Police and Prosecutions: Vanishing Differences between Practices in England and Germany

By Michael Jasch[*]

A. Introduction

Police powers of discretion to discontinue criminal proceedings are rather exceptional in Europe, where most Criminal Justice Systems are based on some kind of principle of legality. Germany and England may be regarded as contrasting examples for different decision-making-models on the question whether or not to prosecute an offender. Germany, with a principle of compulsory prosecution theoretically guiding the work of public prosecutors— compared to England, where already the police have significant powers of discretion when deciding about a case. In recent years, however, the differences between the practice of these principles seem to have vanished: Whereas some German federal states have started to involve police in prosecution decisions, policy makers in England try to restrain the traditionally wide discretion of police in dealing with cases of minor crimes. Interesting lessons that might be useful for future harmonization of European criminal justice systems can be drawn from the experiences in both countries.

B. Police Cautioning in England and Wales

Once the police in England and Wales have arrested an offender, they have in theory four alternatives how to proceed: (1) they might take no further action in cases of very minor violations of the law; (2) give an informal warning; (3) administer a formal police caution; or (4) decide to prosecute by sending the case to the Crown Prosecution Service. All but the last-named option have the effect of diverting the offender from the criminal process. If the officer in charge decides to formally caution the suspect, his case will be discontinued at police level and no prosecutor will get to know the case. The caution is usually given to the offender at the police station and by a senior officer in uniform, who should remind the offender not to violate the law in the future. Although a caution is no criminal sanction and results in immediate termination of the case, it should be recorded in the National Police

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Computer. If the offender should be prosecuted on a subsequent occasion, cautions can be disclosed to courts in antecedent statements when relevant.

Police Cautioning has, at least for adults,[1] no statutory basis since it derives from the police role in the English justice system as it has developed for some centuries: Until 1985, when the national Crown Prosecution Service was set up, it had been for the police to decide on the prosecution of offenders and to present the case in court.[2] The cautioning of adults is governed only by the National Standards for the Cautioning of Offenders, set out in Home Office Circulars.[3] According to the Circulars, a formal caution should only be given if four basic criteria are met:

(1) There must be evidence of the offender's guilt sufficient to give a realistic prospect of conviction in case of a court trial,
(2) the offender has admitted the offence and
(3) has given an informed consent to being cautioned.
(4) It is, according to the police, in the public interest to caution the offender instead of prosecuting him or her.

Home Office Circulars, aimed at ensuring more nationwide consistency of the cautioning practice, are not legally binding for the police. There is, however, an indirect obligation to meet the requirements of the Circular for the police because the decision to caution might be challenged in court by the offender. Since the ruling in *R. v. The Commissioner of the Police for the Metropolis ex. p. P.*,[4] English courts accept the National Standards as criteria when deciding about the lawfulness of a caution. Yet, this remains a weak safeguard because very few persons who have given their consent to a caution go to court afterwards. By now, formal police cautioning has become the most important instrument of the English criminal justice system for dealing with minor crimes efficiently and diverting offenders from courts. Currently, about one third of all offenders known to the police are cautioned and do not have to appear in a criminal court. In 2002, the cautioning rate[5] for indictable

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[1] The cautioning of juveniles has been replaced recently by reprimands and final warnings administered by the police, *see infra*: B. Police Cautioning in England and Wales.

[2] M. Jasch, *Perspektiven der polizeilichen Entscheidungsmacht – Strafverfahrensabschluss und Polizei in Deutschland und England*, Frankfurt (Main) 2003, (describing the development of the English system of prosecution).

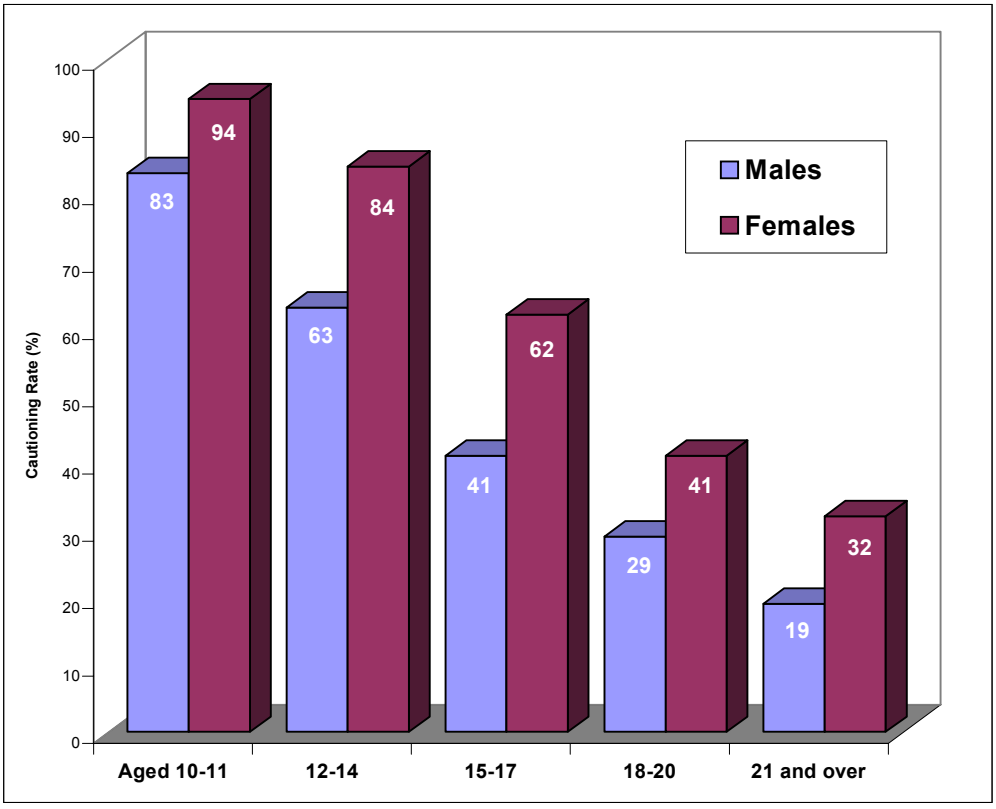
[3] Latest version: HOME OFFICE CIRCULAR 18 (1994).

[4] Q.B. Div'l Ct., The Times, May 24, 1995.

[5] *See* Criminal Statistics England and Wales, Tab 2.1 (2002), (showing the proportion of offenders formally cautioned as a percentage of those found guilty or cautioned (excluding motoring offences)).

offences was 30 percent – due to an increasingly restrictive criminal justice policy – the lowest in the previous ten years. The offences dealt with by cautioning range from theft, burglary and drug offences to interpersonal violence. There are significant differences in the use of cautioning with regard to the age and sex of the offender. In the first place, cautions are given for juvenile offenders (see figure). Across all age groups, females are more likely to get cautioned instead of prosecuted than males, which might be due to different patterns of crime committed.

Figure: Cautioning rate (percentage) for indictable offences by sex and age groups, England and Wales 2002



There are several benefits of cautioning to consider. When a criminal offence has been committed, a police caution may be administered with less workload for the

criminal justice system in comparison with prosecutions. Obviously, no public prosecutor must be concerned with the case. Furthermore, the English experiences indicate that by simply cautioning, the police save time in dealing with crime. According to officers, preparing a proper case file for the prosecution service and communications with prosecutors takes on average about four times as long as the administration of a formal caution does. With regard to crime prevention, police cautioning in England has proven to be at least as effective as court sanctions against minor offenders. Juveniles who are given police cautions show relatively low rates of recidivism after being cautioned. According to Home Office studies, about 68 percent of these juveniles do not reoffend after having received a police caution. Research into recidivism of offenders of all age groups has concluded that just 13 percent of the offenders cautioned are registered by the police because of a new offence within a follow-up period of two years.[6] Therefore, compared to prosecutions, police cautioning offers advantages with regard to the efficiency of the criminal justice system as well as to crime prevention.

Although cautioning is widely perceived as unbureaucratic, fast and "often the most effective mean to prevent further crimes,"[7] the practice of cautioning raises serious questions as to the legal context and the extent of police powers. For decades, lawyers, criminologists and politicians have criticised the enormous regional variations in cautioning rates that amount to a kind of "justice by geography." In 2002, cautioning rates for all offenders varied between 54 percent in the Constabulary of Dyfed-Powys (Wales) and only 17 percent in South Yorkshire and Cleveland.[8] For adult male offenders, cautioning rates ranged between nine and 42 percent. Empirical studies have shown that these variations are not due to local patterns in crime or different offender populations in particular Constabularies, but rather to different policies and working attitudes of the local police towards cautioning. In other words, police discretion has been the most important reason behind geographic variations in the use of cautions instead of court prosecutions. The scope of discretion also seems to be the main cause for the problem of multiple cautioning: In contrast to official guidance issued by the Home Office, some police forces use cautioning as a reaction even for offenders who have a record of a considerable number of previous, sometimes even serious offences.

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[6] S. Keith, 32 HOME OFFICE RESEARCH BULLETIN 45, London (1992).

[7] HOME OFFICECIRCULAR, *Tackling Youth Crime*, para. 5.9, London (1997).

[8] *See* Criminal Statistics England and Wales, Tab 2.4 (2002), (showing the cautioning rates for indictable offences without motoring offences; data for the police area of Leicestershire have been ignored because of an exceptional shortfall in the number of cautions reported in 2002).

Moreover, critical questions have been raised about the impact of cautioning on the position of victims within the criminal justice system. If proceedings are discontinued already on the police level, victims of crime often get no opportunity to present their views of the incident and to pursue their legal interests. In England, Home Office Guidelines ask the police to take the victims view into account when deciding about prosecuting an offender or not.[9] Yet the lack of transparency, publicity and control of the decision-making process leaves victims with less chances to articulate their viewpoint than they would have in a court trial. Furthermore, the victims chances of receiving compensation may suffer. It is not surprising that the number of compensation orders imposed by courts have decreased in the decade between 1981 and 1991 while cautioning rates have increased substantially.[10]

The most important problem with the English cautioning practice might be the position of the suspect. If it is not obvious who committed an offence, or if an act really was a criminal offence in terms of the law, suspects might find themselves in an awkward position. The offer of a caution if he or she confesses puts enormous pressure on suspects – specifically if police make it clear that prosecution will be the alternative. Especially young persons and suspects who have limited abilities to express themselves, inadequate access to legal advice, a previous criminal record, or other reasons to be afraid of a court trial might well be inclined to confess in order to avoid a court trial with an uncertain result. Similar problems arise usually from the practice of plea bargaining at the court level,[11] however, there is even less transparency of the proceedings when police offer a caution in exchange for a confession. Furthermore, because the decision to caution usually takes place behind the closed doors of police stations, it is questionable if all recorded cautions meet the official requirement of a "clear and unequivocal" confession. A research study into police interrogation of juvenile suspects concluded that there was no clear confession in one out of five police interviews with juveniles who received a formal caution. In some cases, the suspect had even explicitly denied the alleged offence but was, nevertheless, cautioned by police.[12]

Facing the problem of a diverse and opaque cautioning practice, England's criminal justice policy has begun to curtail the wide discretion of the police. In June 2000, the traditional cautioning as described above was replaced by a new system of rep-

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[9] HOME OFFICE CIRCULAR, National Standards for the Cautioning of Offenders, Annex B, para. 4.

[10] A. ASHWORTH, THE CRIMINAL PROCESS. AN EVALUATIVE STUDY 142 (Oxford 1995) (referring to the Criminal Statistics for England and Wales).

[11] *See* M. McConville, L. Bridges, *Convicting the Innocent*, 160 NEW LAW JOURNAL (1993).

[12] R. Evans, *Police Interviews with Juveniles*, RCCJ Research Study No. 8, London (1993).

rimands and final warnings for juvenile offenders under the Crime and Disorder Act 1998.[13] For the first time, the act provides a statutory basis for police warnings and limits the maximum number of warnings a single person may receive to three. Furthermore, the Criminal Justice Act 2003[14] has recently introduced conditional cautions[15] that may be given to offenders aged 18 or over by police or prosecutors on a statutory basis.

C. The Role of the Police in Germany

Cautioning as it is in operation in Britain would be impossible under current German law. It would be incompatible not only with the Criminal Procedure Act StPO (*Strafprozessordnung*) but also with principles of the constitution. Criminal proceedings in Germany are based on the principle of legality. Whereas prosecutors are entitled to exercise exceptional powers of opportunity to discontinue cases without a trial, there are no such options for police officers. A strict principle of legality applies to the police and obliges them to investigate every single crime they have noticed and, subsequently, to send all their investigations to the prosecution service (§ 163 StPO). Deciding on the question whether to prosecute or not is entirely up to the prosecutor (§§ 152, 170 StPO). Basically, parliament would be able to amend the Criminal Procedure Act, but not so radically that constitutional principles would be neglected. A formal police caution, however, which has to be recorded and can be cited in court like a previous conviction stigmatises the person cautioned, practically serving as a criminal sanction. And the imposition of criminal sanctions is, according to Art. 92 of the German constitution, a monopoly of the independent courts and not a matter for executive agencies like the police.

Nevertheless, the introduction of a police caution which terminates criminal proceedings in Germany could be realized.[16] A formal police warning, based on a parliamentary act, dependent on clear and precise statutory conditions which have to be met and without a recording that would be as incriminating as a previous conviction could be introduced into the German system without violating constitutional law. Furthermore, there should be a fixed maximum number of cautions for any offender and he or she should be entitled to appeal against the police decision. A precise statutory regulation of the conditions and the decision-making process is

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[13] CJA 1998, sec. 65.

[14] CJA 2003, part 3, sec. 22.

[15] A conditional caution may be given as a caution attached to conditions of reparation or rehabilitation. Criminal proceedings will be discontinued if the offender meets the condition.

[16] *See* Jasch, *supra* note 3, at 213 (showing the legal framework for a reform).

not only a constitutional requirement, but might also be the best means to avoid the difficulties with cautioning that occurred in England. Most of the problems of the cautioning practice noted above have their roots in the lack of clear, detailed and binding statutory provisions.

However, there are currently no initiatives at the national level to extend police responsibilities with regard to the decision on criminal cases. Five years ago, the then Secretary of Justice, *Däubler-Gmelin*, proposed the introduction of a fixed police fine especially for shoplifting if a certain amount of damage would not have been exceeded.[17] But her plan failed because of vehement protests of academic lawyers as well as representatives of the courts, the prosecution service, and the police. Despite this failed attempt to establish an independent police force responsible for sanctioning minor offenders at the national level, two federal states have started pilot schemes in order to involve police in the decision-making process. In the federal state of Saxony and the Bavarian city of Nürnberg, police have been encouraged to create the conditions legally required for a conditional withdrawal[18] of the proceedings in cases of shoplifting. If the offender agrees to pay a fixed sum of money either immediately at the police station or later within a certain period of time, the case file will be sent to the prosecutor with the police recommendation to discontinue the proceedings. Formally, the decision is still up to the prosecutor – as required by the law. However, it is very unlikely that he or she refuses to consent as long as the police stick to the case criteria agreed upon. First reports on the new schemes are promising: Research into both projects show that similar effects as to the length of proceedings may take place in the context of a system of legality as it has been described above for England. Police in the federal state of Saxony offered to arrested shoplifters to pay a certain prosecution fine in advance. During a pilot period, proceedings in Saxony turned out to be less time consuming for police officers as well as for prosecutors.[19] A systematic evaluation of the almost identical project in Nürnberg found a considerable shortening of proceedings, yet additional efforts of police officers were necessary to achieve this goal.[20] Such pilot projects reflect a tendency in Germany to strengthen the police role in the proceedings against petty offenders – even though there is no political majority at the moment to change the national law on criminal procedure.

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[17] *See*, H. Däubler-Gmelin, *Schwerpunkte der Rechtspolitik in der neuen Legislaturperiode, in Zeitschrift für Rechtspolitik* 81 (1999), and for a critique of her proposals: E. Weßlau, Strafgeld, *und kein Ende, in Deutsche Richterzeitung*, 118 (2000); H. Ostendorf, *Polizeiliches Strafgeld, in Neue Kriminalpolitik*, 7 (1999).

[18] According to § 153 a StPO. The approach of the pilot projects applies only to offenders aged 18 or over.

[19] W. Sprenger, T. Fischer, *Verbesserte Verfolgung des Ladendiebstahls. Eine Zwischenbilanz des sächsischen Verfahrensmodells, in Zeitschrift für Rechtspolitik*, 242 (2001).

[20] E. Minthe, *Soforteinbehalt bei Ladendiebstahl, Wiesbaden*, 132 (2003).

It is, however, noteworthy that there is a kind of adaptation of such – regarding police powers – antagonistic systems like the English and the German. Moreover, the question whether a criminal justice system is based on discretion or the principle of compulsory prosecution appears to be not the crucial point for the administration of justice because similar problems arise in both systems: The German principle of legality should, in theory, ensure a maximum of consistency and equality in application of the criminal law. Nevertheless, the reality looks different. There are important concerns as to the enormous variations in diversion policies of different federal states, even of different court districts within these states.[21] Hence, the crucial question is rather how to manage the discretion inherent in criminal justice decision-making.

D. A Need for Reform in Germany

In recent decades, Germany's criminal justice system has gotten more and more into a dilemma: On the one hand, numbers of registered minor offences have been growing steadily. On the other hand, criminal justice services – like most other public services -- have gotten too expensive for the state and federal-state governments to maintain their usual performance in the face of budget crises. Nowadays, the workload of police and prosecutors are dominated by cases of minor or intermediate crimes. In 2003, German police registered about 6.5 million criminal offences in total, among them 1.54 million thefts without aggravated circumstances. In the vast majority of these cases, the damage caused by the offender was very minor: In 46.5 percent of these offences a damage of less than 50 Euro was reported to the police. In shoplifting cases, the rate of offences with a damage below that line was 76 percent.[22] Even among other offences, *e.g.*, fare dodging, embezzlement, slander or bodily harm between juveniles, there are many cases which do not require the ´last resort´ of a criminal sanction.

For decades, some criminal lawyers have called for a decriminalisation of certain minor offences. However, criminal justice policy in Germany has adopted a strategy of procedural decriminalisation instead of repealing statutory provisions: During the last 30 years, the options for public prosecutors and courts to withdraw cases unconditionally or conditionally were permanently extended. Today, about 50 percent of all formal proceedings against suspects are already discontinued at the prosecution service level without a charge. In 2001, the total number of withdrawals and prosecution fines exceeded the number of charges brought to court for

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[21] *See* P.-A. Albrecht, Kriminologie, § 19, (2nd ed); Jasch, *supra* note 3, at 198; J. FIONDA, PUBLIC PROSECUTORS AND DISCRETION: A COMPARATIVE STUDY, 134 (1995).

[22] *See*, Bundeskriminalamt, Polizeiliche Kriminalstatistik, Wiesbaden, Tab. 1.7 (2003).

the first time.[23] Policy makers in Germany should recognize that it is nothing but a waste of resources when a prosecutor's job mainly consists of spending time filling out paperwork on cases that are going to be withdrawn anyway. Almost 20 years ago, a senior prosecutor complained that "half of the workload of a public prosecutor consists of putting a stamp `Withdrawal´ on a few pages of police reports."[24]

Obviously, the limited resources of the criminal justice system should be used more sensibly. During the last two decades, a changing perception of crime problems in society and politics has led to new and additional responsibilities for prosecutors as well as for police officers. Proactive crime prevention strategies, the investigation of serious crime, phenomenon like domestic violence, white-collar, and organized crime, and - more recently – international terrorism, are working fields where the manpower is missing because it has been bound to the administration of minor cases.

A reform of police powers seems to be recommendable not only because there is an urgent need for a more efficient way of dealing with minor crimes, but also because it could reduce the current gap between the law and the reality of police practice in Germany.[25] Nowadays, it is an open secret among practitioners that police do not adhere to the strict principle of legality[26] that is stated by law (§§ 152 II, 170 StPO). Perhaps, the realisation of such a principle is inherently impossible for police in a modern society. Police officers use a certain degree of discretion every day when they allocate their resources differently, "convince" victims to refrain from reporting petty offences or when they turn a blind eye to some acts that might violate the law. As long as lawyers and policy makers stick to the myth of a strict principle of legality, they deprive themselves of the chance to regulate police discretion in a transparent and constitutional way. If exercising discretion is inevitable for police, we should face the facts and regulate them by means of the law in the interest of an equal and constitutional police work.

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[23] In 2001, 1.14 million cases were prosecuted or dealt with by a prosecution fine compared to 1.21 million withdrawals according to §§ 153 ff. StPO (Statistisches Bundesamt: Rechtspflege 2001, 140). Some German lawyers and criminologists are deeply concerned about the growing control of the executive level on the criminal justice system; *see, e.g.*, P.-A. Albrecht, *supra* note 21, § 19 II; W. Naucke, *Schwerpunktverlagerungen im Strafrecht, in Kritische Vierteljahresschrift*, 135 (1993).

[24] H. J. Kerl, *Das Opportunitätsprinzip als Magd des Legalitätsprinzips, in Zeitschrift für Rechtspolitik*, 312 (1986).

[25] For a detailed reform proposal, *see* Jasch *supra* note 3, at 192.

[26] *See,* J. FEEST AND E. BLANKENBURG, DIE DEFINITIONSMACHT DER POLIZEI (1972).

For German lawyers and their criminal justice system, such a reform would amount to a kind of revolution since it partly cuts with a long tradition of the distribution of responsibilities between police and prosecution service and extents the scope of discretion within a system, still committed to the principle of legality. Nonetheless, the anticipated advantages for the efficiency and transparency of the administration of criminal justice makes it worth trying.