebook for which the author has a special responsibility attempts to show the differences as well as the common features of the prosecution services of the Council of Europe member states. In order to do so the following five categories of statistics are collected:

1. the total number of cases the prosecuting authority recorded as having been dealt with within a particular year,
2. the number of cases brought before a court,
3. the number of cases dropped,
4. the number of cases dropped conditionally,
5. the number of cases ended by the imposition of a sanction.

Workload and Disposals of PPS

The term workload is used here, deviating from the common definition, to describe the total number of cases disposed of by the prosecution authority per 100 000 of the population. In other words, we attempt to measure the workload of the entire prosecutorial system in a given country in relation to its population. Naturally the workload an institution can deal with depends upon how many employees

² Members were: G. Barclay and C. Lewis (England and Wales), P. Tournier, later B. Aubusson de Cavarlay (France), J.-M. Jehle (Germany), I. Kertesz (Hungary), H. von Hofer (Sweden), M. Kommer, later P. Smit (the Netherlands), M. Killias (Switzerland, Chairman) as well as W. Rau from the Council of Europe; at a later stage the group was enlarged by M. Aebi (Spain), A. Ahven (Estonia), U. Gatti (Italy), Z. Karabec (Czech Republic), V. V. Kembowski (Macedonia), A. Arozola (Spain), C. Spinnellis (Greece).

³ Authors are: M. Aebi, K. Aromaa, B. Aubusson de Carvalay, G. Barclay, B. Gruszczynska, H. v. Hofer, V. Hysi, J.-M. Jehle, M. Killias, P. Smit, C. Tavares.

it has and what individual workload they have to process. Presumably the following will be true: the more cases a single prosecutor has to deal with, the sooner he will search for ways to lessen the work he puts into each individual case. Therefore he will presumably prefer to utilise the simpler and less time consuming alternatives to going to court, i.e. to drop cases, than the complicated and drawn out process of a trial, i.e. of taking a case to court. This presumption can, however, not be proved or disproved with the available material because exact numbers as to the employees of prosecuting authorities are not available for many European countries.

The number of cases disposed of on the prosecutorial level depends on two main factors: firstly on the amount of crimes known to the police and secondly on the question as to whether the police are obliged to hand all cases over to the public prosecutor or are able to dispose of some cases independently. As a consequence of the different input levels in the individual countries the workload varies considerably.

The workload of the prosecuting authorities measured by the output of prosecuting authorities shows massive differences across Europe. In some East European countries the figures of prosecutorial disposals are low and this is matched by a growing number of pending cases. The caseload development (from 1995 to 2000) also differs greatly: In many (western) countries the rates of all cases disposed of by the prosecuting authorities appear to be stable on a high level (i.e. increase or decrease in case numbers of less than 10%), in other countries there is a remarkable increase of between 10% and 50% (Armenia, Latvia, Lithuania, Moldova, Norway, Poland, Romania, Slovenia) and in some Central and Eastern European countries there is a high increase of more than 50% (Estonia, Slovakia).

Regarding the reaction of the prosecutorial system it is decisive whether the case is brought before a court, i.e. if the disposal could lead to a formal conviction by the court or if the disposal means a formal conviction does not ensue. The rate of cases brought before a court is an important indicator. The underlying assumption is: The higher the prosecution service's workload, the more cases will be disposed of without court involvement, in other words, the less cases will be brought to court. The table indicates that a relationship of this kind exists: