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SETTLEMENTS OUT OF COURT: A Comparative Study of European Criminal Justice Systems

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MAX-PLANCK-GESELLSCHAFT

PROJECT 73

**SIMPLIFICATION OF CRIMINAL PROCEDURE
SETTLEMENTS OUT OF COURT:
A COMPARATIVE STUDY OF EUROPEAN
CRIMINAL JUSTICE SYSTEMS**



German Technical Co-operation

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INTRODUCTION

The South African Law Commission was established by the South African Law Commission Act, 1973 (Act 19 of 1973).

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PREFACE

The South African Law Commission is conducting an investigation into the 'Simplification of Criminal Procedure'. The investigation aims to identify shortcomings in this area of the law with a view to improve the efficiency of the criminal justice system and, at the same time, its constitutionality.

As part of the investigation the project committee responsible for the investigation included in its terms of reference an investigation into the possibility of introducing legislation providing for a procedure of sentence agreements. The Commission's report was completed during April 2001 and the final report with proposed draft legislation was submitted to the Minister for Justice and Constitutional Development. The proposed Bill provides the prosecution with a framework to agree with the accused on a particular sentence in suitable cases to avoid time consuming and costly trials. This Bill has already been tabled in Parliament.

Interlinked with the issue of sentence agreements, the Commission also identified the need to conduct an investigation dealing with out-of-court settlements. The idea is to empower the prosecution to discontinue a prosecution in less serious cases on certain conditions, for example, that the offender is prepared to compensate the victim or perform community service. This investigation compliments the Commission's report on sentence agreements in that it also aims at minimising the workload of the courts. The proposed procedure aims at preventing cases from going to court and will be available in cases where an actual sentence and criminal conviction does not seem to be necessary, but the imposition of less serious sanctions, based on mutual agreements with offenders, are nevertheless deemed to be appropriate.

For this purpose and with the assistance of the German Technical Co-operation/GTZ, Professor Dr. Hans-Jörg Albrecht of the Max Planck Institute for Foreign and International Criminal Law in Freiburg, Germany drew up a report for the Commission on current developments regarding out-of-court settlements in Europe. This report provided the background study for the Commission's discussion paper on out-of-court settlements which was published during September 2001, and the Commission therefore approved its publication in the Commission's research series. The Commission would like to express its appreciation for the assistance provided by GTZ and for the work done by Professor Albrecht.

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1. Introduction: Settling Cases out of Court - Basic Trends

The debate on the settlement of cases out of court points to several trends in national and transnational criminal law reform. It is a discussion that can be traced back to the sixties and is not confined to individual European countries but clearly shows a fairly general need to develop and reframe traditional criminal procedure. Policies on settlement out of court are based primarily on considerations of cost efficiency, as is evident from, for example, the proceedings of the 60th German Law Day (*Deutscher Juristentag*) held in 1994.¹ Here again, answers were sought to the question whether further simplification and acceleration of criminal procedure (particularly as regards the trial stage) could be attempted without undermining the rule of law and basic standards of a fair and just criminal process.² Acceleration and simplification have also been a topic dealt with within the framework of the Council of Europe. Here, too, answers were sought to the question whether the processing of criminal cases could be accelerated by simplifying criminal procedure and the criminal trial in a way which on the one hand adheres to basic standards of the rule of law, but on the other hand reduces the potential for slowing the process down and complicating procedures. It should be acknowledged that the principle of acceleration is accepted in all European legal systems.³ The principle that criminal cases should be dealt with within a satisfactory period of time derives from several normative sources.⁴ In Articles 5, III, 2 and 6 I, 1 of the European Convention on Human Rights as well as in various provisions of criminal procedure codes (e.g. §§ 115, 128f, 121, 163 II, 1, § 229, 268 III, 2 of the German Criminal Procedure Law), acceleration and speedy processing figure as major objectives in dealing with criminal cases. So far as the duration of criminal procedures, its role-players and variables that account for duration is concerned, the available research is noted for its paucity. In Germany, only one empirical study (published some weeks prior to this writing) goes into the question of duration of criminal proceedings and what are the reasons that might account for long-drawn-out procedures and trials.⁵ Furthermore, there are no comparative studies that attempt to place the differences between criminal

¹ Gössel, K.H.: Empfehlen sich Änderungen des Strafverfahrensrechts mit dem Ziel, ohne Preisgabe rechtsstaatlicher Grundsätze den Strafprozeß, insbesondere die Hauptverhandlung, zu beschleunigen? Gutachten C zum 60. Deutschen Juristentag, München 1994.

² Küng-Hofer, R.: Die Beschleunigung des Strafverfahrens unter Wahrung der Rechtsstaatlichkeit. Bern, Frankfurt, New York 1984.

³ See Pradel, J.: Procédure pénale comparée dans les systèmes modernes: Rapports de synthèse des colloques de l' ISISC. Toulouse 1998, p. 113.

⁴ See for historical and comparative information Pfeiffer, G.: Das strafrechtliche Beschleunigungsgebot. In: Festschrift für Jürgen Baumann zum 70. Geburtstag. 1992, p. 329.

⁵ Dölling, D., Dittmann, J., Feltes, Th., Laue, Ch. Törnig, U.: Die Dauer von Strafverfahren vor den Landgerichten. Eine Untersuchung im Auftrag des Bundesministeriums der Justiz. Heidelberg 1999.

procedures in a comparative perspective. From what can be found in the available research, it is evident that assessment of the relative merits of the various ways of processing cases through the system is fraught with problems.

Besides cost arguments and cost–benefit considerations, restitution and restorative justice theory has given momentum to out of court settlements. At the same time, mediative and compensative elements have been introduced which have come to exert considerable influence on both adult and juvenile criminal justice in various European countries. However, significant trends in out of court settlements in various systems (particularly in Germany and Austria) have been spearheaded by developments in juvenile justice.

The result has been that procedural alternatives involving settlement out of court have given rise to several questions and touch upon various dimensions. Besides the issue of acceleration, there are the issues not only of cost efficiency, mediation and reconciliation, but also the attainment of goals in sentencing and punishment.

Among the suggested ways of making the criminal process less costly, processing cases more speedily and adapting criminal procedure to the needs of victims of crime, out of court settlement procedures rank very high. It is evident also that the types of question arising out of settlements out of court are under discussion in nearly all European countries. This shows that the various criminal justice systems are faced with the same basic problems and that a definite tendency towards convergence of previously quite distinct systems of justice has emerged. The political, economic and cultural transition that has been in progress in Europe since the eighties have decidedly accelerated the pace of reforms in Europe that are downgrading the role of the criminal court as the function of the trial stage while strengthening the position of the police and public prosecutors, determining not only the input into, but particularly also the outcome of, the processing of cases.

Transition and social as well as economic change in general have contributed greatly towards setting and strengthening several trends in criminal justice that have become evident from:

- The simplification and streamlining of criminal procedure.
- Elements of administrative, as well as –
- elements of executive justice,

while pursuing interests such as –

- compensation of the victim and reparation of the loss of trust occasioned by crime;
- reduction of stigmatization and other ill-effects of labelling, as well as –
- conserving resources.

What has become evident is the dominance of the implementation of law over the creation of law. In modern societies, conditions obviously require flexibility and informality in the administration and enforcement of the law. Modern legislation has responded to such needs by actually entrusting the police and the prosecutors with more and more discretionary powers that have changed considerably the relationship between the creation and the application or implementation of law. It seems that in many areas today it is no longer the legislative bodies that decide the penalization of behaviour but the police and prosecution services. It is here that law determined by the executive comes into play, posing numerous questions with regard to relationships between the executive authority and the legislature.

Transitional processes that are clearly linked to those needs that in turn have given rise to trends in out of court settlements can be broken down into different concepts. One of these concepts relates to modernization, and with notions of modernization the focus switches to the basic mechanisms of societal integration and thus to the role of formal control systems and the function of criminal law in modern and complex societies. Part of the process of modernization relates to certain developments in the fields of crime phenomena and criminal justice which pose new challenges to criminal law and in particular to the system of criminal sanctions. Challenges to criminal justice reform in modern societies are found in several fields.

Among the crime phenomena that are placing criminal justice systems under new strains, mass crime and mass delinquency rank high. Furthermore, organized crime, transnational and cross-border crimes, and new crimes, e.g. economic and environmental crimes have been put on the policy agenda.⁶ Mass crimes and complex crimes have caused capacity and overload problems and have contributed to a significant trend towards simplification and streamlining of basic criminal law and criminal procedure. Added to this, organized crime, economic crime and other types of rational crime have necessitated an ongoing search for measures likely to improve clearing rates and overcome problems associated with both, evidence as such and the gathering of evidence, which have become a notorious field of concern in almost all criminal justice systems.

⁶ See Farkas, A.: Stand und Tendenzen der Strafrechtsreform in Ungarn. In: Eser, A., Kaiser, G., Weigend, E. (Eds.): Von totalitärem zu rechtsstaatlichem Strafrecht. Kriminalpolitische Reformtendenzen im Strafrecht osteuropäischer Länder. Freiburg 1993, pp. 43-53, p. 50.

Then, the complexity of criminal cases has increased dramatically, with certain types of economic, environmental and transnational crime placing unprecedented demands on the procedural, legal and technological expertise of criminal prosecution and criminal courts. Finally, on top of all this, the costs of criminal justice have increased dramatically. Here the point comes to mind that implementing basic principles and standards is likely to result in higher costs. Therefore reform of criminal law and of the system of criminal sanctions is associated with the question of how much of the gross national product should be devoted to crime prevention and criminal justice, and how criminal justice resources should then be distributed and allocated. Then there are new types of offender to consider – offenders who are to some extent linked to new crime phenomena, e.g. the rational offender, the minority offender and criminal organizations or corporate criminals. With these types of offender the basic approach adopted in criminal justice systems in the sixties and seventies, viz. rehabilitation and reintegration focused on the individual offender, has come under considerable pressure. Socio-economic changes in modern societies also bring new demands. Societies in transition undergo major changes, with black markets and the shadow economy representing new social and economic frameworks and producing new at-risk groups out of which, and for which, crime policy and criminal justice reform has to be developed. Then the victims come back into the picture, and with them their needs as well as their expectations of the criminal justice system in terms of compensation and restitution. In addition to the victim, the role of the public – more specifically the role of the community – in crime control, as well as the private sector's potential for crime control, the administration of justice and criminal correction, have become issues in debates on crime policy.

In summarizing these challenges it may be said, therefore, that on the one hand crime has become a mass phenomenon, while on the other the complexity of certain types of crime has definitely increased. The former, surely, is accounted for by the development of not only opportunity structures, but also risk structures in modern societies that make crime a ubiquitous behaviour, particularly among the youth.

The latter may be seen as a consequence of the creation and application of criminal law in complex environments and the corresponding need for criminal justice systems to develop equally complex structures. Thus, criminal law interferes with other systems (economy, commerce or the environment) which organized interests require conditions of implementation quite different from those in the field of conventional (street) crime and traditional criminal law.

2. Developing and Implementing Out of Court Settlements: The German Example

2.1 Unconditional and Conditional Dismissals

Simplification of criminal procedure and simplification of criminal sanctions have been on the agenda of policy-makers since the sixties, when growing caseloads began to cause capacity problems for criminal justice systems.⁷ Nearly all criminal justice systems have provided for simplified procedures – irrespective of the basic approach, be it the common law or the inquisitorial system.⁸ In the nineties, criminal policy has again been preoccupied with simplification as a major device in responding to economic problems that arise during a process of transition. Here, Germany has been in the forefront streamlining criminal justice in order to make resources available for the eastern part of Germany, where priority had been given to a complete overhaul of the criminal justice system in line with the standards that apply in the western part. Simplification and streamlining are high on the reform agendas in other countries in transition, since such approaches promise efficient responses to the economic problems encountered in implementing criminal justice reform.⁹

The meaning and consequences of simplifying and streamlining criminal procedure depend on the relationship between the different actors in the criminal justice system and their basic functions. Under the German criminal justice system, powers are divided between the court and the public prosecutor, the police having a dependent position in the procedure with some emergency powers only. The criminal court decides on guilt and the sentence. The public prosecutor has to investigate criminal cases and decide whether there is sufficient evidence to make a formal indictment. In practice, however, police investigations are only rarely subjected to interference by public prosecutors, who restrict their activities to decision-making on the charge and the indictment. The public prosecutor and the police have to comply with the principle of legality. In principle, therefore, every case has to be investigated and brought before a criminal court in order to counterbalance, to some extent, the monopoly

⁷ See Council of Europe: *The Simplification of Criminal Justice*. Strasbourg 1988.

⁸ Weigend, E.: Polen. In: Eser, A., Huber, B. (Eds.): *Strafrechtsentwicklung in Europa*. 4.2 Landesberichte 1989/1992. Freiburg 1994, p. 1093 with information on simplified procedures contained in the Polish Code of Criminal Procedure (§ § 418, 455).

⁹ Musil, J.: Stand und Tendenzen der Strafrechtsreform in der Tschechoslowakei. In: Eser, A., Kaiser, G., Weigend, E. (Eds.): *Von totalitärem zu rechtsstaatlichem Strafrecht. Kriminalpolitische Entwicklungstendenzen im Strafrecht osteuropäischer Länder*. Freiburg 1993, pp. 61–74, p. 73; Bavcon, L.: Stand und Tendenzen der Strafrechtsreform in Slowenien. In: Eser, A., Kaiser, G., Weigend, E. (Eds.): *Von totalitärem zu rechtsstaatlichem Strafrecht. Kriminalpolitische Reformtendenzen im Strafrecht osteuropäischer Länder*. Freiburg 1993, pp. 27–42, p. 42.

of the public prosecutor in charging the suspects. Although in theory the principle of legality prevails, the procedural code provides for some exemptions.

The first important change in German criminal procedure law occurred when, in the early sixties, § 153 of the German Procedural Code was introduced, conferring upon the public prosecutor the power to dismiss a case if the guilt of the suspect is marginal only. With this concept a mixture of objective and subjective elements was introduced as being decisive for dismissal of a case. The objective element relates to the seriousness of the offence in terms of the damage caused or the severity of the injuries inflicted. The subjective element relates to the degree of the offender's intent or the degree of his/her negligence. Although dismissal of cases was in the discretion of the public prosecutor, the court had to affirm every decision not to prosecute. Felonies are not eligible for dismissal. The introduction of this element of opportunity was justified in the face of growing caseloads in the sixties. In that decade, too, criminal policy focused also on the decriminalization of a wide range of behaviour thought to be better dealt with within a framework of administrative sanctions. In particular, traffic offences were downgraded to so-called administrative offences where only administrative fines are available. Administrative fines are imposed by a central authority within the general state administration. They are subject, upon appeal by the offender fined, to revision by an ordinary court.

In 1975 the discretionary powers of the public prosecutor were extended considerably: the enactment of § 153a of the German Procedural Code enabled the public prosecutor to dismiss a case of minor guilt (felonies still excluded) if the offender complied with conditions specified and determined by the public prosecutor. In this way –

- ▶ a (summary) fine,
- ▶ community service,
- ▶ and/or compensation of the victim of the crime

may be imposed. Furthermore, the public prosecutor may suggest that the defendant fulfil maintenance duties. Neither the fine, nor community service as may be required by the public prosecutor has an upper limit (in § 153a). Only the constitutional principle of proportionality may be applied for the purposes of setting an upper limit and avoiding an excessive fine or the excessive use of community service. In practice, the fine prevails as a condition (see Graph 2); community service and restitution are rarely imposed. The 1975 amendment also removed the requirement of affirmation by the court in petty property cases. The 1975 amendment was justified by the increasing caseloads and the exigencies of having to deal with the resultant pressures.

During the eighties a further argument was added in favour of non-prosecution. This argument, derived from labelling theory, purported to favour a policy of diversion (within the framework of non-prosecution).¹⁰ Diversion through non-prosecution initiated by the public prosecutor's office became especially important in the juvenile justice system, where the opportunity or expediency principle is all the more important in view of the educational goal pursued by juvenile criminal law, where even felonies do not preclude dismissal (§ 45 Juvenile Court Law).

Furthermore, the discussion on the introduction of elements of opportunity placed the emphasis on the question of principled ways of dealing with petty offences. Here, two options were available:

- ▶ The procedural option as adopted in German legislation provides for the diversion of cases, on the grounds of their petty nature, by the office of the public prosecutor.
- ▶ The basic criminal law option provides for a general solution by making the petty nature of offences an “offence characteristic”. Thus the petty nature of the offence precludes the possibility of establishing that a criminal offence has been committed and that the behaviour in question may be prosecuted as a criminal offence.

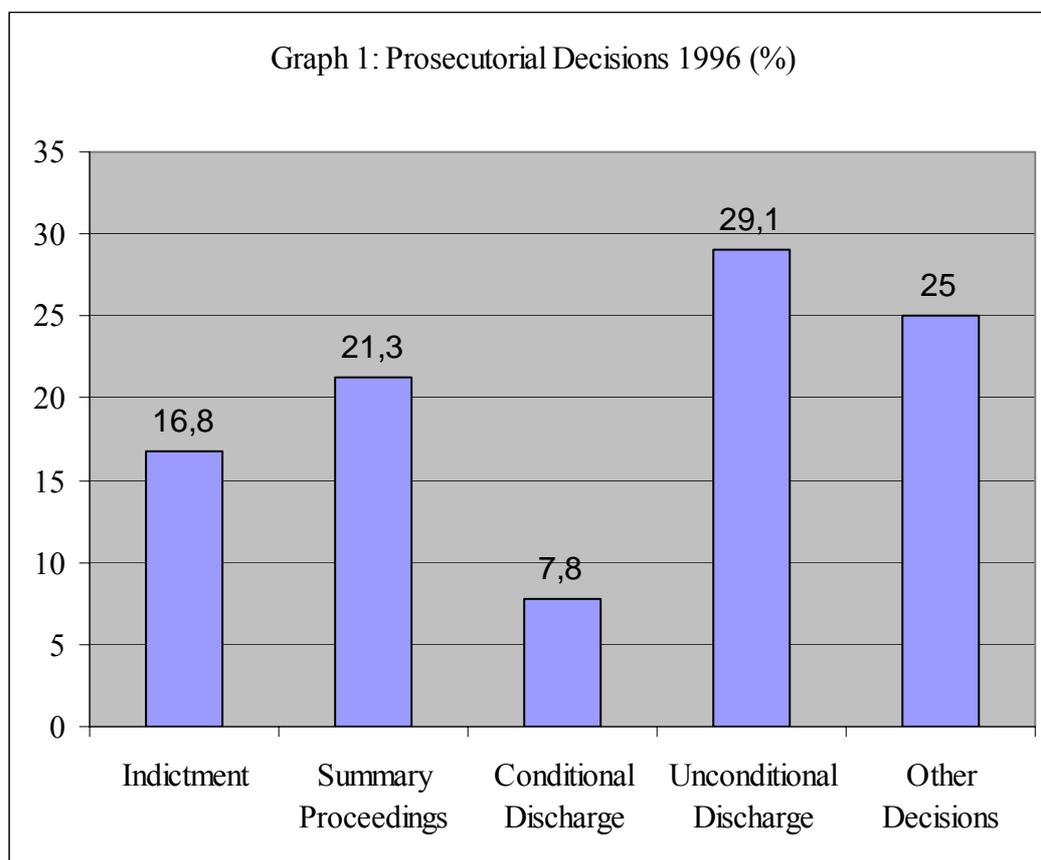
The Austrian legislature adopted the latter principle,¹¹ which applied also in the former socialist countries. Subsequently, in 1994, Slovenia introduced a new criminal law creating exemptions from the principle of mandatory prosecution which have parallels in § 153a of the German Criminal Procedural Code. The public prosecutor may postpone indictments on condition that the suspect fulfils certain requirements such as community service, restitution, payment of a fine (to a state compensation scheme for crime victims) or support of a dependent person,¹² or dismiss a case if the suspect has made good the damage caused by the crime, or if the suspect has prevented detrimental consequences of the offence in question. In the Czech Republic a similar option was introduced in 1994. Criminal prosecution may be postponed (and the offender may be placed under probation for a period of up to two years) if the alleged crime does not

¹⁰ See also the introduction of conditional discharges in the Czech Republic 1 January 1994 which are regarded as significant means of diversion, Valkova, J.: Community sentences gain solid ground in Czech Republic. CEP Bulletin June 1996, pp.1–2, p.1.

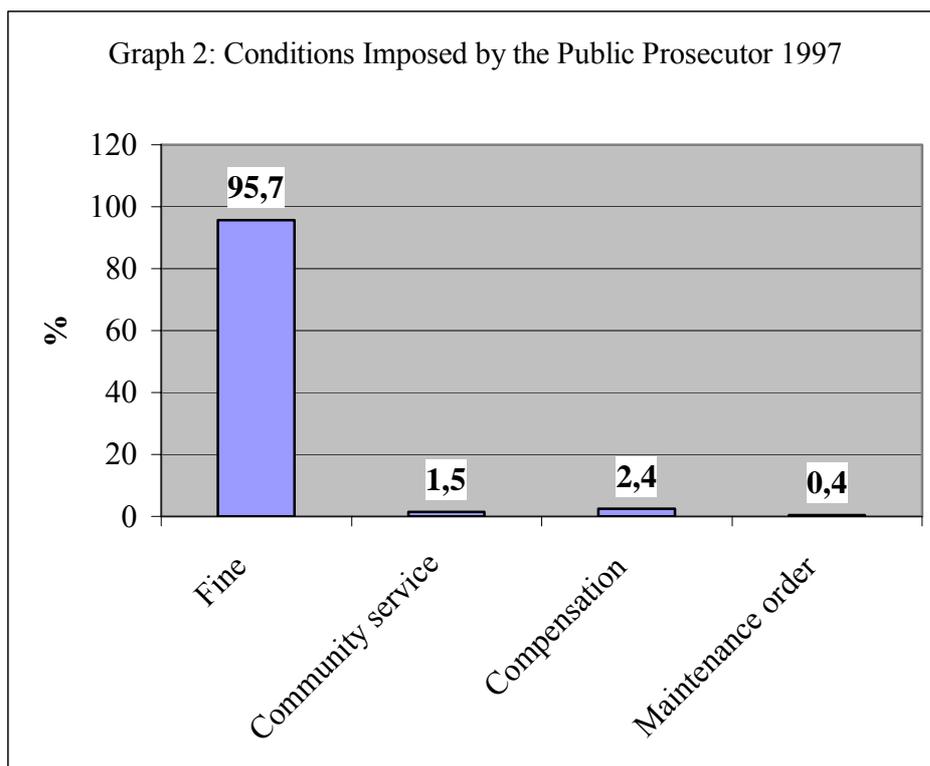
¹¹ Moos, R.: Die mangelnde Strafwürdigkeit bei Bagatelldelikten nach § 42 österreichisches StGB. Zeitschrift für die Gesamte Strafrechtswissenschaft 95(1983), p. 153.

¹² See Krapac, D.: The Position of the Victim in Criminal Justice: A Restrained Central and Eastern European Perspective on the Victim–Offender Mediation. European Journal of Crime, Criminal Law and Criminal Justice 3(1995), pp. 230– 40, p. 240.

carry a penalty exceeding five years and if the victim has been compensated or if arrangements to that end have been made. In addition, restrictions may be placed upon the offender during the period of probation.¹³



¹³ Valkova, J.: Community sentences gain solid ground in Czech Republic. CEP Bulletin June 1996, pp. 1-2, p.1.



2

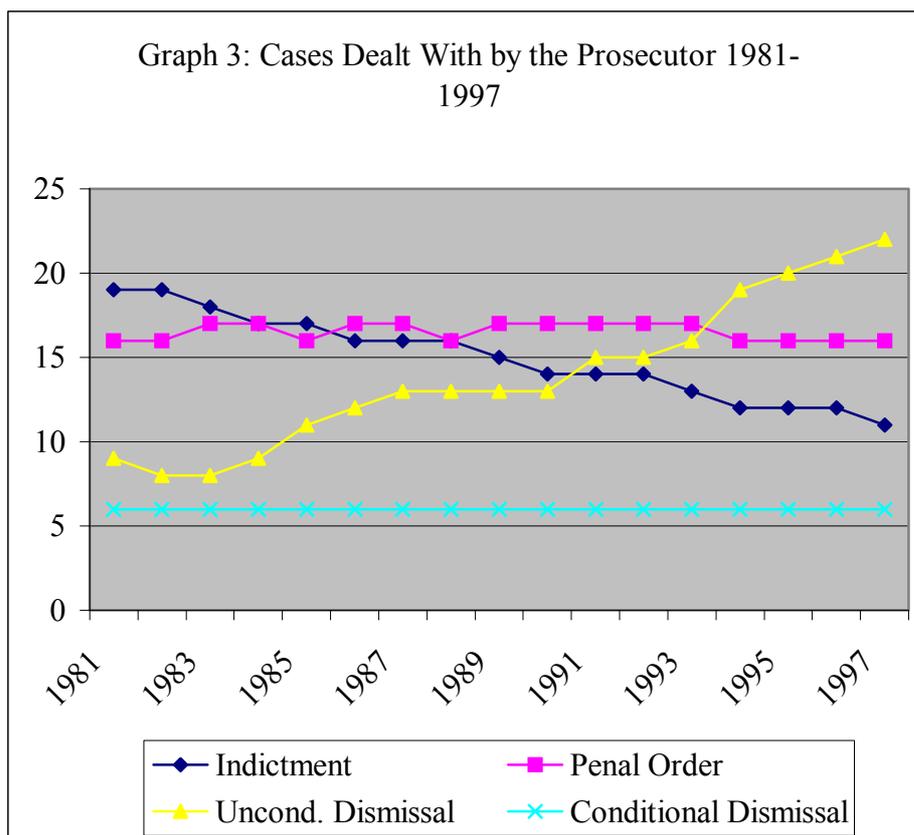
2.2 Simplified Procedures: Penal Orders

A second way of responding to the challenges of mass crime, and thereby easing the burden of an ever-increasing number of full-blown trials, many countries have been resorted to are simplified procedures, which, in practice, extend the powers of the prosecutor while a judge is ultimately and formally responsible. Here too, one may use as an example the Federal Republic of Germany, where the strains of trying to cope with transition have led to significant developments in the recent past. The public prosecutor has the power to initiate a simplified procedure consisting merely of written proceedings. If the public prosecutor concludes that, as regards proof of guilt, the case is not complicated and that a fine is a sufficient punishment, a penal order may be suggested to the judge, where, besides the indictment, the public prosecutor proposes a fine (in accordance with the day fine system). If the court agrees to the proposal a penal order is mailed to the suspect, who may appeal against the order within a period of two weeks. If an appeal is filed, ordinary proceedings take place.

Of ordinary crimes that may in principle be brought before a court (approximately 1,3 million cases a year), 30 per cent are dismissed (half of these by way of fulfilment of conditions imposed by the public prosecutor), a further 40 per cent are dealt with in simplified procedures, and the rest (30 per cent) go to full trial. These data demonstrate that most offenders are not subjected to the

full-scale criminal procedure but are dealt with along simplified – one might say administrative – lines. In March 1993, after a short debate fraught with controversy, a law was passed which was justified on the grounds of needs that arose out of German reunion – a step that would necessitate the establishment of the rule of law also in the eastern part of Germany. As overhauling the justice system in that part of the country demanded huge resources, the need was felt for further streamlining of procedures in both the west and the east to make it possible to reduce costs drastically. From the perspective of simplification two parts of this law are of particular interest. First, the power of public prosecutors to dismiss cases was extended dramatically. Now, in exchange for the conditions mentioned above, the public prosecutor has the discretionary power to dismiss a criminal case if the extent of the guilt of the offender does not necessitate a criminal penalty. The procedural option of simplified procedures was extended drastically, too. Now, the public prosecutor may propose, in a simplified procedure, a suspended sentence of imprisonment of up to one year if the offender has defence counsel. As only 6 per cent of all criminal penalties imposed by criminal courts in the FRG today involve prison sentences of more than one year, in theory a full trial may be restricted to a negligible proportion of criminal cases (see Graph 1).

Developments and trends in trial cases, including settlements out of court and simplified procedures, are shown in Graph 3. The data illustrate the gradual and linear decrease in the rate of indictments, and likewise criminal trials. (However, the role of trials in these data definitely is exaggerated, since classification as formal indictment and trial does not preclude out of court settlements in terms of agreements – as discussed in detail below – having had a decisive impact on both the course and the outcome of the criminal process.) Graph 3 shows, then, that the increase in crime observed (especially in the nineties) has been responded to largely by way of unconditional dismissal of cases. Summary procedures and transaction fines exhibit quite stable rates of application.



2.3 Concerns

From the outset, the continuing expansion of a prosecutor's power to dismiss cases and of the expediency principle in general have been subject to criticism.¹⁴ Critics point to the deplorable position of both the victim of a crime and the suspect. The victim of a crime, it should be noted, may not appeal cases dismissed pursuant to §§ 153, 153a of the German Criminal Procedure Code. In selected cases, the victim has the right to apply for a court decision, which may oblige the prosecutor to charge the suspect (*Klageerzwingungsverfahren*). It is a complaint that represents an exception to the so-called monopoly of public prosecution held by the office of the prosecutor. An internal procedure of complaint is then available, which, according to criminological research, is very rarely used and, moreover, does not lead to successful interventions by victims of crime. Finally, in cases that come under a class of offence referred to as offences of a private character (*Privatklagedelikte*), the victim is entitled to act as a private prosecutor if, owing to the private character of the offence committed (e.g. assault), the public prosecutor does not prosecute. However, this kind of procedure involves considerable financial risk for the victim, who as a rule has to bear all the costs if prosecution is not successful.

¹⁴ See also HEUNI: Criminal Justice Systems in Europe and North America. Helsinki 1990, p.109

Dismissal of cases may have an impact on the suspect as well. In principle, the suspect may not appeal a dismissal of the case. Confession by the suspect is not required. In the case of unconditional discharge, the suspect cannot appeal in order to have a public trial. In conditional dismissal of a case, the suspect is not obliged to accept the condition; but non-acceptance may necessitate a public trial. It seems clear that this may put strong pressure on the suspect – pressure that may be due to the uncertainty whether, in undergoing a trial, the suspect might not risk incurring penalties harsher than the condition offered by the public prosecutor in the first place.

There has also been criticism regarding the problem that §§ 153, 153a of the GCPC could be used with the intention of avoiding acquittals because of insufficient evidence. Concern has also been expressed about the disparity that arises out of the use of dismissals by the public prosecutor's office. Even greater is the disparity in the case of juvenile offenders dealt under juvenile criminal law. Differences in the rate of dismissals cannot be accounted for by differences in the type of offence; but obviously differences in the local culture of courts and public prosecutors' offices account for such disparities. In essence, the use of these differences as quasi-experimental settings for the purpose of testing assumptions regarding the effects of differential strategies did not produce differential outcomes in terms of rates of recidivism.¹⁵

Concern has also been expressed about the question whether offenders of substance might receive differential treatment. Such offenders might benefit from dismissal options, because they might bargain their way out of the criminal justice system by offering to pay a fine in exchange for charges being dropped. This in turn leads to the problem that dismissal options might be used to get rid not only of petty offences but also complicated and possibly prolonged proceedings – predominantly cases involving economic or environmental offences committed in a corporate context. Findings support this view: for example, for environmental crimes dismissal rates are highest in the corporate-offender group, while in the group responsible for small-scale (individual) environmental crimes that do not pose problems of evidence are regularly processed through the system.¹⁶ Moreover, while fraud and other economic

¹⁵ Heinz, W., Hügel, C.: *Erzieherische Maßnahmen im deutschen Jugendstrafrecht*. Bonn 1986; Heinz, W., Spieß, G., Storz, R.: *Prävalenz und Inzidenz strafrechtlicher Sanktionierung im Jugendalter. Ergebnisse einer Untersuchung von zwei sanktionierten Kohorten anhand von Daten des Bundeszentralregisters*. In: Kaiser, G., Kury, H., Albrecht, H.-J. (Eds.): *Kriminologische Forschung in den 80er Jahren. Projektberichte aus der Bundesrepublik Deutschland*. Freiburg 1988, pp. 631–60.

¹⁶ Meinberg, V., Heine, G.: *Environmental Criminal Law in Europe. Legal comparative and criminological Research*. In: Kaiser, G., Albrecht, H.-J. (Eds.): *Crime and Criminal Policy in Europe*. Freiburg 1990, pp. 3–23.

offences, which, on an average, involve rather high levels of damage are dismissed, the average damage involved in shoplifting or other simple theft cases found eligible for dismissal is quite modest. In fact, on the one hand sentencing and sanction bargaining might turn out to be an efficient way of dealing with complex criminal cases; but on the other hand the effects in the domain of justice could be detrimental.¹⁷

In summing up the problems we may pose the question: How far can criminal legislation go in streamlining and simplifying criminal procedure? Are there any essentials of criminal procedure that cannot be simplified away? In other words, what are the "bare bones of criminal justice"¹⁸ that cannot be used as a trade-off against the state's interest in saving money or in making criminal law more efficient? We may conclude that the German legislature has gone too far in attenuating the system of checks and balances essential to a criminal justice system based on the rule of law. Furthermore, the role of the trial judge is marginalized and victims as well as offenders are stripped of basic rights.¹⁹ In this respect the Polish legislature has been advised to be more cautious and to entrust the courts with the decision-making that pertains to conditional dismissals.²⁰ In evaluating policies of streamlining and simplification the first test that should be applied relates to the question whether decriminalization of certain criminal conduct have had to be considered. If simplification is sought, then effective controls of the public prosecutor's decisions have to be implemented. Recent proposals in the FRG concerning the problem of how to handle petty offences are aimed at establishing separate simplified procedures before a court whose powers of mediation or compensation should be restricted.²¹ The problem of concentrating sentencing powers in the hands of the public prosecutor is apparent also in the Czech system of diversion, whereby criminal prosecution may be postponed for a period of up to two years. As the offender may be placed under restrictions for the period of probation, important powers are assigned to the public prosecution and thus to the executive branch

¹⁷ See Schünemann, B.: *Absprachen im Strafverfahren? Grundlagen, Gegenstände und Grenzen*. Gutachten B für den 58. Deutschen Juristentag. München 1990.

¹⁸ Weigend, Th.: *The Bare Bones of Criminal Justice: The Simplification of the Criminal Process*. In: HEUNI (Ed.), *Effective, Rational and Humane Criminal Justice*. Helsinki 1984, pp. 233–39.

¹⁹ See Schöch, H.: *Rechtsstaatliche und kriminologische Grundlagen der strafrechtlichen Sanktionen in der Bundesrepublik Deutschland*. In: Eser, A., Kaiser, G., Weigend, E. (Eds.): *op. cit.*, 1993, pp. 361–88, p. 380.

²⁰ Buchala, K.: *op. cit.*, 1993, p. 278.

²¹ See Schöch, H.: *Empfehlen sich Änderungen und Ergänzungen bei den strafrechtlichen Sanktionen ohne Freiheitsentzug? Gutachten C für den 59. Deutschen Juristentag*. München 1992, p.54.

of the justice system. In principle, this line of reform ushers in a major trend in modern justice systems.²²

2.4 The Emergence of Sentence Bargaining

During the eighties the phenomenon of so-called *Absprachen* (informal agreements or contracting between prosecutor, defence and the court) came under discussion. Although there is no statutory basis for such agreements (which continue to be the subject of controversy), this type of “contracting” between the parties has spread rapidly in recent decades and is prominent in discussions on consensual solutions (and settlements) of criminal cases outside the court.²³ Such proceedings certainly accelerate the process significantly.²⁴ At the core of such agreements lie discussion and the finding of a consensus on –

- ▶ a confession by the defendant and
- ▶ a sentence discount.

The sentence discount represents an “honorarium” for confessing and thereby saving the prosecution and the court the trouble of gathering and presenting evidence. The defence may also offer to withdraw motions to hear evidence during trial, or to withdraw appeal or refrain from moving for appeal.²⁵ The prosecutor and the court, on the other hand, offer reductions as regards conviction and/or sentencing.²⁶

However, out of court proceedings in the course of which questions of confession and sentencing are discussed, entail the risk of turning the trial into a theatre for acts, which, in fact, merely express what has been agreed upon outside the trial. During the trial, then, facts are not presented as they should be presented, but as they have been agreed upon beforehand.

Such developments certainly demonstrate that judicial practice produces pragmatic proceedings and procedures outside the statutory framework should the need for this be felt. However, in the first place, these practical devices pose the problem of control, if they remain in the shadows and are put into effect

²² Eser, A.: Entwicklung des Strafverfahrensrechts in Europa. Orientierung an polizeilicher Effektivität oder an rechtsstaatlichen Grundsätzen? Zeitschrift für die Gesamte Strafrechtswissenschaft 108(1996), pp. 86-127, p. 94.

²³ B. Schünemann, "Absprachen im Strafverfahren? Grundlagen, Gegenstände und Grenzen", Gutachten B für den 58. Deutschen Juristentag, München 1990.

²⁴ B. Schünemann, "Die informellen Absprachen als Überlebenskrisen des deutschen Strafrechts", in: Festschrift für Jürgen Baumann zum 70. Geburtstag, 1992, p. 361.

²⁵ See OLG Köln NStZ 1999, pp. 97–9, p. 98.

²⁶ See B. Schünemann, op. cit., 1990, p. 31, who differentiates between benefits related to output and benefits related to activities whereby the latter are further broken down into external, internal and control-related benefits.

under a camouflage.²⁷ During the nineties in particular, decisions of both the Supreme Court and the Constitutional Court dealt with so-called informal agreements, and in principle the courts decided that such agreements should be admissible if certain preconditions are fulfilled. However, from the side of jurisprudence, serious criticism continues to be levelled against these agreements.²⁸ Critics argue, that the system of out of court (or out of trial) agreements could create a climate in which the defendant comes under pressure. Such a system displayed patent disregard for essential principles of procedure and trial, among these, the principle of finding the truth and establishing justice. The German Supreme Court, however, has – notwithstanding such criticism – accepted agreements if the parties comply with certain (informal) rules as determined in several Supreme Court decisions. According to the supreme court, among the conditions that make agreements legitimate judgments there are the following:

- ▶ All parties involved in the process have to be included in the negotiations pertaining to the charge, the confession and the possible outcomes of the trial (and informed), among them also lay judges – still functioning at the level of the magistracy (*Schoeffengericht*) and at the level of the district court (*Grosse Strafkammer*) – and, most important, the accused. As agreements tend to be the product of legal discourse among law professionals, the accused is easily excluded from such discourse. This poses the risk that the accused is merely informed of the outcome rather than included as an active participant in the discourse (as is demanded by procedural principles and particularly by considerations of human dignity).
- ▶ There must be no threat of heavier penalties being imposed, if the suspect or accused does not cooperate.
- ▶ Advantages not provided for in principle by law may not be offered in exchange for a confession.
- ▶ A fixed penalty may not be offered as a legally binding advantage, but only an upper limit below which the sentence will remain.
- ▶ Waiver of appeal may not be demanded (it will most probably be part of the deal, because prosecution and court will be interested in finalizing the case immediately, with conviction and sentence), nor may a waiver of appeal be formally an element in the agreement.²⁹

²⁷ B. Schünemann, "Die informellen Absprachen als Überlebenskrise des deutschen Strafverfahrens", in: Festschrift für J. Baumann zum 70. Geburtstag, 1992, p. 361.

²⁸ Weigend, Th.: Eine Prozeßordnung für abgesprochene Urteile? NSTZ 19(1999), pp. 57–63, p. 57.

²⁹ See e.g. BGH Neue Zeitschrift für Strafrecht 2000, pp. 96–8.

- ▶ The agreement must be reached in open trial and a protocol thereof drawn up.
- ▶ Upon fulfilment of all these conditions, the agreement is legally binding upon the court.
- ▶ However, the sentence must be commensurate with the seriousness of the crime and in particular reflect the degree of guilt (as evidenced by the offence committed). But, since the prevailing sentencing theory is based on a doctrine holding that the principle of “just deserts” (or punishment commensurate with the guilt of the individual) does not mean that a numerically determinable penalty is to be imposed, but rather that it opens up a range of penalties (*Spielraumtheorie*), there are no doctrinal problems with sentencing discounts.
- ▶ The confession must be examined by the court in order to check its reliability and validity.³⁰

Thus, prosecution and judicial practice has resulted in the introduction of a sort of plea and sentence bargaining,³¹ by which the trial has been truncated to the presentation of a confession and the imposition of an – agreed – penalty.³²

3. Simplification and Non-Controversial Criminal Sanctions

Simplification of criminal procedures – by cutting out the trial and settling cases by assigning them to the public prosecutor or even the police, formal or informal powers with respect to sanctioning or in a written procedure – hinges on simple and non-controversial criminal penalties. In many criminal justice systems the fine, especially a day or unit fine, has been adopted as a penalty not only less severe and therefore less controversial than imprisonment but also cost-effective. Finland was the first country to introduce (in 1921) a day fine system.³³ Although, there had been prolonged scholarly debate on the advantages of day fines and their potential as regards proportional and equal punishment before, the primary reason for their introduction was the rapidly declining value of money in Finland – a reason which today, in periods of rapid transition and economic change, makes the day fine the penalty of choice. Almost all countries in transition are plagued by economic crises and the concomitant problems of rapidly fluctuating monetary values and inflation, with the result that summary-fine systems are hampered by difficulties inherent in

³⁰ See for a summary Weigend, Th.: op. cit., 1999, pp. 58–9; Artkämper, H.: Der Deal im Strafprozess. *Kriminalistik* 53(1999), pp. 784-787; see also BGHSt 43, p. 195.

³¹ Weigend, Th.: op. cit., 1999, p. 61.

³² BGH NStZ 1999, p. 92.

³³ See the comprehensive historical analysis in Jescheck, H.-H., Grebing, G. (Eds.): *Die Geldstrafe im deutschen und ausländischen Recht*. Nomos, Baden-Baden 1978.

routine adjustment of the range of fines to monetary values.³⁴ Day fines, as compared to summary fines, are easy to adjust to changes in the economy wrought by inflation or recession. Nevertheless – with the exception of some South American countries – Finland, Sweden and Denmark were the only ones to introduce a day fine system in the first half of the twentieth century. This despite the fact that Italy, Germany, the Netherlands, Austria, and Switzerland substantially revised their penal codes during the 1920s and 1930s. It should be noted, however, that the concept of the day fine elicited considerable controversy in all three Scandinavian countries and was far from being unanimously accepted.³⁵

Both the Federal Republic of Germany and Austria introduced day fine systems in 1975;³⁶ they were followed by Hungary (1978),³⁷ and then by France and Portugal (1983).³⁸ Most recently, after a series of experiments, a system of unit fines was introduced in England and Wales³⁹ by the Criminal Justice Act 1991, which came into force at the end of 1992.⁴⁰ The new French Criminal Code, in force since 1 March 1994, has expanded the scope of day fines, which had been rather narrow since the criminal law amendment of 1983.⁴¹ Proponents of reform of the penal codes of Switzerland,⁴² Spain,⁴³ and Poland⁴⁴ and Slovenia⁴⁵

³⁴ Weigend, E., op. cit., 1994, p. 1109 for Poland; for the Republic of Estonia see Sootak, J.: *Estnische Republik*. In: Eser, A., Huber, B. (Eds.): *Strafrechtsentwicklung in Europa*. 4.2 *Landesberichte 1989/1992*. Vol. 4.1, Freiburg 1994, pp. 411–24, p. 417.

³⁵ For a review of the use of fines in Europe see also Casale, S.S.C.: *Fines in Europe: A Study of the Use of Fines in Selected European Countries with Empirical Research on the Problems of Fine Enforcement*. Vera Institute of Justice, London 1981; a general overview of sanctions systems is provided by van Kalmthout, A., Tak, P.: *Sanctions Systems in the Member States of the Council of Europe*. Kluwer, Deventer/Boston, Part I 1988; Part II 1992.

³⁶ See Grebing, G.: *The Fine in Comparative Law: A Survey of 21 countries*. Institute of Criminology Occasional Papers No. 9, Cambridge 1982.

³⁷ Nagy, F.: *Arten und Reform punitiver und nicht-punitiver Sanktionen in Ungarn*. In: Eser, A., Kaiser, G., Weigend, E. (Eds.): *Von totalitärem zu rechtsstaatlichem Strafrecht*. Max-Planck-Institut, Freiburg 1993, pp. 313–39, p. 324 (with a number of day fine units ranging from 10 to 180; the new draft criminal code will increase the maximum number of day fines to 360).

³⁸ Spaniol, M.: *Landesbericht Frankreich*. In: Eser, A., Huber, B. (Eds.): *Strafrechtsentwicklung in Europa. Landesberichte 1982/1984 über Gesetzgebung, Rechtsprechung und Literatur*. Max-Planck-Institut, Freiburg 1985, pp. 251–318, p. 262; Hünerfeld, P.: *Neues Strafrecht in Portugal*. *Juristenzeitung* 1983, pp. 673–75.

³⁹ See Gibson, B.: *Unit Fines*. Waterside Press, Winchester 1990.

⁴⁰ Wasik, M., Taylor, R.D.: *Criminal Justice Act 1991*. Cambridge 1991.

⁴¹ *Ministère de la Justice: Circulaire Générale Présentant les Dispositions du Nouveau Code Pénal*. *Journal Officiel de la République Française*, Paris 1993, p. 44.

⁴² Schultz, H.: *Bericht und Vorentwurf zur Revision des Allgemeinen Teils des Schweizerischen Strafgesetzbuchs*. Bern 1985; Heine, G., Spalinger, B.: *Landesbericht Schweiz*. In: Eser, A., Huber, B. (Eds.): *Strafrechtsentwicklung in Europa* 2. Vol. 2. Max-Planck-Institut, Freiburg 1988, pp. 1347–462, p. 1365.

have recommended the introduction of day fine systems; in part, these proposals have been put into effect (in Poland, Spain and Slovenia). However, the current draft of a proposed penal code in Belgium retains the concept of summary fines,⁴⁶ which suggests that the trend towards extended use of day fines is not unequivocal. Other European countries, including the Netherlands, Norway, Italy and Iceland, have not incorporated the idea of day fines into the criminal justice system and do not consider abolishing the system of summary fines. But at the same time fines *per se* continue to play a major role in the sentencing practices of these countries. Furthermore, it should be noted that some jurisdictions in the United States⁴⁷ are currently experimenting with day fines in order to evaluate their potential for reducing overcrowding in prisons and the overburdening of probation systems.⁴⁸

So far, Denmark and England and Wales have been the only countries to devote serious discussions to the matter of replacing the day fine system with a system of summary fines. The Danish discussion took place in the 1970s, and there are at present no signs of any successful movement towards abolition. However, in England and Wales the introduction of day fines did not seem to be successful after all. About six months after the new day fine provisions came into force, the Home Office announced provisional suspension of those measures in view of the extreme opposition of the judiciary to the idea of fining offenders according to day fine standards.

⁴³ Ministerio de Justicia: Anteproyecto de Código Penal. Madrid 1992; adopted by the Spanish Parliament on 8 November 1995 and put into effect in May 1996; in the Spanish Draft Penal Code the unit fine system differentiates between day units, weekly units and monthly units, with 24 monthly units being the upper limit of the fine. Daily, weekly and monthly units carry different ranges of rates allowed. In the case of daily units the rate may be between 300 and 30.000 pesetas, for weekly units between 2000 and 200.000 pesetas, and for monthly units the corresponding rates are between 10.000 and 1.000.000 pesetas (Art. 46 para. 2).

⁴⁴ The new criminal code of Poland contains the day fine system, see Buchala, K.: Arten und Reform punitiver und nicht-punitiver Sanktionen im polnischen Strafrecht. In: Eser, A., Kaiser, G., Weigend, E. (Eds.): Von totalitärem zu rechtsstaatlichem Strafrecht. Max-Planck-Institut, Freiburg 1993, pp. 261–83, p. 275 (the draft provides for a range of 14 to 360 day fine units).

⁴⁵ Bavcon, L.: op. cit. 1993, p. 34.

⁴⁶ Legros, R.: Avant-Projet de Code Pénal. Moniteur Belge, Bruxelles 1985.

⁴⁷ For a review of the use of fines in the US see Hillsman, S.T., Sichel, J.L., Mahoney, B.: Fines in Sentencing: A study of the Use of Fines as a Criminal Sanction. National Institute of Justice, Washington 1984; see also Zamist, I.: Fines in Sentencing: An Empirical Study of Fine Use, Collection and Enforcement in New York City Courts. VERA Institute of Justice, New York 1986.

⁴⁸ Hillsman, S.T., Greene, J.A.: Improving the Use and Administration of Criminal Fines: A Report of the Richmond County Criminal Court Day-Fine Planning Project. VERA Institute of Justice. New York 1987; McDonald, D.C. (Ed.): Day Fines in American Courts: The Staten Island and Milwaukee Experiments. National Institute of Justice, Washington 1992.

In almost all the criminal justice systems in Western European countries, fines play a major role in sentencing. Clearly, countries in transition are following this trend, too. Fines as a proportion of all sentences handed down by criminal courts in Western European countries varied between 30 per cent and 85 per cent at the end of the 1980s and the beginning of the 1990s.⁴⁹ In general, differences in the extent to which fines are used as a form of punishment are not dependent on whether or not a day fine system has been adopted; rather, these differences may be due to the fact that criminal justice systems vary in the extent to which they emphasize sentencing options other than fines, such as suspended sentences, probation, community service, etc.

The basic problem with the use of fines in periods of transition lies in the rate of unemployment, particularly among those groups most likely to have a brush with the law.⁵⁰ Because of this, alternatives to fines (and especially alternatives to default imprisonment) have to be considered, too. Among such alternatives, community service gained prominence during the eighties⁵¹ and will undoubtedly continue to play an important role in securing the position of the fine as a major criminal sanction.⁵²

Most of the intermediary and alternative sanctions such as fines and community service are found also among the conditions that may be imposed (or offered) in out of court settlements (as part of transaction decisions, e.g. transaction fines).

4. Community-based Responses, and Relief for Crime Victims through Settlement out of Court

The eighties saw new concern for the role of the community in the system of criminal sanctions and their implementation. Although much of the debate was devoted to alternatives of imprisonment as ways of avoiding the negative consequences imputed to the prison system (such as recidivism and high levels of social stigmatization), community participation was given prominence also because of other advantages said to be inherent in informal and extra-judicial procedures. Among these advantages assumed to be associated with community participation are, first of all, reduced costs, and then the increased responsibility taken by the community for dealing with crime problems.

⁴⁹ In the Federal Republic of Germany, fines constituted 84 per cent in 1991, a similar percentage being noted for Austria; in France, fines constituted 31 per cent in 1991.

⁵⁰ See Buchala, K.: Arten und Reform punitiver und nicht-punitiver Sanktionen im polnischen Strafrecht. In: Eser, A., Kaiser, G., Weigend, E.(Eds.): op. cit., 1993, pp.261–83, p. 276.

⁵¹ See e.g. Albrecht, H.-J., Schädler, W. (Eds.): Community Service, Dienstverlening, Travail d'Intéret Général - A New option In Punishing Offenders in Europe. Freiburg 1986.

⁵² Buchala, K.: op. cit., 1993, p. 278.

The former socialist countries offered a widely known approach,⁵³ recognized also in Western countries, to community participation in providing responses to crime as well as justice. With the system of comrade courts, conflict resolution commissions, conciliation boards or community courts, the perspective of the community was introduced into the control of crime and the dispensing of justice. The theoretical and ideological basis was derived from the concept of popular (direct) participation in dispensing justice, as well as Marxism's prophetic vision of the ultimate disappearance of the state and state administration.⁵⁴ These theoretical foundations of community administration of justice have parallels in the abolitionist perspectives; but it is evident that ultimately, in practice, community participation of the type referred to above came to be used to extend, and to intensify social control. During the sixties and seventies, apparently, small-scale crime and lesser conflicts not seen to be a threat to the social and political fabric were relegated to extra-judicial settlement of disputes and small-scale sanctions (e.g. fines, cautioning, etc.). However, evaluation of this system of out of court dispute settlement and crime control reveals a number of major deficiencies: for example, the system being guided by activists loyal to the government, the lack of procedural guarantees, and poor selection of staff.⁵⁵ This is why present-day attitudes to community participation and extra-judicial control are not at all favourable in Central and Eastern European countries. Thus, for example, the new Slovenian Procedural Code has completely done away with referrals to conciliation boards (a procedural option under the former Yugoslavian criminal procedure) and adopted a system of prosecutor-based exemptions from mandatory prosecution.⁵⁶ However, while on the one hand, the new move towards legalism and the rule of law discernible in Eastern Europe has been accompanied with a tendency to mistrust informality and extra-judicial proceedings, rising crime rates and concerns about safety are said to have fuelled demands for retributive justice, on the other hand.⁵⁷

Throughout the eighties the topics of reparation, restitution, compensation, and victim–offender mediation or reconciliation received considerable attention in most West European countries and to a considerable extent also in countries of Central and Eastern Europe. International standards have emerged with respect to the role and position of the victim of crime in the criminal justice system. The United Nations Declaration of Basic Principles of Justice for Victims of Crime

⁵³ Eser, A.: *Gesellschaftsgerichte*. In: Kaiser, G., Kerner, H.-J., Sack, F., Schellhoss, H. (Eds.): *Kleines Kriminologisches Wörterbuch*. 3rd Ed., Heidelberg 1993, pp. 140–5.

⁵⁴ Krapac, D.: *The Position of the Victim in Criminal Justice: A Restrained Central and Eastern European Perspective on the Victim–Offender Mediation*. *European Journal of Crime, Criminal Law and Criminal Justice* 3(1995), pp. 230–40, p. 237.

⁵⁵ Krapac, D.: *op. cit.* 1995, pp. 238–9.

⁵⁶ Krapac, D., *op. cit.* 1995, p. 239.

⁵⁷ Krapac, D., *op. cit.* 1995, p. 235.

and Abuse of Power⁵⁸ and the Council of Europe's recommendations on the position of the victim within the framework of criminal law and criminal procedure and on assistance to victims and the prevention of victimization⁵⁹ reflect the new concern for victims of crime and frame victim policies designed also to recognize those victims in the system of criminal sanctions. Among the policies adopted out of concern for the victim, restitution (or compensation) and victim–offender reconciliation are of immediate importance for out of court settlements because they relate to mechanisms that are in principle informal, community-based and immediate. Thus issues of both basic law and procedural law arise, since with restitution and victim–offender reconciliation alternatives to traditional criminal penalties are sought on the one hand and procedural alternatives to the criminal process are envisaged on the other.

Although numerous experiments with restitution and victim–offender mediation have been carried out (also in countries in transition)⁶⁰ and reparation and compensation have been introduced as sole sanctions (particularly for juvenile delinquents) in some criminal justice systems, many questions have been left open from the viewpoint of both, criminal law and criminology.⁶¹ One of the questions that should be addressed at the outset is why restitution suddenly received so much attention in the eighties and how these grounds might fit in with the policy developments in the first half of the nineties. Various answers can be found.

First of all, the perspective of the victim has to be taken into consideration. It has been claimed that the victim of the crime has been marginalized in the criminal process, which centres on the offender. Indeed, focussing on the offender matches with the prevailing legal theory according to which prevention, either pursued through individual or general deterrence or through rehabilitation resp. incapacitation, represents the main goal of criminal law. When rehabilitative efforts as well as deterrence failed to produce at least significant results, the vacuum that was left could be easily filled with a new rationale for responding to the offender: restitution and compensation for the victim. An answer is provided also by cost-benefit considerations, the argument being that the burden of the criminal justice system, especially criminal correction, can be reduced by introducing pre-trial restitution as an alternative to regular criminal proceedings and criminal penalties.

⁵⁸ Adopted by Resolution A/Res/40/34, General Assembly 1985; see also Joutsen, M.: *Changing Victim Policy: International Dimensions*. In: Kaiser, G., Kury, H., Albrecht, H.-J. (Eds.): *Victims and Criminal Justice*. Vol. 52/2, Freiburg 1991, p. 768.

⁵⁹ R(85), 11; R(87), 21.

⁶⁰ See e.g. Valkova, H.: *op. cit.* 1993, pp. 352–4.

⁶¹ See Albrecht, H.-J.: *Kriminologische Aspekte der Wiedergutmachung. Theoretische Grundlagen und empirische Befunde*. In: Eser, A., Kaiser, G., Madlener, K. (Eds.): *Neue Wege der Wiedergutmachung im Strafrecht*. Freiburg 1990, pp. 43–72; Ashworth, A.: *Some doubts on Restorative Justice*. *Criminal Law Forum* 4(1993), pp. 277–99.

Evidently restitution appeals to desires, hopes and ideas that can be accepted and assented to by virtually everybody. Among these, it is consensus and considerations such as a peaceful neighbourhood, permanent mediation of conflicts and patterns of direct interaction between individuals, as well as the notion of a socialized and altruistic individual, that fuel the demands for the replacement of both, traditional criminal procedure at large and criminal penalties, by a system of mediation and restitution. Thus mediative restitution is conceived not as a mere alternative to traditional criminal sanctions, but as being essentially a procedural alternative to the traditional concept of criminal procedure based on confrontation and conflict. On the other hand, the new allure of restitution, which puts the focus on the consequences of criminal behaviour and the impact an offence has had on the victim, is manifesting itself in an era when actual developments in criminal law point to the growing importance of so-called endangering offences. This concept of endangering offences puts the focus on the risk created by human behaviour, and in part the idea is accepted that, at the least, modern societies should totally avoid certain consequences because restitution or reparation would not make sense if risks actually turned into damage. But one has to take into account, too, that the idea of restitution is in harmony with today's mainstream thinking, in which cooperation and co-ordination rank among highly valued principles. Furthermore, the development of criminal law and criminal sanctions is increasingly exhibiting administrative, civil and consensual elements, for in many criminal justice systems summary procedures from which elements of conflict and confrontation are absent greatly outweigh the full-scale criminal trial. While in principle no objections can be raised against implementing restitution as an additional option in the context of criminal law, conflicts do arise if the focus is placed on the question of how far restitution can be extended as an alternative to criminal procedure and criminal law. On the one hand, it is argued that criminal penalties and criminal procedure can be replaced by mediation and restitution. On the other hand, restitution is understood as a medium-range or even short-range concept that should be developed within the framework of criminal law, but should in any event be adapted to the structure constituted by criminal laws, criminal penalties and sentencing goals.

With the abolitionist approach, restitution and mediation point to the private resolution of conflicts and are claimed to have potential as substitutes for criminal law and the criminal process. The basis of such claims may be seen in a theory of social exchange relating to citizens' capacity for, and interests in, taking care privately and immediately of conflicts and disturbances that have resulted from a criminal offence. Furthermore, abolitionist approaches suggest curtailment of the state's powers of interference in societal conflicts. The radical abolitionist perspective asserts the advantages of informal, private resolution of conflicts – a mechanism that is unduly restricted under systems of social control

based on penal law. It is held, that research based on surveys, shows that the public accepts restitution as a sole response to offences and offenders and is dissatisfied with social control based on penal law. The radical abolitionist perspective is broadened by placing the emphasis on participation by the offender, the victim and the public in social and criminal policy-making. Decentralization, privatization and informal justice dispensed in the community are the key concepts of this perspective. The main idea underlying abolitionism is that a system of informal restitution can replace the criminal process and criminal penalties. However, we do not know much about either the positive or the negative consequences of such immediate and informal handling of criminal offences. It is clear that, besides the formal system of control, there must be informal mechanisms that take care of a certain proportion of criminal offences. Because a situation, in which all deviant acts or criminal offences have to be dealt with by the criminal justice system, is not economically feasible, nor is it a workable option. It is equally clear that the informal handling of criminal offences without recourse to the criminal justice system provides no evidence to support the assumption that also the criminal offences that come to the attention of criminal justice institutions can be handled informally. Moreover, it is not known whether, on an average, the informal and immediate resolution of conflict produces results as satisfactory as those obtained through the formal disposal of cases. On the one hand, we may assume that successful conflict resolution is dependent on the availability of formal procedures and the potential of coercive measures. The threat, that there is the criminal law that may be resorted to, may be conducive to informal procedures, and also to mediation. But in those fields where, for a variety of reasons, criminal law may not be used compensation and mediation will not be the regular consequence of a "natural" development of conflicts. The problems that arise out of family violence, violence in drug scenes or crimes in other marginalized social settings serve as an indication that obstacles to the use of formal procedures and criminal law regularly result in failure to secure acceptable outcomes. Finally, the concept of restitution impinges upon several policy strategies that have had to be discussed in terms of interrelationships. These policy strategies relate to the concept of decriminalization and substitutes for criminal law in terms of civil and administrative law; the concept of depenalization; diversion; alternative criminal penalties (especially the fine); victim compensation; the concept of rehabilitation; and, most recently, confiscation of the proceeds of crime.

Looking at the legal framework of restitution and victim–offender mediation, it becomes evident that a range of different models has evolved in recent years and that countries in transition have adopted the perspective of restitution and mediation. Differences occur in the goals to be pursued, the content of restitution or mediation, and especially as regards the place in criminal procedure where restitution or mediation should be located. It is possible to distinguish a model of restitution located outside the criminal justice system .

However, this type of approach is rather rare. Then, there is the use of restitution/mediation as a condition for dismissing a case or for refraining from a verdict of guilt and punishment.⁶² The latter obviously plays a dominant role in European justice systems, so much so that restitution and mediation become part of conditional dismissals.

5. Settlement out of Court in Europe

5.1 Denmark

In Denmark, the public prosecutor may dismiss a case according to section 721 of the Code of Criminal Procedure if the costs, the expected length of the proceedings or the workload entailed by processing a case would be disproportionate to the significance of the case and the expected outcome. This provision was introduced in 1987 mainly for economic cases which placed a heavy burden on the Danish criminal justice system. Nevertheless, the provision is obviously used in a significant proportion of cases for partially dismissing a case only.⁶³

The prosecutor may then, in his/her discretion, waive prosecution (section 722 Code of Criminal Procedure) if:

- ▶ The offence carries a fine only and is of a petty nature.
- ▶ The accused is a juvenile, he/she confesses the crime and either social support measures are applied or conditions are accepted by him/her (e.g. compensation of the victim; a fine)
- ▶ The expected costs of a trial will be disproportionate.
- ▶ The law authorizes waiving of prosecution (e.g. where the victim requests non-prosecution).
- ▶ General rules issued by the Ministry of Justice or by the Prosecutor General allow for a waiver (for example, rules have been issued regarding the possession of small amounts of illicit drugs).

Where non-prosecution decisions are based on discretion, the victim of the crime is not entitled to complain against the decision. However, in practice,

⁶² See Buchala, K.: op. cit., 1993, p. 277.

⁶³ Garde, P.: Denmark. Paper presented at the Conference on: The Role of the Public Prosecutor in the European Criminal Justice Systems, Gent, 2-3 December 1999.

public prosecutors generally require full compensation of the victim before closing the case with a decision of non-prosecution.⁶⁴

Furthermore, there are two types of summary or abbreviated procedures that may come under the concept of settlements outside the court. First, there is a sort of summary fine that may be used in all cases where the prosecutor intends to go for a fine only. In such cases the prosecutor may send the indictment directly to the defendant together with a notice that the process would be terminated if the accused paid the fine proposed as part of the indictment. However, the accused may either pay the fine immediately (which act is construed as his/her consent to the proposal of the prosecutor) or declare that he/she consents to the proposal but will pay the fine in instalments. Although the law requires, as a basic condition, that the defendant pleads guilty (or confesses to the alleged offence) Danish practice allows payment, or a declaration of payment by instalment, to suffice. If the defendant has consented to the proposal the case is closed; an appeal is not possible.

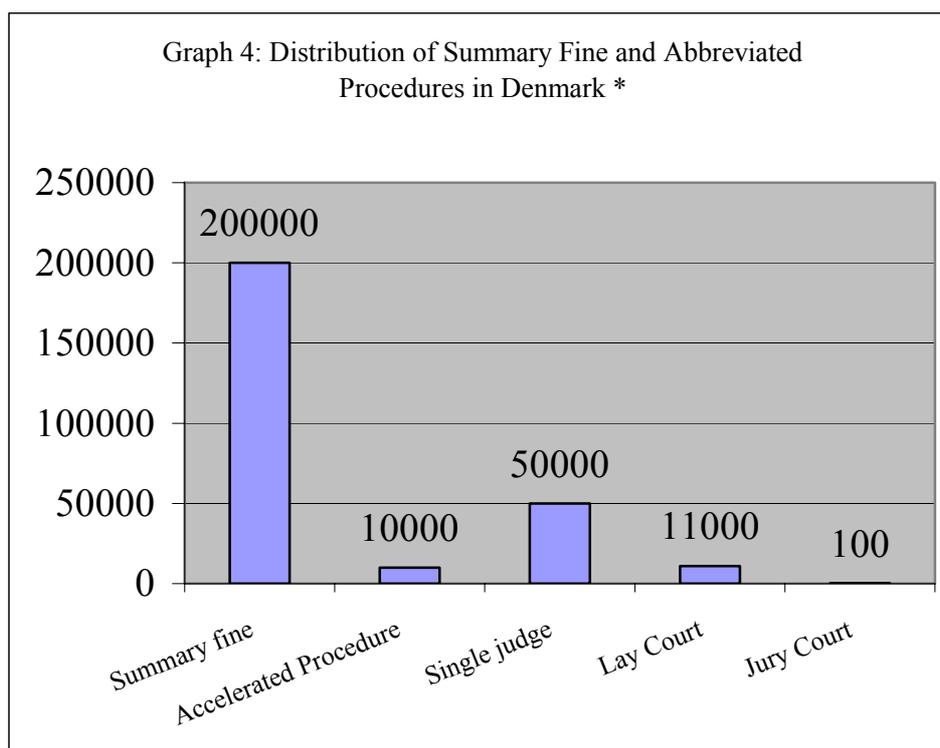
An abbreviated procedure may be initiated in all criminal cases, without regard to the seriousness of the case. However, an abbreviated procedure may not be used if the process might result in detention in a psychiatric hospital. The abbreviated-procedure case is dealt with by a single judge. Such a case requires the consent of the defendant as well as confession of the alleged offence. As regards juvenile defendants, the requirement of parental consent was dropped in 1997. It is sufficient that the juvenile agrees to the abbreviated procedure.⁶⁵

If the parties (judge, defendant and prosecutor) have agreed upon an abbreviated procedure no further evidence will be introduced. The confession will play the central role in convicting and sentencing the defendant. A formal indictment is not necessary. An informal letter from the prosecutor requesting an abbreviated procedure suffices. Consent to such procedure may be withdrawn at any time before the final decision is taken on conviction and sentencing. Where there are several defendants, ordinary and abbreviated procedures may be mixed.

Although evidence introduced is restricted to the confession, Danish law requires that the confession be corroborated by other evidence and that the judge be satisfied that the confession is true. However, it will suffice if evidence corroborating the confession is present in writing (e.g. documents containing evidence given by witnesses), since the contents of the file are available to the judge, the prosecution and the defence.

⁶⁴ Garde, P.: Denmark. Paper presented at the Conference on: The Role of the Public Prosecutor in the European Criminal Justice Systems, Gent, 2-3 December 1999.

⁶⁵ Garde, P.: Verfahrensbeschleunigung im Spannungsfeld der Interessen verschiedener Prozeßbeteiligter. Deutsche Richterzeitung 1997, pp. 251-8.



* Source: Garde, P.: Verfahrensbeschleunigung im Spannungsfeld der Interessen verschiedener Prozeßbeteiligter. Deutsche Richterzeitung 1997, pp. 251–8.

5.2 England and Wales

The criminal justice system of England and Wales, based on the common law tradition, differs considerably from the continental European justice systems.⁶⁶ The starting point for differentiating the various modes of processing cases under the English justice system is the classification of the alleged criminal offence either as a summary offence or as an indictable offence or a criminal offence that may be dealt with either summarily or by way of indictment. Summary offences are tried by the magistrates' courts, while indictable offences come within the jurisdiction of the Crown Court (with jury). However, only the most serious offences such as murder, rape, robbery and aggravated property crimes are classified as indictable offences. Court statistics show that approximately 90 per cent of all cases are dealt with summarily. The essential distinction between the process applied to summary offences and that used in indictable offences is the trial by jury. In both procedures the guilty plea plays a decisive role; but the significance of guilty pleas is greatest in criminal offences, which in principle are eligible for trial by jury. These trials being both costly and long, provide the basis for bargaining between defence and prosecution/court.

⁶⁶ Thomas, Ph.: Plea Bargaining in England. *Journal of Criminal Law and Criminology* 69(1978), p. 170.

In the adversarial system, the crucial point comes at that stage of the criminal procedure where the defendant is confronted with the question whether to plead guilty or not.

In an ordinary criminal case the police, in the first place, are responsible for organizing the criminal investigation as well as for processing the case (at this stage public prosecution services have no powers to interfere).

In simple cases and in cases where the suspect has confessed, the police have the power to caution the offender and to dismiss the case after a formal caution had been issued. Cautioning has become a quite important way of dealing with large groups of offenders, particularly young offenders. However, cautioning has become a significant response to adult offenders as well. In the nineties some 25 per cent of all offenders either cautioned or found guilty actually had been cautioned and had their case dismissed as a result of cautioning. When the Crime and Disorder Act 1998 came into effect cautioning was given a statutory basis.

However, neither the police nor the public prosecution services have the power to impose transaction fines or similar conditions in exchange for dismissing a criminal case. The Scottish criminal procedure law provides for transaction fines in minor traffic offences. But at present the introduction of transaction fines in the English criminal justice system is clearly not under discussion.

If the police consider the case to be in need of a formal procedure (and a criminal trial), it is channelled (upon completion of the investigation) to the public prosecutor, which decides whether or not to prosecute and where the case should be tried. Initiation of summary proceedings is possible if the crime falls under a summary offence statute and if the formal powers of the magistrate as regards punishment (maximum six months' imprisonment) are considered sufficient. In summary proceedings a formal indictment is not required; the defendant may be informed by way of summoning him/her to attend the trial in the magistrates' court. If the case is transferred to the Crown Court a formal indictment has to be presented to the local magistrate, who has to examine the indictment in order to confirm that sufficient evidence has been produced and that the case may be presented to the Crown Court. At this point (arraignment), the defendant has to introduce a formal declaration as to whether he/she pleads guilty or not guilty. If the defendant pleads guilty, there is no formal trial. Sentence is passed in due time after the arraignment hearings.

A guilty plea will most certainly be the result of either charge bargaining or sentence bargaining. Charge bargaining may take place partly between the

police and the defendant⁶⁷ and partly between the Crown Prosecution Service and the defence. As regards sentence bargaining, it is clear that English court practice has developed a reliable framework of decisions enabling defence and defendant to predict the size of sentencing discounts.⁶⁸ Sentencing discounts upon a guilty plea range from one quarter to one third of the sentence that would have been imposed without a guilty plea and after full trial.⁶⁹ Security and trust are reinforced by superior court rulings which in principle admit of sentence bargaining, and by the possibilities of appealing a sentence, with fairly good odds to get sentences corrected in the Court of Appeal which significantly deviate from average sentences imposed in similar cases.⁷⁰ Sentence bargaining and sentencing discounts are substantially justified by the argument that a guilty plea is an expression of remorse and acceptance of guilt. This in turn should legitimize reductions in length of sentence. However, discounts are by no means an invariable consequence of guilty pleas. For example, discounts are excluded where the protection of society demands the imposition of the maximum sentence, or in instances of last-minute pleas adjudged to be an indication of procedural tactics and an expression of remorse.⁷¹ As in the German system of *Absprachen* (agreements), charge and sentence bargaining is done among the legal professionals. Obviously, a crucial question is whether the judge should be involved in bargaining matters at all. Indeed, practice shows that cases are regularly settled by way of discreet talks between judge and defence counsel. However, superior courts evidently look upon this kind of practice with mistrust, although up to now this mode of preparing settlements of cases has been left intact. What has been voiced in superior court rulings, though, is the need for judges to maintain a neutral and unbiased position. This should be done by not disclosing to the defendant information on concrete sentencing discounts as agreed upon by defence counsel and judge. But defence counsel may nevertheless advise the defendant on possible negative consequences of a plea of not guilty as well as on his/her own views on possible sentence reductions if the plea is one of guilty.⁷² Anyway, the formal acknowledgement of the neutral position of the judge has not precluded the emergence of a full system of settling cases out of court within the framework of plea bargaining, which after all is essentially intended to serve the purpose of conserving resources through consensual decision-making.

⁶⁷ Morton, J.: Plea Bargaining. *New Law Journal* 1985, pp. 457.

⁶⁸ Weigend, Th.: *Absprachen in ausländischen Strafverfahren*. Freiburg 1990, p. 88.

⁶⁹ Weigend, Th.: *op. cit.*, 1990, pp. 88-89.

⁷⁰ See e.g. *R. v. Sullivan Cr. App. R. (S) 9*, 492, 496 (1987).

⁷¹ Weigend, Th.: *op. cit.*, 1990, p. 89.

⁷² See Weigend, Th.: *op. cit.*, 1990, pp.89–90.

5.3 France

The French Criminal Procedural Law (*Code de Procédure Pénale*) adopts the expediency principle, and together with that confers upon the public prosecutor discretionary powers to dismiss criminal cases. In particular, simple non-prosecution (*classement sans suite simple*) is widely used in French criminal procedure. In 1995, about 70 per cent of criminal cases were disposed of by opting for simple non-prosecution.⁷³

As regards particular types of procedures that are based on, or verge upon, settlement out of court proceedings, French procedural law provides for two options besides ordinary proceedings. The first of these two options caters for certain criminal offences; the second may be invoked where the offender has been caught red-handed. French criminal law differentiates three types of criminal offence:

- *Contraventions*, which correspond to the German concept of administrative offences (*Ordnungswidrigkeiten*) or to the concept of misdemeanours.
- *Délits*, which come close to the German concept of *Vergehen*.
- *Crimes*, which correspond to felonies.

Courts of first instance in France are represented by the single judge, the *tribunale correctionnelle* and the jury court – the last-mentioned having jurisdiction over *crimes* (felonies).

In the case of *contraventions* the magistrate is empowered to issue a penal order through which only a summary fine may be imposed. The public prosecutor suggests proceeding by way of a penal order if a fine seems to be sufficient as a response to the offence and if the case is free from problems of evidence. The magistrate may for the same groups of reasons refuse to issue a penal order and continue to process the case into an ordinary trial. For certain types of traffic offence a system of tariffs applies with fixed amounts of (administrative) fines imposed by the police. In the latter case the defendant may consent by paying the fine, which in turn finalizes the procedure. The defendant has also the right to appeal to the public prosecutor, which then has to decide whether to dismiss the case unconditionally or whether to take the case to court (with the consequence of ordinary trial procedures).

⁷³ See Pradel, J.: *Procédure pénale comparée dans les systèmes modernes: Rapports de synthèse des colloques de l' ISISC*. Toulouse 1998, p. 117.

The type of procedure as regards other offences (*délits* and *crimes*) depends largely on whether the defendant was caught red-handed or not. Arrest immediately upon committing a crime equals a situation where evidence of the crime is found on the person of the defendant. In such a case the police must immediately inform the public prosecution services and commence criminal investigation of the crime. The public prosecutor may then move for detaining the suspect; however, the suspect can be detained only if the prosecutor chooses to initiate the procedure of *comparution immédiate* (immediate trial). With the immediate-trial procedure the suspect is brought before the court without ordinary criminal investigations, which in France are headed by what is termed a “judge of investigation”. An ordinary criminal procedure requires transfer of the case and the file to the judge of investigation, who upon completing the criminal investigation decides whether the suspect should be formally accused and to which court the case should be transmitted. Ordinary proceedings are complicated and time-consuming, which is the reason why the public prosecutor in France will go for an immediate trial whenever possible. The conditions to which instituting such proceedings are subject are as follows (Article 395 pp):

- ▶ The offence statute does not carry imprisonment of more than seven years.
- ▶ There is sufficient evidence.
- ▶ The case is suited for immediate trial.

If the prosecutor chooses the procedure of immediate trial, the suspect will be brought before the court for trial on the very same day. If this is not possible, the defendant may be detained for a maximum of five days within which period the trial has to be carried through. If the trial cannot be concluded in those five days, ordinary proceedings take effect, which means that a new decision has to be made on pre-trial detention.

What brings the procedure of immediate trial so close to out of court settlement or at least a workable alternative to such settlement is that the defendant has to consent to such proceedings (moreover, defence counsel has to be present). This in fact points to the important precondition that basic agreement be achieved between prosecution and defence. Prior to initiating such proceedings the prosecutor evidently has to engage in a process of establishing consent, which in turn means that there must be no unresolved conflicts that could impede immediate trial. Such immediate trial definitely offers all participants in criminal proceedings certain advantages. The defendant does not have to wait for the trial and may make his/her consent dependent on determination of a penalty to which all sides agree; an added advantage is that the prosecutor and the court may save time and resources.

Finally, the *composition pénale*, enacted on 23 June 1999 (Article 41-2 and 41-3 *Code de Procédure Pénale*), has to be mentioned, which has given effect to a transaction fine procedure broadening considerably the scope of out of court settlements arranged through the public prosecutor. Previously, out of court settlements of this kind were restricted to mediation/compensation procedures under Article 41 of the said *Code*, adopted on 4 January 1993⁷⁴, when the victim had been compensated or where the perpetrator was engaged in such compensation, if this was adjudged a feasible way of restoring peace and order or if this kind of response was deemed to contribute to the rehabilitation of the offender.⁷⁵ A precursor to the *composition pénale* had been introduced already in December 1994 but was ruled to be unconstitutional in 1995.⁷⁶ The procedure is quite similar to that introduced by § 153a of the German Criminal Procedure Law. It may be applied in cases of petty crime, (which do not carry more than three years of imprisonment). The prosecutor offers dismissal of the case in exchange for a transaction fine of up to FF25.000 (US\$3.500) or withdrawal of a driver's licence for a period of up to four months (or withdrawal of a hunting licence for the same period) or for performing community service of up to 60 hours over a period of up to six months or for confiscation of the proceeds or instruments of crime. The judge who is to have jurisdiction in the case must consent to conditional dismissal. The victim of the crime must be informed and may be heard by the judge. All dismissals of cases must be conditional upon compensation in full of the victim of the crime.⁷⁷ The legal discourse that preceded the introduction of this new way of conditionally dismissing criminal cases deals with the very same pros and cons as those discussed in Germany before and after § 153a of the Criminal Procedure Code was passed. Critics' voice concerns about the principle of innocence, the division of powers, equal treatment and possible abuse by the prosecution services. Proponents counter that there is an urgent need for procedures that provide relief in the face of increasing caseloads and economic constraints.

⁷⁴ See Schönknecht, S.: Das Opportunitätsprinzip im französischen Strafverfahren. Pfaffenweiler 1999, p.86.

⁷⁵ Pradel, J.: Procédure pénale comparée dans les systèmes modernes: Rapports de synthèse des colloques de l' ISISC. Toulouse 1998, p. 119.

⁷⁶ Pradel, J.: Procédure pénale comparée dans les systèmes modernes: Rapports de synthèse des colloques de l' ISISC. Toulouse 1998, p. 119; the constitutional court argued that by introducing a transaction fine a criminal sanction could be imposed without involving a judge; see also Schönknecht, S.: op. cit. 1999, p. 73.

⁷⁷ Leblois-Happe, J.: De La Transaction Pénale à la Composition Pénale. Loi no 99-515 du 23 juin 1999. La Semaine Juridique No. 3 2000, p. 63-69, summarizing the debate and the process of creating the possibility of imposing transaction fines through the public prosecutor.

5.4 Belgium

Although the Belgian law of criminal procedure is quite close to French criminal law, an urgent need is felt for reform (due largely to the Dutroux case and the debates it elicited in Belgian legal circles). Actually, the Belgian criminal procedure, having remained unaltered for quite some time, lacks many of the modern mechanisms that have been introduced in other systems in response to large-scale changes in the fields of crime and criminal justice. However, a discourse on in-depth amendments to the law of criminal procedure is under way, and this will surely lead to major law reforms in the future. In this discourse the French model is playing a decisive role, and Belgian criminal procedure may be expected to develop along the lines described above for the French criminal procedure.

In the settlement of cases out of court, the public prosecutor has full discretion with respect to the question whether or not to prosecute.

The Belgian Criminal Procedure Code (§ 28) authorizes the public prosecutor to decide whether a case should be brought before the court. There are four ways in which a public prosecutor may dismiss a case:

- Simple non-prosecution.
- Transaction (imposing a condition to be fulfilled by the defendant prior to the decision not to prosecute).
- Proposal to settle the case by way of consent.
- Proposal to settle the case through mediation.

Simple non-prosecution decisions must comply with the general guidelines of the Ministry of Justice; in principle these decisions must be restricted to petty crimes. Such non-prosecution decisions do not preclude the continuation of criminal investigation for any reason. They have to be justified in writing, although the reasons given may be summary in nature (in order to prevent overburdening of the prosecution services).

Non-prosecution may be made subject to conditions to be fulfilled by the suspect, who has to agree to such conditions. This comes close to probation and probation orders.

In § 216 of the Belgian Criminal Procedure Code it is provided that the prosecutor may propose a fine or consent with forfeiture of assets of the suspect. There are several conditions to be fulfilled in order to enable the prosecutor to

apply the procedure of settlement by consent: First, the case must in principle be suited to being brought before a court (enough evidence). Second, the case must still be pending during criminal investigation (the case has not yet been transferred to the court). Then, settlement by consent is possible only where criminal offences carry as maximum penalty a fine or imprisonment of five years and where the prosecutor is of the opinion that, were the case to be tried in court, a fine would be imposed as the principal criminal sanction. Moreover, the damage caused through the offence has to be made good, or a civilly valid declaration has to be made that restitution for the losses will be made immediately. The legal consequences of such a settlement by consent are that the public prosecutor is precluded from instituting new proceedings or from continuing the case. Such consequences take effect immediately upon fulfilment by the suspect of all relevant conditions.

In § 216 of the Belgian Criminal Procedure Code the prosecutor is empowered finally to initiate mediation proceedings (not between offender and victim, but between the suspect and the state). To initiate such proceedings several requirements must be met. First – and this is a parallel to the settlement by consent – the case must still be under investigation and not have reached the criminal court. Then, the punishment imposed in the concrete case must not – according to the assessment by the prosecutor working on the case – exceed two years' imprisonment. However, there are no restrictions (as laid down for the application of settlement by consent) as regards the abstract minimum and maximum penalties provided by the offence statute in question. Thus, in principle, all types of felony crime come within the ambit of this provision.

- ▶ The first option available to the public prosecutor is full compensation for the losses resulting from the crime; in addition, the prosecutor may summon the victim in order to arrange a mediative meeting between offender and victim.
- ▶ The second option is a request for treatment and therapy where the suspect has shown signs of addiction or problems with addictive drugs (including alcohol) or some other treatable illness; the prosecutor may then request treatment of up to six months and regular reporting on the process of treatment.
- ▶ The third option is the imposition of a number of hours (not exceeding 120) of community service to be served within a period of between one and six months.
- ▶ The fourth option available the prosecutor is to propose participation in a programme of training or education aimed at facilitating and promoting rehabilitation and preventing recidivism.

The consequence of such mediation is discontinuation of proceedings. The prosecution services are not allowed to continue criminal proceedings after the suspect has fulfilled the conditions to which he/she consented.

Statistics on these out of court settlements show that in 1995 about 15 per cent of all cases were disposed of by simple non-prosecution decisions and that about 1,2 per cent were disposed of by settlement by consent.

The structure of prosecutorial decisions for 1999 is shown in Graph 5. The data provide clear evidence that the role of both transaction fines and mediation is scarcely significant, but that decision-making in the office of the public prosecutor relies heavily on simple unconditional non-prosecution. Evident, too, is the reduced role of the judiciary. Of the cases that could in principle be brought to court and to trial, only 11 per cent were actually indicted and sent to full trial.

In Belgium no simplified procedures in writing (or penal orders) are available.

5.5 Italy

The Italian law on criminal procedure provides for several options that simplify and abbreviate ordinary criminal proceedings. Italian procedural law was completely revised in 1988.⁷⁸ With that revision came the introduction of major elements of the adversarial system.⁷⁹ However, the Italian criminal process remains based upon the principle of legality and does not permit discretionary dismissal of criminal cases through the office of the public prosecutor.

First, the public prosecutor may initiate a summary procedure that applies to all criminal cases except crimes carrying a penalty of life imprisonment. In summary proceedings the case is dealt with not by the criminal court that would in principle have jurisdiction over the case but by the investigating judge during pre-trial proceedings. The consent of the defendant is required.

The investigating judge conducts a summary trial on the basis of the facts and evidence as on the case file. This means that witnesses will not be heard and that no other direct evidence will be adduced. The trial is not public but remains *in camera* and is usually held in the office of the investigating judge. If the investigating judge concludes that the defendant is guilty, the penalty is reduced by one third. Charges may not be altered to the disadvantage of the defendant in a summary procedure (as could be done in ordinary proceedings). In theory,

⁷⁸ Amodio, E.: Das Modell des Anklageprozesses im neuen italienischen Strafverfahrensgesetzbuch. Zeitschrift für die Gesamte Strafrechtswissenschaft 102 (1990), p. 171.

⁷⁹ Weigend, Th.: Absprachen in ausländischen Strafverfahren. Freiburg 1990, p. 101.

therefore, the summary proceedings require only consent to the procedure (and not consent to the outcome as regards finding of guilt and/or punishment). The defendant may, for example, be acquitted. A finding of guilt and the sentence may be appealed (in the form of cassation; conversely the prosecutor may appeal a decision of acquittal or a sentence perceived to be too lenient). Therefore consent by defendant and prosecutor covers abbreviated proceedings as well as a range of penalties reduced by one third (compared to ordinary proceedings, where the full range of penalties provided by an offence statute is susceptible of application). However, proceedings of this type offer the defendant the following further advantages:

- ▶ The case is confined to what is on the file (there are no further investigations and possible new charges after hearing witnesses during a trial).
- ▶ The case is dealt with in a discreet manner (the public is excluded).

A second option is provided *patteggiamento*, which may be described as sentencing on motion of the parties (Article 444 of the Italian Criminal Procedure Law).⁸⁰ However, a prison sentence resulting from such proceedings may not exceed two years' imprisonment.⁸¹ With this procedure both, the public prosecutor and the defendant, may apply for a certain penalty. If the public prosecutor requests the *patteggiamento*, the defendant has to consent. If the defendant requests such proceedings, the prosecutor has to consent. In principle such proceedings require that both parties should have consented, to a certain extent, to a specified penalty and that both express the will to end criminal proceedings by waiving the right to have the case examined in a full trial. There can be no doubt, that at the core of such proceedings, there is the exchange of a sentencing discount, on the one hand, against savings of time and resources, on the other hand. Advantages for the defendant are:

- Costs of proceedings are covered in full by the state.
- The penalty has to be reduced by two thirds of the original range of penalties.
- There are none of the other consequences of criminal convictions (in terms of temporary suspension of, for example, civil rights).

In *patteggiamento* cases the judge decides on the basis of the case file; an ordinary trial does not take place. In principle, all that the judge has to go into is whether the sentence applied for must be considered to be completely out of proportion in view of the seriousness of the crime. While there is no empirical

⁸⁰ Budde, R.: Vereinbarungen im italienischen Strafprozess nach altem und neuen Recht. Zeitschrift für die Gesamte Strafrechtswissenschaft 102(1990), p. 196.

⁸¹ Budde, R.: op. cit., 1990, p. 196; Weigend, Th.: op. cit., 1990, p. 102.

research on the implementation this type of proceeding, unsystematic information does reveal negative attitudes among the public and among victims of crime, whereas defence counsels, prosecutors and judges obviously welcome opportunities for consensual decision-making.⁸²

Finally, the Italian Criminal Procedure Law provides for a procedure that makes it possible to issue a penal order (without a trial) by which a fine may be imposed. This kind of summary procedure takes place on motion of the public prosecutor; however, the penal order has to be issued by the investigating judge.

5.6 The Netherlands

The Dutch Criminal Procedure Code has adopted the expediency principle: § 167 II thereof simply states, that on grounds of the public interest the public prosecutor may elect not to institute criminal proceedings, while § 242 II authorizes dismissal of criminal cases on the same grounds provided that no trial has been opened.⁸³

In Dutch Law and doctrine, there are five categories of disposing cases out of court as a consequence of the principle of opportunity:

- There are other agencies that deal with the offence and the offender (e.g. administrative bodies or youth authorities; professional bodies or employers imposing disciplinary measures)
- The law is going to change – for instance, the impending coming into force of amendments that will alter the status of the behaviour in question (e.g. decriminalization).
- The offence is petty in nature, or it occurred so long ago that the need of punishment has diminished.
- There are certain personal attributes or particulars of the suspect to take into account – for example, he/she is very young or very old.
- There are particularities in the relationship between the suspect and the victim which would make punishment superfluous (e.g. the victim took part in the crime or provoked the crime, a close relationship between victim and suspect, the victim has been compensated, there has been victim–offender mediation).

⁸² Weigend, Th.: op. cit., 1990.

⁸³ Fijnaut, C., van Daele, D.: Zum Einstellungsverhalten der Staatsanwaltschaften in Belgien, Deutschland und in den Niederlanden. Ergebnisse einer ländervergleichenden Analyse. In: Geisler, C. (Ed.): Das Ermittlungsverhalten der Polizei und die Einstellungspraxis der Staatsanwaltschaften. Wiesbaden 1999, pp. 207–28.

Decisions not to prosecute are classified into formal decisions of non-prosecution and informal decisions. Informal decisions are based upon § 167 II; they concern mere factual decisions to stop investigations. In any event, the public prosecutor may then decide to resume investigations and prosecution in the future. Formal decisions on non-prosecution include notification of the judge. No reasons are to be given. However, continuation of prosecution is possible only if there is new evidence justifying resumption of criminal investigation.

Under § 74 of the Dutch Criminal Procedure Code the public prosecutor is authorized to dismiss a case in exchange for the fulfilment of a condition (*transactie*). In principle, a *transactie* is possible in all criminal offences. Felonies are eligible for *transactie* only if the offence statute does not carry a prison sentence of more than six years. The Dutch Ministry of Justice has issued guidelines precluding unwanted discretionary practices in this field; so a suspect has the right to be granted a *transactie* if his/her case falls under categories for which a *transactie* should be offered. The suspect then has to consent to his/her case being dealt with by way of *transactie*. There are four possible conditions that can be offered:

- Payment of a sum of money to the state (minimum 5 guilders (US\$2) and a maximum of what might be imposed as a fine were the case to be transferred to court and sentenced.
- Consent to confiscation of items that in principle could be forfeited.
- Payment of a sum equal to the value of items that in principle could be forfeited.
- Compensation and restitution.

In practice, most conditions relate to a fine to be paid to the state. Of the 255.238 cases dealt with by Dutch prosecutors in 1998, 64.590 (or 25,3 per cent) were dealt with by way of transaction fine.⁸⁴ A further 13,4 per cent were dealt with by way of a decision of non-prosecution without imposing a condition.⁸⁵

⁸⁴ Fijnaut, C., van Daele, D.: Zum Einstellungsverhalten der Staatsanwaltschaften in Belgien, Deutschland und in den Niederlanden. Ergebnisse einer ländervergleichenden Analyse. In: Geisler, C. (Ed.): Das Ermittlungsverhalten der Polizei und die Einstellungspraxis der Staatsanwaltschaften. Wiesbaden 1999, pp. 207–28, p. 224.

⁸⁵ Fijnaut, C., van Daele, D.: Zum Einstellungsverhalten der Staatsanwaltschaften in Belgien, Deutschland und in den Niederlanden. Ergebnisse einer ländervergleichenden Analyse. In: Geisler, C. (Ed.): Das Ermittlungsverhalten der Polizei und die Einstellungspraxis der Staatsanwaltschaften. Wiesbaden 1999, pp. 207–28, p. 221.

Furthermore, Dutch law empowers the police to dismiss cases conditionally, or by way of imposing a transaction fine. Since 1993, petty crimes have been under the jurisdiction of the police, who may dismiss, in particular, cases of shoplifting and drunken driving in exchange for a transaction fine of up to 500 guilders (approximately US\$220).⁸⁶

Ordinary proceedings are instituted by way of an indictment forwarded to the court upon completion of the criminal investigation. Whether to introduce proceedings similar to the French *comparution immédiate* has been the subject of debate for some time. Obviously, however, not much pressure is felt for this, since Dutch criminal procedure enables quite speedy processing of cases. This is due to certain provisions of the law of evidence, which does not necessitate the hearing of witnesses or the presentation of other evidence during the trial. But the judge may restrict the trial to the reading out of documents as well as statements by witnesses (who were interviewed by the police) if defence counsel and defendant, as well as the public prosecutor, agree to such proceedings. Moreover, some 90 per cent of all criminal cases in the Netherlands are dealt with by a single judge (who may impose a maximum of six months' imprisonment). However, in view of the general preference for short-term prison sentences evident in the Netherlands the powers of the single-judge court are considered sufficient to respond to the bulk of criminal cases.

No simplified procedures in writing are available in the Netherlands, the obvious reason for this being that the statutory provisions relating to trials allow for simplified presentation of evidence during trial.

5.7 Portugal

Depending on the type of crime, summary and simplified proceedings are possible under the Portuguese Criminal Procedure Law. If the defendant is caught red-handed and arrested on the spot, a summary procedure may come into effect (provided that the suspect consents), making it possible to try the case within a period of two to five days. Besides the consent of the suspect, such summary proceedings require clear evidence as well as a charge linked to an offence statute not carrying more than three years' imprisonment.

For petty offences Portuguese Criminal Procedure Law provides a penal-order summary procedure (corresponding to the German *Strafbefehlsverfahren*). There

⁸⁶ Pradel, J.: Procédure pénale comparée dans les systèmes modernes: Rapports de synthèse des colloques de l' ISISC. Toulouse 1998, p. 118.

is no trial, and the summary procedure is restricted to criminal offences carrying a maximum of six months' imprisonment. This means that in practice the penal order is restricted to a limited range of offences.

5.8 Spain

Simplified proceedings were introduced in Spain by a new code of procedure of 1989. Such proceedings may take place if offences are charged which carry a maximum of 12 years' imprisonment (Article 779*bis* of the Spanish Code of Procedure). If the suspect and the prosecutor consent, the investigating judge may immediately transfer the case to the court; intermediary proceedings do not come into effect. Such simplified proceedings require that the suspect shall have confessed to the charges laid against him/her, that he/she shall be represented by defence counsel and that the case shall be under the jurisdiction of the single-judge court (sentence is subject to a maximum of six years' imprisonment).

However, the simplified procedure referred to above must be seen in the context of a legal concept or notion which, in Spanish legal language, is known as *conformidad*.⁸⁷ By *conformidad* is meant a summary trial that quite simply allows the defendant to declare his/her consent to the indictment and the penalty proposed in the indictment being forwarded to the court. The consent has to be given in writing by the defendant upon receipt of the indictment. As a consequence the court may impose the penalty proposed by the prosecutor and consented to by the defendant without a full trial (that is to say, without hearing any evidence). Although the law itself does not mention bargaining, it is evident that this type of proceeding requires that prosecutor and defence discuss the case and arrive at a consensus on the outcome.

5.9 Austria

The Austrian criminal justice system is based on the principle of legality. However, the Austrian legislature adopted (in the seventies) a mechanism aimed at substantially excluding petty offences in a principled manner. Article 42 of the Austrian Criminal Code states that a criminal offence may be established only if the act in question – besides falling formally under an offence statute – must be regarded as an act that deserves punishment. Article 42 lays down the conditions that make a criminal act an act that is not punishable:

- ▶ The offence statute does not carry a prison sentence of more than three years.
- ▶ The offence has resulted in only minor loss/damage, and the offender has compensated, or at least seriously tried to compensate, the victim.

⁸⁷ Weigend, Th.: op. cit., 1990, p. 98.

► Punishment to deter the offender from relapsing into crime, or to serve as a general deterrent, is not necessary.

If these conditions are fulfilled, a criminal offence cannot be established and the prosecutor has to dismiss the case (unconditionally). However, the condition as regards full compensation of the victim, or serious efforts to compensate, provides ample opportunities for the public prosecutor to link the decision according to § 42 of the Austrian Criminal Procedure Code with the requirement that the offender compensate the victim. Therefore § 42 was taken as a statutory basis for conducting an experiment, starting in 1992, in victim–offender mediation for adult offenders.

With a recent procedural law amendment (1999) the Austrian Parliament responded to positive evaluation of the 1992 experiment in victim–offender mediation by introducing discretionary dismissal of criminal cases (by Article 90a–m of the Austrian Criminal Procedure Code), an amendment which came into force on 1 January 2000.⁸⁸ Article 90a–m authorizes the public prosecutor to settle a criminal case by imposing certain conditions. These conditions are:

- A fine (upper limit: 180 day fine units).
- Community service (maximum: 240 hours' community service over a period of six months).
- Placement under probation for a period of up to two years (specified obligations may be attached to probation).
- Victim–offender mediation (including compensation and restitution).

The conditions mentioned above cannot be combined. However, the Austrian legislature is looking at making it possible to combine such conditions after a certain period of experimenting with the new provisions.

Conditional dismissal of criminal cases is restricted to offences that do not carry more than five years' imprisonment, and of course conditions may be imposed only with the consent of the suspect. It is further required that the circumstances of the offence are clear and do not pose problems of evidence. Finally, the guilt of the offender has to be considered to be minor.

Austrian procedural law, then, contains simplified or accelerated proceedings that can be commenced in the single-judge court at the lower level (where the maximum penalty that may be imposed is 12 months' imprisonment). In this procedure a formal indictment is not required; a written motion by the prosecutor to impose a criminal penalty suffices. An immediate trial is possible,

⁸⁸ Strafprozessnovelle 1999; Maleczky: Die Strafprozessnovelle 1999. JAP 1999/2000, p. 83.

if the suspect consents to accelerated proceedings and if he/she has confessed to the charges.

5.10 Switzerland

In Swiss procedural laws no particular types of simplified or accelerated procedures exist in any of the cantons (which have their own procedural laws). However, a summary procedure in which a penal order may be issued is generally available. These procedures have to concentrate (as in the Federal Republic of Germany) on criminal cases of a petty or moderately serious nature, which, moreover, do not present problems of evidence. The penal order is to be issued by the public prosecutor (*Bezirksanwalt*), which in this function enjoys judicial independence.⁸⁹ A penal order requires (in addition to the conditions mentioned above) that the suspect has accepted the results of criminal investigation as regards the objective facts; so a confession is not required, as the suspect must not accept personal guilt in relation to negligence or intent. Then, the maximum penalty that can be imposed is either a fine or a prison sentence of up to three months. The defendant has the right to appeal, which will then end in ordinary criminal proceedings.

5.11 Poland

Poland completely revised its Book of Criminal Codes as well as the procedural law in 1997⁹⁰ as part of the changes accompanying the transition into a market economy. The whole criminal system was purged of elements not compatible with international and, in particular, European conventions such as the International Convention on Political and Civil Rights and the European Convention on Human Rights. Both the criminal procedure and the criminal code have been drafted with German criminal law serving as the basic model.

It is not surprising, therefore, that the new Polish criminal law provides for several options regarding out of court or out of trial settlements which are found also in German criminal law but which assign a far greater role to the judge.

In principle, the public prosecutor may opt for non-prosecution only in cases where petty crimes have resulted only in insignificant danger to society (Article 17 subsection 3). Underlying this is the notion of “criminal offence” which according to legal doctrine as developed under socialist regimes is established not by human conduct falling under some criminal offence statute but only by behaviour which exceeds a certain limit of seriousness. Thus the public prosecutor, in deciding the question of “insignificance” is applying the law and

⁸⁹ Schmid, N.: Strafprozessrecht. Eine Einführung auf der Grundlage des Strafprozessrechts des Kantons Zürich und des Bundes. 3. Aufl., Zürich 1997, p. 279.

⁹⁰ Code of Criminal Procedure, Act of June 6 1997; Penal Code, Act of June 6 1997.

not – as in, for example, German criminal procedure – exercising discretion in decisions on conditional or unconditional dismissal of cases.

The new Polish criminal procedure now contains procedural devices that provide for settlement of cases outside the court or outside regular trial. It goes without saying that the move towards introducing such provisions was prompted by the growing caseload that was caused by the dramatic increase in crime and criminal cases accompanying the process of transition.

The rapid and radical political, social and economic changes affecting Central and Eastern Europe and at the same time also Western European countries may be described in brief as transitional periods, processes of modernization and (for Eastern Europe) as deferred modernization. On the surface, some of the changes that have taken place and are still under way are obviously of particular importance for criminal policies and the amendment of criminal codes and procedural law.⁹¹ Among the conditions affecting criminal procedural law and its implementation in the first place, there is the dramatic increase in the volume of crime, which is reported from virtually all countries in Central, Eastern and Western Europe.⁹² On the one hand this increase in crime is accounted for by changes in the opportunity structures as well as by increasing anomy⁹³ (likely to be observed in times of rapid economic and social change).⁹⁴ On the other hand it seems plain that also the unabated weakening of formal and informal mechanisms of control should account for increases in crime, as well as for shifts in offence patterns and the emergence of new types of crime. Then, the considerable increase in the overall crime rate,⁹⁵ particularly the rate of

⁹¹ For a summary see Huber, B., Restle, G.: *Developments of Criminal Law in Europe: An Overview*. *European Journal of Crime, Criminal Law and Criminal Justice* 3(1994), pp. 291-306, pp. 292-3.

⁹² Huber, B., Restle, G., op. cit., 1994, p. 292; Lammich, S.: *Politische Demokratisierung und strafrechtliche Entwicklung in den Ländern des ehemaligen Ostblocks*. *Kriminalpädagogische Praxis* 19(1991), pp.6-14; Sootak, J.: *Estnische Republik*. In: Eser, A., Huber, B. (Eds.): *Strafrechtsentwicklung in Europa*. 4.2 Landesberichte 1989/1992. Vol. 4.1, Freiburg 1994, pp. 411-24; Kanduc, Z.: *Crime in Slovenia. A criminological analysis*. *European Journal of Crime Policy and Research* 3(1995), pp. 64-72.

⁹³ See Joutsen, M.: *Crime Trends in Central and Eastern Europe*. In: Council of Europe (Hrsg.): *Proceedings of the Pan-European Seminar: Crime Policies and the Rule of Law - Problems of Transition*. Ljubljana 1995, pp. 11-32.

⁹⁴ Savelsberg, J.: *Crime, Inequality, and Justice in Eastern Europe*. In: Hagan, J., Peterson, R.D. (Eds.): *Crime and Inequality*. Stanford 1995, pp. 206-24.

⁹⁵ For a description of the situation in Poland see for example Weigend, E.: *Polen*. In: Eser, A., Huber, B. (Eds.): *Strafrechtsentwicklung in Europa*. 4.2 Landesberichte 1989/1992. Freiburg 1994, pp. 1088-1160, pp. 1096-98. In Poland, police-recorded crimes jumped during 1989-90 in absolute numbers from 547.489 (1989) to 883.346 (1990), which amounts to a rate of approximately 2300/100.000 at the beginning of the nineties. The crime rate then seems to have stabilized. In Hungary a corresponding increase is reported, with police-recorded crimes doubling between 1989 and 1992 (1989: 225.393; 1992: 447.215); see

traditional crimes such as property and violent crime,⁹⁶ is reported to be associated with a decline in clearing rates⁹⁷ and an increase in problems of law enforcement.⁹⁸ This, in turn, contributes to perceptions among the general public and professionals of a dramatic decline in the efficiency of law enforcement.⁹⁹ However, the volume of crime reported from countries in transition in Eastern Europe still seems to be comparatively low in view of rates of officially documented crime in countries of Western Europe.¹⁰⁰ Furthermore, it has to be considered that part of the increase could be due to changes in victims' patterns of reporting crime.¹⁰¹ For instance, comparative victim surveys at the beginning of the eighties showed that the Federal Republic of Germany and Hungary experienced quite comparable victimization rates,¹⁰² although police-recorded crime rates differed considerably between these two countries.¹⁰³ Similar evidence is obtained from the International Crime Survey, pointing to victimization rates in urban areas that are fairly similar for various property and contact crimes in Western and in Eastern Europe.¹⁰⁴ With these trends in crime and such trends in public opinion, nearly all countries in transition have been urged to amend criminal procedure law and to adapt to new conditions arising in the course of transition.

Article 335 of the Polish Criminal Procedure Code provides that the prosecutor may attach a motion to the indictment that will go to the court, that the defendant shall be sentenced to a mitigated penalty without trial, if the offence

Farkas, A.: Ungarn. In: Eser, A., Huber, B. (Eds.): *Strafrechtsentwicklung in Europa*. 4.2 Landesberichte 1989/1992. Freiburg 1994, pp. 1629–78.

⁹⁶ Walmsley, R.: *Prison Systems in Central and Eastern European Countries*. Progress, Problems and the International Standards. Helsinki 1996, pp. 15–16.

⁹⁷ Weigend, E., op. cit., 1994, p. 1097. The decrease in clearing rates obviously is linked also to the increase in those types of crimes which (e.g. property crimes) are low-clearing-rate crimes anyway.

⁹⁸ Weigend, E., op. cit., 1994, p. 1097 points to a continuing decrease in the rate of successful criminal prosecutions. At the beginning of the nineties the rate of cases with indictments finalized by the public prosecutor dropped to less than 20 per cent.

⁹⁹ Huber, B., Restle, G., op. cit., 1994, p. 293; Walmsley, R.: op. cit., 1996, p. 16.

¹⁰⁰ See Kanduc, Z., op. cit. 1995, p. 64, where for Slovenia a total crime rate of 22,4/100.000 is reported; for Russia and other countries in transition see Heberton, B., Spencer, J.: *Law Enforcement in Societies in Transition*. *European Journal of Crime, Criminal Law and Criminal Justice* 6(1998), pp. 29–40, p. 31.

¹⁰¹ Kanduc, Z., op. cit., 1995, p. 64.

¹⁰² Kerner, H.-J.: *Kriminalitätseinschätzung und innere Sicherheit*. Wiesbaden 1980; Arnold, H.: *Kriminelle Viktimisierung und ihre Korrelate*. *Zeitschrift für die gesamte Strafrechtswissenschaft* 98 (1986), pp. 1014–58.

¹⁰³ Arnold, H., Korinek, L.: *Kriminalitätsbelastung in der Bundesrepublik Deutschland und Ungarn: Ergebnisse einer international vergleichenden Opferbefragung*. In: Böhm, H. et al. (Eds.): *Kriminologie in sozialistischen Ländern*. Bochum 1985, pp. 65–136.

¹⁰⁴ van Dijk, J.J.M., van Kesteren, J.: *Criminal victimization in European cities: some results of the International Crime Victims Survey*. *European Journal of Crime Policy and Research* 3(1995), pp. 9–21, p. 11.

does not carry a prison sentence of more than five years and if the defendant consents to such proceedings. Moreover, the circumstances of the alleged crime must raise no doubts as to the guilt of the defendant. Finally, there must be indications that the objects of the trial can be achieved without its being carried through.¹⁰⁵ With this type of motion, the prosecutor may also suggest that imposition of a penalty shall be waived, that the proceedings be conditionally dismissed or that a criminal penalty as specified in Article 39 subsections 1 to 3 and 5 to 8 of the Polish Criminal Code should be imposed by the court. These provide for the suspension of civic rights: (1) suspending the right to vote and be elected and to hold public office; (2) debarring the defendant from practising certain professions; (3) prohibiting the defendant from driving a motor vehicle; (4) restitution of the losses caused by the crime; (6) payment of additional compensation to the victim or into public funds; (7) a fine for the benefit of the state; (8) making the conviction publicly known.

By far the most important element in Article 335 of the Polish Criminal Procedure Code seems to be mitigation of punishment, which obliges the court (if it agrees to the motion by the prosecutor) to impose a penalty below the statutory minimum prison sentence. The sentencing options available to the court in proceedings in accordance with Article 335 of the Criminal Procedure Code are very precisely spelled out in Article 60 subsection 8 of the Criminal Code. In the case of serious offences carrying a prison penalty only, a mitigated sentence must not exceed a third of the statutory minimum prison sentence. In case a statute carries alternatively other penalties than imprisonment (fine or restriction of liberty) mitigation consists of refraining from imposing a penalty altogether.

Then Article 387 provides for a sort of guilty plea proceeding (including elements of plea and sentence bargaining) which may be initiated by the defendant prior to commencement of the trial, but also at any time during the course of the trial, up to the close thereof. Here the defendant may introduce a motion for the imposition of a specified penalty and for this to be done without the hearing of evidence. The defendant has the right to be assisted by counsel whom the court has to appoint if the defendant so requests. The court may admit the motion and decide accordingly on condition that the prosecutor and the victim agree and that the objects of the criminal procedure can be achieved without holding a full trial. Moreover, the court may make its decision dependent on changes to the penalty specified and suggested in the defendant's motion.

¹⁰⁵ The objects of the Polish criminal procedure are spelled out in Article 2 of the Criminal Procedure Act. These include: special and general prevention (the latter covering also the positive dimension of general prevention); protection of the rights of the victim and the principles of community life; protection of the innocent; and finding and establishing the truth.

Finally, the Polish Criminal Procedure Act provides for a summary procedure in writing, initiated by the court, if upon examination of the indictment and file the court concludes that a criminal trial is not necessary and that the evidence is clear and if the offence in question carries the penalty of imprisonment or a fine (Articles 500–07). In such cases, the court may issue a penal order by which a fine is imposed. Imprisonment may not be imposed by penal order. Both defendant and prosecutor may appeal the penal order, and, upon appeal, a full trial takes place.

5.12 European Union, *Corpus Juris* and the Draft of a European Criminal Procedure

The recent discussion of European unification and the development of criminal justice in Europe at the instance of the European Commission has resulted in what is now called the *Corpus Juris*, which should be regarded as the core of an evolving European substantive criminal law and criminal procedure. Although confined to the protection of the financial interests of the European Union, essentially to fraud, corruption and money-laundering, the *Corpus Juris* has come up with proposals, that decidedly contain the core of a common European criminal procedure. It seems to be of interest, therefore, to consider what is held in prospect with regard to settlements out of court. In this respect the *Corpus Juris* follows the trends discernible in the major European criminal justice systems. The European prosecution service, as suggested by the *Corpus Juris* working group, should, indeed, have the power to settle cases out of court. The conditions upon which a decision of non-prosecution should be allowed relate to: confession, restitution and/or compensation for the losses on the side of the European Union (Article 19).¹⁰⁶ Furthermore, the *Corpus Juris* provides for an agreement (*Verständigung*) on the case (apparently corresponding to models of settlement as available in many tax law systems), by which criminal proceedings are brought to an end if the suspect confesses and the confession is corroborated by other evidence (Article 22 § 4). However, such an agreement is not admissible in the case of recidivism or certain aggravating circumstances in the crime.

¹⁰⁶ For details see Spinellis, D.D.: Das Corpus Juris zum Schutz der finanziellen Interessen der Europäischen Union. Kritische Vierteljahresschrift 82(1999), pp. 141--61.

6. Comparison of Out of Court Settlement Procedures in Europe

6.1 Overall Trends

The various ways developed in European countries to provide for out of court settlements of criminal cases are shown in the table below. It is evident that there are certain similarities as well as differences. All these jurisdictions obviously try to develop mechanisms that enable criminal justice systems to cope with the growing caseloads and the increasingly complex criminal cases (especially economic crimes) and to improve the performance of the systems in the attainment of objects. However, whereas in the sixties and seventies the focus of the objects pursued by procedures for settlement out of court was definitely on reducing stigmatization and recidivism, the last decade has seen the dominance of cost arguments and the economic rationale. But the last two decades have also seen the victim of the crime again becoming a central figure in the criminal process. In like measure, mediation and compensation have been given considerable attention with a view to justifying conditional dismissals by making mediation and compensation an important argument in policy debates on settlements out of court. However, empirical evidence so far suggests that in most systems mediation and compensation do not play a major role as compared to transaction fines, which are evidently much better suited for routine application and efficient administration.

A common trend – though not present in all systems – is obviously the leading role of public prosecution services in settlements out of court. It seems clear that European legislatures – the latest demonstration of this trend has come from Austria – are increasingly entrusting public prosecution services with more powers for the conditional dismissal of cases. Public prosecution services have slipped into the role of decision-makers and policy-makers. They have become “judges before the courts”. They decide on individual cases. But in the exercise of their new powers, public prosecutors also create and implement new criminal policies, how to approach certain types of crime in general.

There is evidence, too, that this trend is continuing, on the one hand extending such powers on the side of prosecutors and on the other hand increasingly entrusting the police with powers to dismiss cases. In at least the Danish and Dutch criminal justice systems such trends are becoming visible, while in England and Wales cautioning powers have always been part of police powers.

A second common trend seems to be the emergence of elements of bargaining, whether on a statutory basis, as in Spain, Italy and Poland, or on the basis of informal mechanisms as developed by the German courts. With this it is becoming evident also that common law systems and Continental systems or

expediency-based prosecution systems and legality-driven systems are converging substantially.

A third common trend is represented by simplified procedures, penal orders, consisting in administrative types of arrangement with a focus on petty crimes and mass crimes. Here, too, the public prosecutor in most systems has a significant position since it is the public prosecutor's office that initiates such proceedings – although, formally, it is the judge that is responsible for making the penal order. With the aid of simplified proceedings, cases are mostly settled out of court, because trials are not requested, and – according to empirical evidence – penal orders are rarely refused by defendants. As penal orders in most systems are restricted to non-custodial sanctions, simplified procedures in writing may be considered to include some sort of implicit understanding that liberal sentencing discounts are granted in exchange for acceptance of so economical a mode of processing.

Country	Out of Court Settlement Procedures in Europe			
Germany	§§ 153, 153a: Conditional or unconditional dismissal by the prosecutor; conditions that can be imposed: transaction fine; community service, compensation	Penal order No trial; issued by the judge on motion of the public prosecutor; maximum penalty: day fine or (if defendant is represented by a lawyer) suspended prison sentence of up to 12 months	Informal agreements: On an exchange of confession against a mitigated penalty. No statutory basis, but accepted by Constitutional and Supreme Court Essential requirements: Sentence must remain within what is considered to be proportional punishment. The agreement has to be made public during trial.	
Denmark	Art. 722 DCPC: Unconditional and conditional dismissal of cases in discretion of public prosecution services	Summary Fine Procedure (imposed by the public prosecutor)	Shortened Procedure <i>Requirements:</i> Confession, consent <i>Consequences:</i> No formal indictments No hearing of evidence	
England and Wales	Cautioning by police	Guilty Plea Requirements: fit to plead guilty <i>Consequences:</i> No trial, immediate sentencing		

France	Transaction fine imposed by the public prosecutor as condition for dismissal of case <i>Requirements:</i> Consent of court; hearing of victim; compensation of victim.	Summary fine by police Imposition of a fine in a simplified (written) procedure.	<i>Comparution immediate</i> <i>Requirements:</i> Offence does not carry more than 7 years imprisonment; defence counsel; consent by the defendant; case must be suited for immediate trial <i>Consequences:</i> Trial takes place immediately; defendant can be detained for a maximum of 5 days	
Italy	Summary (in writing) procedure: maximum penalty: fine	Summary proceedings <i>Requirements:</i> Offence may not carry life imprisonment; defendant must consent. <i>Consequences:</i> Penalty reduced by one third. Sentencing decision based on investigation files. Decision made by the investigating judge.	Sentencing on motion of the parties <i>Requirement:</i> Defendant must consent; penalty imposed not to exceed two years imprisonment <i>Consequences</i> Penalty reduced by two thirds; decision based on investigation files; no trial.	Direct/Immediate Trial <i>Requirements:</i> Confession or <i>in flagrante</i> offence. <i>Consequences:</i> No intermediary procedure. No formal indictment. <i>In flagrante:</i> Trial within 48 hours. Confession: Trial within 15 days after transfer of the case to public prosecution services.
Holland	Transaction fine Imposed by: either the police in cases of petty crimes, subject to maximum of 500 guilders, or the public prosecutor in any criminal offence: size of transaction fine limited by the statutory limits of a criminal fine.			
Portugal	Summary penal order proceedings (in cases of criminal offences not carrying more than 6 months of imprisonment)	Abbreviated proceedings <i>Requirements:</i> The suspect was caught red-handed for a criminal offence not carrying more than 3 years of imprisonment. <i>Consequences:</i> No formal investigative and intermediary proceedings. Trial had to take place within five days.		

<p>Austria</p>	<p>Conditional Dismissal:</p> <p><i>Requirements:</i> Consent of suspect; offence carries maximum of 5 years' imprisonment; circumstances are clear; minor guilt.</p> <p><i>Consequences in terms of conditions:</i> Fine or community service or probation or victim-offender mediation.</p>	<p>Summary penal order proceedings</p> <p><i>Consequence:</i> No trial.</p>	<p>Accelerated proceedings in the single-judge court</p> <p><i>Requirements:</i> Criminal offence charge punishable by maximum of 12 months' imprisonment.</p> <p><i>Consequences:</i> No formal indictment. Minimum period between indictment and trial 3 days. If defendant consents and evidence is clear, trial may commence immediately.</p>	
<p>Switzerland</p>	<p>Summary penal order proceedings</p> <p><i>Requirements:</i> Defendant has accepted the objective facts revealed by investigation; Petty crime or moderately serious crime; Clear evidence; Maximum penalty that may be imposed by penal order: Fine, or Prison sentence of up to three months</p>			
<p>Spain</p>	<p>Conformidad</p> <p>The defendant agrees with the penalty as suggested in the indictment. The court imposes the penalty without a trial and without hearing evidence.</p>	<p>Shortened Procedure</p> <p><i>Requirements:</i> The alleged offence does not carry a penalty exceeding 12 years. No more than 6 years' imprisonment expected to be imposed. Confession. Defence counsel available. Defendant consents.</p> <p><i>Consequences:</i> Investigating judge immediately refers case to the competent court. No intermediary hearing.</p>		
<p>Poland</p>	<p>Non-prosecution</p> <p>On grounds that dangers arising out of offence are insignificant (through the prosecutor).</p>	<p>Conviction and sentence on motion of public prosecutor</p> <p><i>Conditions:</i> Alleged offence does not carry a sentence exceeding 5 years' imprisonment. Consent of defendant. Clear evidence. Objects of criminal procedure must be attained without trial.</p> <p><i>Consequences:</i> Mitigated penalty. No criminal trial.</p>	<p>Conviction and Sentencing on Motion of the defendant</p> <p>Defendant moves for conviction and sentencing without trial and without evidence being heard and specifies penalty to which he/she agrees.</p>	

Belgium	Conditional Dismissal of criminal cases: Full discretion – no restrictions as to type of offence. <i>Conditions to be imposed:</i> Fine; Community Service; Mediation/Compensation.			
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6.2 The Range of Criminal Offences coming within the Ambit of Out of Court Settlements

All out of court settlements, whether by way of unconditional and conditional dismissals by the public prosecutor or court-based bargaining and settlement procedures cutting out a full trial, are aimed primarily at petty offences and moderately serious crimes. However, it seems clear that there is a certain tendency to move deeper into serious crime with conditional dismissals since, from the very beginning, court-based settlement arrangements have been developed and implemented to respond also to cases of serious crime, particularly complex cases of economic crime.

6.3 Basic Elements of Out of Court Settlements

Consent and/or confession are undoubtedly the most important elements of out of court settlements. There are numerous variations of these elements; however, there seems to be convergence towards consent as the major requirement for the application of out of court proceedings.

As regards evidence available, that is to say, sufficient evidence or requirements in relation to factual circumstances that make a case suited and eligible for out of court procedures, there is something of a double bind. This is so because, in various systems, out of court settlements have obviously been introduced with a view to disposing of complex cases of economic crime. In general, if, actually, economic considerations of conserving resources and saving time were the most important motifs, then criminal cases eligible for transaction fines and the like should be fraught with serious problems of evidence, since only such cases could be considered likely to be conducive to savings for the criminal justice system – which would then justify sentencing discounts. However, it is evident that at least the bulk of the cases involving mass and petty offences will actually be characterized by, for example, clear and simple factual circumstances that do not call for a full trial.

Finally, there remain many open questions surrounding a most important issue: the sentencing discount and the size of discounts that can be offered in exchange for consenting to out of court proceedings. In this area there are certainly

important links to sentencing theory. More often than not, statutory guidelines either reduce possible penalties to non-custodial penalties (as in both penal order procedures and conditional dismissals) or cut the range of penalties by one third or two thirds (an option quite often used in statutory guidelines on mitigation in sentencing).

6.4 Concerns and Conflicts

In summarizing the concerns and conflicts surrounding the emergence of out of court settlements we may note the following:

There are concerns about equal treatment where public prosecutors are entrusted with powers to create and to implement non-prosecution policies. In the Dutch system, recently, general prosecution and sentencing guidelines for public prosecutors have been introduced. These guidelines very precisely define those cases that must be prosecuted or dismissed and provide for detailed rates as regards the size of transaction fines. It seems plausible that such guidelines should be implemented wherever prosecution services take on the functions of a sentencing judge.

Throughout Europe the problem of division of powers has been addressed in the face of public prosecutors' increasing powers of conditional and unconditional dismissal of criminal cases. On the one hand, undoubtedly, the trends described above undermine the role of parliament and the operation of the law; on the other hand the judicial system is in danger of becoming marginalized.

The proper response to the problems that current policies have tried to address by "settlements out of court" seems to be rather statutory decriminalization, particularly of petty crimes. Here the provision of § 42 Austrian Criminal Code -the prerequisite that an act must be regarded as deserving punishment - might serve as a model. Thus, the courts would, again, be in the position to control efficiently the outcome of criminal proceedings.

With the extension of the authority of the police and prosecutors to settle cases, a sort of executive law characterized by informality and discretionary powers is spreading rapidly. This runs counter to conventional principles of law.

Control of discretion and the risk of abuse of power have been prominent arguments on the agenda, too. Control of discretion and proper responses to the risk of abuse are linked to the victim's position in the procedure on the one hand and to the question of transparency of out of court settlements on the other. In particular, the victim's position is of paramount importance, not only for the purpose of control, but also for pursuing victim policies irrespective of whether the case is settled outside the courts or within the framework of trial procedures. In this respect the French model offers a feasible solution, since victims of crime have to be informed how the case is processed and may be heard by the

public prosecutor or the court. As regards possibilities of appeal on the side of the victim of crime, the goal of simplification and cost-saving certainly gives rise to arguments against formal powers of appeal for the victim.

Finally, the principle of presumption of innocence definitely suffers when it comes to arrangements for out of court settlements. The main argument used in favour of accepting out of court settlements and in view of presumption of innocence concerns "consent". But then out of court settlements should be safeguarded by rules that can be derived from the concept of "informed consent" controlled either through defence counsel or appeal mechanisms that allow for the reinstatement of procedures should the principles of "informed consent" not have been complied with.