TIME LIMITS ON THE PROSECUTION OF CRIMES:

A THEORETICAL AND COMPARATIVE STUDY OF ENGLISH AND GERMAN LAW

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ABSTRACT

This thesis examines the legal regulation and practice of using the criminal law when significant time has passed since the commission of an offence. It compares the law in England and Wales and Germany, two jurisdictions that have evolved seemingly opposed positions. While there are mandatory rules barring prosecution across the board in Germany, there are no such generally applicable rules in England and Wales.

The thesis explores the origins and evolution of these positions. It attempts to explain why these different legal systems have adopted contrasting positions regarding the passage of time in criminal law. For this purpose, the thesis analyses the current state of the law as well as the history of these mechanisms. The degree of centralisation of the prosecutorial function and the authority of the state to prosecute emerge as crucial to understanding the differences and similarities between the two jurisdictions.

The work also evaluates which forms of time limits are preferable and under what circumstances. Two models are compared: one discretionary and one categorical in nature. Rather than obtaining a positive justification from the aims of the criminal law and procedure, both modes of limitation provide effective limiting mechanisms. The interests of the crime victim may justify the use of discretionary limits while the perspective of the accused may support categorical limits on the state's power to prosecute. Considered from the point of view of the state, categorical limits may comply with functions that otherwise would require additional constraints and related mechanisms. A recognition of the law's own fallibility is institutionalised through this form of limits. The thesis concludes by drawing some lessons for a legal regime which seeks to place temporal limits on the power to prosecute.

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After trying to elucidate the relevance or irrelevance of time for our practices in criminal law, the doctorate itself taught me that '[i]f by eternity is understood not endless temporal duration but timelessness, then he lives eternally who lives in the present' (Wittgenstein, Tractatus Logicus Philosophicus, 6.4311). Thank you for being there; long live you all.

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CHAPTER 1. INTRODUCTION

Tiempo en el tiempo, el hombre, dónde estuvo?
Pablo Neruda, Alturas de Macchu Picchu

Faced with the passage of time, the poet in our epigraph questions where man has been. The legal theorist faced with the passage of time may enquire where the law has been when no reaction follows a relevant event for a long time. The law sometimes seems to have an answer to this question: across jurisdictions and in different areas, the response is to bar legal actions. In the criminal law, the most visible version of such bars is time limits or limitation periods. Limiting the power to prosecute crimes due to the passage of time might be conceived as a form of 'ordered forgetfulness'.[1]

This thesis aims to understand the reasons for and against prosecuting crimes after a long time, as well as which mechanism or legal regime best encompasses these reasons. No single mechanism is used to deal with the passage of time around the world. A comparative analysis of England and Wales, and Germany can help understand how the law can be different and embody different values, as well as share significant similarities.

It is generally understood that English law does not feature a comprehensive system of specific limitation periods while in Germany there is a carefully worked out and mandatory system of limits. This seems to be a striking difference, since the most drastic possible effect of the passage of time in criminal law is a ban on prosecution and conviction. It is often said that in England and Wales, the dominant maxim is *nullum tempus occurit*

[1] Andreas Piekenbrock, *Befristung, Verjährung, Verschweigung und Verwirkung: eine rechtsvergleichende Grundlagenstudie zu Rechtsänderungen durch Zeitablauf* (Mohr Siebeck 2006) 3.

regi. Contrary to a general perception among lawyers of a wide difference in the operation of systems like the English and the German, the outcomes seem to be very similar. What does this tell us about how law is understood, and how it actually works?

This thesis compares temporal limits on the prosecution of crimes in England and Wales and Germany. It does so by first describing and analysing that law as it stands today. The analytical structure of the first chapters is not the one usually followed by lawyers when describing their own legal system, but one designed to make comparison possible. Such comparison is undertaken later, considering the traditional comparative tropes of legal families and traditions, as well as a contrast of the specific legal institutions interacting to limit the prosecution of crimes (such as limitation periods) and other surrounding and related mechanisms which are affected by the passage of time (such as the effect of time on sentencing and procedural fairness).

The thesis reveals that between the two legal systems under study there is a striking difference in their self-perception about how time affects the prosecution of crimes. At the same time, there is an important degree of functional equivalence, when all the more complex regulation and the practical effects are considered. These realisations cannot be explained exclusively by reference to the legal traditions or procedural families to which Germany and England and Wales are usually considered to belong.

An enquiry into the history of time limits in both legal systems sheds some light on the reasons for the contrasting structuration of these regulations, and also about why they share a function. A known divergence is related to the influence of Roman law, or the lack of it. The thesis does not merely acknowledge this point, though. It proposes an interpretation regarding the extent of that influence in contemporary limitation law for

Germany as well, highlighting a break with the Roman tradition. For the more recent history, the explanatory potential of other changes in the criminal justice system and the distribution of powers between agencies is analysed. Thus, the relevance of the creation of police and prosecutorial bodies can be seen in England. In Germany, the political context impacts on the use and nature of time limits.

After this historical analysis, the thesis moves to a more abstract level, detaching from the features of existing legal systems and adopting the construction of two modes of temporal limitation in order to analyse how a system could be assessed if it was based on one pure form. With this strategy, the most discussed points in the literature on criminal limitation periods are revisited, as well as some more innovative approaches. To the first category belongs an analysis of the two modes of limitation from the point of view of the aims of criminal law, procedure and punishment. One chapter is dedicated to the forward-looking aims of punishment and the effects of time limits on deterring or preventing the commission of crimes. The next is devoted to backward-looking aims of the criminal law and a reflection about whether there is a problematic withdrawal from due retribution when a long time has passed. In different ways, and despite the efforts of various authors to justify limitation periods by reference to them, both modes of limitation are shown to yield little towards the accomplishment of these aims of the criminal law. In terms of the aims of criminal procedure, the two modes of limitation reveal themselves as appropriate depending on the type and role of the prosecution that they interact with, and conversely with the role of the legislator in defining the best way to comply with those aims.

The thesis then explores the performance of the two approaches to limitation from the perspective of the victim, the accused, and the state. With regards to the first, a theoretically constructed interest of the victim is analysed from different perspectives

(participation, voice, validation, vindication, and accountability of the offender). The recognition that victims play different roles depending on the design of the criminal justice system more broadly leads to a more concrete assessment of the performance of time limits depending on those structures, as well as the developments in the ambit of European human rights law.

For the accused, two paths are followed. First, the continuity of the identity of the accused is examined in order to determine the plausibility of the thesis challenging the ascription of criminal liability to a person for a deed committed in the distant past. The second path determines to what extent there are humanitarian concerns with establishing a criminal law that is temporally unconstrained as a threat to a person's dignity.

When it comes to the perspective of the state, this thesis departs from the more canonical approaches to the passage of time and the criminal law to explore the applicability of other normative concepts: authoritarianism, standing, rule of law, and impunity. The literature on those topics is interwoven with considerations about the passage of time to assess what mode of temporal limitation better encompasses the concerns that underlie the theorisation of those ambits.

To conclude, the thesis draws together the insights developed in the comparative and the theoretical parts and includes some lessons for a legal regime considering temporal limits on the power to prosecute.

This thesis argues firstly that there are various mechanisms that serve the function of limiting prosecutions due to the passage of time. The different shapes of such limits adopted in the two studied legal systems can be partly explained by their different level of

reception of Roman law but also because of the role of legislated law, together with the different developments of their prosecution models.

Appeals to the aims of criminal law to justify the existence of time limits (a common strategy in the literature) and to adjudicate between forms of time limits are fruitless. Also inconclusive, although more illuminating, is the appeal to the interests of the victim and the offender. The analysis in terms of what is relevant for a better balancing of criminal justice as a state enterprise does, however, shed light on their limiting function. When it is shown that either mode will grant some level of impunity, the balance is tipped in favour of what is here called categorical limitation, as it can be better controlled through the more explicit and transparent mechanism of legislation.

1.1. General description of the aim and scope of the project

When a crime has been committed, some might think that its relevance and consequences are fixed at the time of the crime. Many, however, think that part of its relevance passes, dissolves, evaporates, or is 'historicised' with the passage of time. Or possibly, others add, it is not a 'natural process', but rather this effect is created by human beings: through the fallibility and shortcomings of our social and legal norms and institutions, and the capacity that they have to address events distant in time.

In modern criminal justice, one of the forms that these reflections have adopted is questioning the limits to the power of the state to prosecute offences. These limitations have acquired different shapes, but they all reflect the view that the passage of time reduces the need for state intervention through the criminal law and makes it desirable or even necessary to prohibit prosecutions. From so-called statutes of limitation to presumptions against prosecutions, an array of institutional alternatives is available. This thesis will

explore the arrangements adopted in England and Wales and Germany, create models based on them (under the labels of 'discretionary' and 'categorical' modes of limitation), and thereby help illuminate the benefits and drawbacks of such mechanisms.

1.1.1. Research questions

This enquiry is guided by two research questions.

1. How may we explain the contrasting approaches taken to temporal limits on the prosecution of crime in the two jurisdictions?

2. Which mode of limitation, under what parameters, performs better?

Part I (Chapters 2 to 5) provides a comprehensive answer to the first question, by way of addressing the current and past law in England and Wales and Germany, and a comparison between them. Part II (Chapters 6 to 11) is predominantly dedicated to answering the second question.

The concept of time limits and its relation to state power occupy a central position in the enquiry. Time is a dimension of and a condition for criminal prosecution, and how the passage of time is institutionalised will say much about the notion of boundaries or limits those criminal prosecutions encounter.

As will be justified later in this chapter, two legal systems have been chosen to illustrate the exploration. The aim of understanding the differences between the German and the English reaction to the passage of time in the context of prosecution of offences will be pursued firstly through describing the rules and practices regulating the effects of the passage of time for criminal prosecution and trials. Then the law will be examined, to explain its performance in practice and through comparing the structures deployed and the

functions set in both cases. The work places the modern law in its proper historical context, to show why and how it developed. This is particularly important for English law since until now there has been no systematic exploration of that history.

When analysing the conceptions underlying the legal structures and their performance, I group together two separate perspectives on the criminal law. The first examines the aims of the criminal law, punishment, and prosecutions. The second focuses on the interests of victims, the accused, and the state.

1.1.2. Scope

This work covers both substantive and procedural elements of the positive criminal law, with a broad historical overview as well as a contemporary description of its state. It does so in two legal systems. Finally, it embarks on a theoretical evaluation which draws on legal, moral, and political arguments, ending in some remarks *de lege ferenda* as to what a system could look like reflecting what we have learned from the experiences in these two countries.

This project does not attempt to exhaustively describe the doctrinal detail of time limits in each jurisdiction. Sufficient detail will be given, combined with historical context, and tested against the relevant system's theories and wider legal reasoning. However, the thesis is not focused only on doctrinal inquiry. Such an inquiry has been conducted in the German context,[2] while more work needs to be done to clarify some obscure parts of the

[2] Martin Asholt, *Verjährung im Strafrecht* (Mohr Siebeck 2016).

English law.[3] The purposes outlined above have guided this research into a more general overview of the criminal law and criminal justice and thisdoes not leave space for a narrowly doctrinal enterprise to be undertaken here.

This project has to be restricted to the limits upon the prosecution of domestic crimes. It will only marginally address the effect of time on sentencing. It will not address the temporal limits on the execution of sentences, although these exist in many legal systems. Finally, the offences in mind, unless otherwise stated, are not the ones dealt with through international criminal law or crimes against humanity. These raise different questions which have already attracted scholarly attention.[4]

Although the passage of time and its effects on the criminal prosecution of child sexual abuse is one of the topics that promptly may come to mind, this thesis will not be focused thereon. Much has already been written on 'historic child sexual abuse',[5] and this thesis covers the pertinent literature and debates. However, the focus is on on offending more generally and the daily operation of the criminal law.

Regarding the evaluative sections (mainly in Part II), the reader will be disappointed if she is anticipating a definitive statement about which system is 'better'. Such an answer is outside of the scope of this work, as it presupposes a wide array of normative commitments which cannot be accomplished here. It also depends on several factual

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3 These I will try to highlight along this text, in the hope that I might help some future researcher or motivate them to do so. Some interpretive work has been done by Richard Vogler, 'Why Is There No Statute of Limitations for Criminal Cases in England and Wales?' (2022) 49 DPCE Online.

4 Ruth A Kok, *Statutory Limitations in International Criminal Law* (TMC Asser Press 2007).

5 For example, Penney Lewis, *Delayed Prosecution for Childhood Sexual Abuse* (Oxford University Press 2006); Tatjana Hörnle, Stefan Klingbeil and Katja Rothbart, 'Sexueller Missbrauch von Minderjährigen: Notwendige Reformen im Strafgesetzbuch' (Humboldt Universität zu Berlin 2014) <https://hoernle.rewi.hu-berlin.de/Gutachten_Strafrecht-2.pdf>.

considerations about the state of a concrete legal system and, more generally, about a concrete polity. For these reasons, it does not make sense to adhere to either model as a totality. As the first part of the thesis shows, actual legal systems draw on different types of mechanisms and controls to achieve a stable and satisfactory situation. Any attempt at establishing an ideal regime will need to do the same. So, in the Conclusions, I will offer some reflections on what I consider to be an ideal system, and what conditions it would operate under.

A final related topic that is outside of the scope of this thesis is a philosophical or social-theoretical reflection on the concept of time and its relevance for time limits in criminal law. The literature on the topic is considered in the chapters that follow, and a personal contribution to this matter has been made elsewhere.[6] But there is no direct treatment of these two elements in the thesis as it is not directly relevant to either of the research questions.

1.2. Methodology

This is a legal inquiry, which also draws on philosophical, historical, and criminological debates. To the extent possible, I follow the disciplinary complexities of all those areas and make an effort to introduce comprehensive pictures of the discussions. This thesis deploys several methods and faces various methodological challenges.

In terms of legal method, the enquiry started from 'black-letter' law and doctrinal analysis. It then expanded to encompass philosophical and criminological research. Where available, empirical data were collected as to the use of time limits. The applicable law was

[6] Carla Sepúlveda Penna, 'La teoría del tiempo y la forma de la prescripción del delito' (2021) July Enfoques Penales <https://crimint.org/producto/enfoques-penales-julio-2021/>., with references.

researched widely both for England and Wales and Germany, in an attempt to find any sort of device fulfilling the functions of delimiting or providing criteria for limitation at all stages of the criminal proceeding. The set of questions about the functioning and implementation of the existing mechanisms covered both statutory law and judicial decisions, and was aimed at determining if other time-related provisions in other areas of the law followed similar patterns to the ones found in the regulation of criminal prosecutions and adjudication. This staged approach allowed to obtain the best of each method, without disfiguring their purpose.

In terms of comparative method, a synthesis of established methodologies was used.

A functionalist perspective was useful to identify which parts of the criminal law and which rules applicable to the criminal justice institutions deal with the passage of time. Comparative law methodological discussions debate what functionalism means in this area. This thesis understands that there are latent and also manifest functions in legal institutions. It also understands functionalism as an approach under which the identification of such functions serves the purpose of comparing seemingly different normative settings and instruments. It is thus not a purist task. This approach places the kind of functionalism used within the realm of what has been called 'interpretive functionalism'.[7] More generally, the basis of the functional method applied followed the directives set out by Zweigert and Kötz in their most influential work.[8]

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7 See Ralf Michaels, 'The Functional Method of Comparative Law' in Mathias Reimann and Reinhard Zimmermann (eds), The Oxford Handbook of Comparative Law (2nd edn, Oxford University Press 2019), 386 ff.,

8 Konrad Zweigert and Hein Kötz, *Introduction to Comparative Law* (3rd edn, Clarendon Press 1998). Important lessons were taken from key pieces in contemporary comparative law theory such as the

However, the subsequent steps drew significantly on structural analysis and addressed the legal cultures around them. As Husa has put it '[s]tructural comparison can be seen as a specialised application of functional comparison',[9] which makes them compatible ways of proceeding. This interplay enables the construction of basic models (such as in our case hard and soft limits, which include more than mere limitation periods), adding, thus, further elements for comparison. The structural analysis here undertaken draws on Sacco's theory of legal formants, considering statutory rules, principles, the decisions of actors within their realms of discretion and powers, and interpretations of all of these, as coming together to create the law at play.[10]

This allowed not to assume some of the traditional (and criticised) elements of a functionalist analysis, such as the *praesumptio similitudinis* supposing that legal systems have the same problems and solutions. Nonetheless, the idea that different legal instruments may be used to achieve similar functions, even serving as functional equivalents was preserved.[11] Some of the answers as to why these legal instruments have taken different forms will be better explained in understanding the more general structures and the relations between different sets of (institutional and natural) facts. An attempt to explain similarities and differences required an overview of the whole of the criminal law, the criminal procedure, the intervening actors and their operational cultures, that connect

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pieces by Cotterell, Flenn, Gordely, Riles and Siems in Mathias Reimann and Reinhard Zimmermann (eds), *The Oxford Handbook of Comparative Law* (2nd edn, Oxford University Press 2019). On the relationship between functionalism and the social and political context of the law, Jonathan Hill, 'Comparative Law, Law Reform and Legal Theory' (1989) 9 Oxford Journal of Legal Studies 101.

9 Jaakko Husa, *Introduction to Comparative Law* (second, Hart 2022), 133

10 Rodolfo Sacco, 'Legal Formants: A Dynamic Approach to Comparative Law' (1991) 39 The American Journal of Comparative Law 1.

11 More on this specific point will be discussed in Chapter 4.2.

apparently rigid and lifeless rules. The work of Damaška, and the balance between doctrine and wider context achieved in his writings was the main example followed.[12]

Following Graziadei,[13] one can formulate two critiques of an analysis in terms of functional equivalence in comparative law that this thesis might want to avoid. The first is the functional method's circularity, and the second is its narrow factual focus, leading to reductionism.

In effect, by at the same time assuming and finding that there are common functions served by two legal systems, it is possible to overlook the possibility that this might simply reflect how the question is posed, even if we have already narrowed the functional equivalence to only a partial explanation of the law. While the functional comparatist would tell the researcher to go back and check the exercise if the conclusion reached were that there is no functional equivalence,[14] a critical approach to this method would suggest that a researcher who has found a similarity should 'do more work to overcome this deception'.[15]

Also, it is apparent that '[t]he functional method brackets whatever is found in between the "facts" and their "legal consequences" as reconstructed in operative terms'.[16] In doing this, a lot of the richness can be lost, as can the capacity to understand the workings of the mechanisms being compared. Looking into that bracket consists of introducing other

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12 See Mirjan Damaška, 'Evidentiary Barriers to Conviction and Two Models of Criminal Procedure: A Comparative Study' (1973) 121 University of Pennsylvania Law Review 506; 'The Reality of Prosecutorial Discretion: Comments on a German Monograph' (1981) 29 The American Journal of Comparative Law 119, and *Faces of Justice and State Authority, A Comparative Approach to the Legal Process* (Yale University Press 1986).

13 Michele Graziadei, 'The Functionalist Heritage' in Pierre Legrand (ed), *Comparative Legal Studies: Traditions and Transitions* (Cambridge University Press 2003).

14 Zweigert and Kötz (n 9) 36.

15 Pierre Legrand, 'Negative Comparative Law' (2015) 10 Journal of Comparative Law 438.

16 Graziadei (n 14) 110.

relevant 'facts' of a legal system, such as the actors, the interests at play, the cultural influences, the historical development and the possibility of mere chance also playing a role in how this is structured.

Even more extreme criticism arises from scholars who deny the possibility of finding any neutral description of some function performed by a part of the law. Already the depiction in the previous chapters may not have been objective, and so surely what comes next will be. What remains possible is to undertake, with a critical attitude, an exercise of 'tracing',[17] digging deep into the law and its connections, and understanding it as a cultural construct. Such a culturally driven enquiry brings parts of this thesis closer to socio-legal scholarship. For this purpose, we can define culture as 'historically shaped sets of habits, understandings, values and priorities that shape or exemplify what societies choose to sanction and how they do so'.[18] Thus, it is not only the rules and doctrinal frameworks that are being compared, but also those cultural elements.

The interaction between socio-legal scholarship and comparative law might be seen as a challenging one, even to the extreme of considering them incompatible. But this is not necessarily the case. As Riles has argued:

> part of the problem with the culture concept in comparative law seems to rest with the limited range of methodological options on the table—to exaggerate slightly, too often it seems that either one is a culturalist, a doctrinalist, or a functionalist in comparative legal circles. Rather than choose between culturalist and rationalist explanations, socio-legal scholars would maintain that we need a more fine-tuned, specific, sceptic, and open-ended understanding of cultural practices.[19]

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17 Legrand (n 16) 419.

18 David Nelken, *Comparative Criminal Justice* (SAGE 2010), 48.

19 Annelise Riles, 'Comparative Law and Socio-Legal Studies' in Mathias Reimann and Reinhard Zimmermann (eds), *The Oxford Handbook of Comparative Law* (2nd edn, Oxford University Press 2019). This paper develops further tensions and shared agendas between comparatists and socio-legal scholars.

In that sense, adopting a socio-legal stance is helpful, supplementing the comparative toolbox. Without committing to this particular method, this thesis will attempt to trace each legal system's relevant influences and internal understandings. Two main additional methodological aids will be adopted for this purpose: comparative jurisprudence[20] and comparative legal history.[21] Neither seeks to find a common function *per se*. The first aims to understand legal mentalities and theoretical constructs, while the second aims to account for the evolution of the legal systems. Both go beyond a strict understanding of doctrinal scholarship.

The difficulties that can arise from applying different comparative methodologies can be mitigated by considering them as different schemes of intelligibility[22] that work together to achieve a better understanding of the studied object. Functionalism focuses on the consequences that it has, while structuralism reads this element as related to others in order to understand its meaning, and a hermeneutical scheme focuses in interpreting the underlying signification of the object. In this way, the different frameworks provide additional layers of information, instead of clashing as incompatible approaches to the same object.

Some of the challenges associated specifically with comparative criminal law have to do with its relative underdevelopment (when compared to civil law)[23] and a tendency to

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20 William Ewald, 'Comparative Jurisprudence (I): What Was It like to Try a Rat?' (1995) 143 University of Pennsylvania Law Review 1889.

21 James Gordley, 'Comparative Law and Legal History' in Mathias Reimann and Reinhard Zimmermann (eds), *The Oxford Handbook of Comparative Law* (2nd edn, Oxford University Press 2019).

22 Geoffrey Samuel, *An Introduction to Comparative Law Theory and Method* (Hart 2014), 99-116.

23 Markus D Dubber, 'Comparative Criminal Law' in Mathias Reimann and Reinhard Zimmermann (eds), *The Oxford Handbook of Comparative* Law (2nd edn, Oxford University Press 2019) 1277.

an ahistorical study of this subject matter.[24] Some have argued that the objectives, objects,[25] means and methods[26] are too diverse. Particularly for substantive criminal law, the underlying moral concepts are perceived as intangible and difficult to grasp.[27]

A historical perspective is employed in order to understand how changes in the criminal justice system and the criminal law and procedure have been accompanied by changes in the state reaction to the passage of time for the prosecution of crimes. The exercise here undertaken could be classified as one of institutional history,[28] thus, cutting across the boundary between internal and external legal history. It seeks for a balance between descriptive accuracy, doctrinal reconstruction, contextualisation and introducing elements of intellectual history and the development of concepts. An important benefit of adopting a historical perspective is that it creates an object of inquiry which is treated as variable, acknowledging some level of contingency, in contrast to pure philosophical analysis.[29] The research shows that in Germany shifts into a more discretionary exercise of prosecutorial powers have been accompanied by a loosening of the idea of limitation periods. Conversely, the structuring of a more centralised and bureaucratised criminal justice system was co-extensive with the existing general time-bars in England and Wales.

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24 Dubber (n 26) 1280.

25 Albin Eser, 'The Importance of Comparative Legal Research for the Development of Criminal Sciences' in Roger Blancpain (ed), *Law in motion: recent developments in civil procedure, constitutional, contract, criminal, environmental, family & succession, intellectual property, labour, medical, social security, transport law* (Kluwer 1997) 493.

26 Eser (n 28) 510.

27 Chrisje Brants, 'Comparing Criminal Process as Part of Legal Culture' in David Nelken (ed), *Comparative Criminal Justice and Globalization* (Routledge 2011) 49.

28 David Ibbetson, 'Historical Research in Law' in Mark Tushnet and Peter Cane (eds), *The Oxford Handbook of Legal Studies* (Oxford University Press 2005), 878.

29 For a detailed treatment of these elements see Maksymilian Del Mar, 'Philosophical Analysis and Historical Inquiry: Theorizing Normativity, Law, and Legal Thought' in Markus D Dubber and Christopher Tomlins (eds), *The Oxford Handbook of Legal History* (Oxford University Press 2018). See also David Ibbetson, 'Comparative Legal History: A Methodology' in Anthony Musson and Chantal Stebbings (eds), *Making Legal History: Approaches and Methodologies* (Cambridge University Press 2012).

The proposed approach mapped and located the relevant changes in the criminal law related to the passage of time, to then analyse their coherence with more general institutional changes in the same period.

Interviews were conducted to inform the research with the perspectives of practitioners, especially those involved in prosecutions, in both legal systems. Six interviews with practitioners working in the criminal justice system were conducted, three in each jurisdiction. These took place between January and February 2021 and were held online. These were semi-structured interviews which followed a topic guide. Four interviewees were prosecutors, one was a police officer, and one was a victims' representative. In terms of their main areas of practice, two worked mainly in sexual offences, one on human rights violations, one on economic crime, while the other two were generalists. Because of their professional involvement, they were not considered to be vulnerable interviewees. The selection method was a combination of recommendations by the respective agencies (thereby allowing them to identify suitable interviewees), and snowball sampling, asking contacts and interviewees to direct the researcher to appropriate candidates. In order to protect the anonymity of the participants and the data, information was stored in separate password-protected folders within the researcher's informatic account at the University of Oxford. The interviews were recorded with the consent of the interviewees and the files will be deleted after all publications drawing on this research have been completed.

More generally, I adhered to the British Society of Criminology Statement of Ethics. The research was judged as meeting the appropriate ethical standards and was

approved by the Social Sciences and Humanities Interdivisional Research Ethics Committee (IDREC) at the University of Oxford.

The project was carried out at the University of Oxford, England, and additionally used the resources of the Max Planck Institute in Freiburg, Germany. This physical distribution allowed discussions with local lawyers and academics from both legal systems. Many of the materials on other jurisdictions were drawn from these two libraries as well, and from extensive online research in local databases and publishers.

1.3. Some necessary definitions

Any comparative project faces difficulties in translation and understanding of legal norms and cultures. I have elected to define some of the core concepts which may be foreign or uncommon in English, as well as for other readers who may wonder why this or that concept is not being used.

I will refer to the legal determination of categorical and generally applicable bars for the prosecution of crimes as 'limitation periods'. I will not use the concept of 'prescription' or *Verjährung* as nouns, nor will I use them in their verbal form because they do not exist as such in English criminal law. I will also not try to import the concept of prescription from Anglo-Saxon civil law, because several of its distinctive features are not present in the criminal law: civil prescription implies that there is an existing subjective right (on land) which is extinguished or the action to claim it is barred due to the passage of time and the inactivity of the right-holder in enforcing it. I will also not call them 'statutory limitations' because there is nothing in the concept that requires them to be enacted in the form of a statute (although we will see how and why the statutory form may well be an important part of the explanation of their presence in scattered locations of the

English legal system and their general presence in Germany). However, there will be references to ‘imprescriptibility’, as a lack of limitation periods where such periods are generally applicable, and ‘imprescriptible’ as an adjective for such crimes, especially in the context of the civil law tradition and in international criminal law since that is the most natural word for those contexts.

‘Time limits’, a more general concept, means both categorical and discretionary (but existing) borders. If a decision is or can be made regarding the extent of the operation of the criminal law by any actor of the legal system, that is called a limit. This definition can be contested, though the word ‘limits’ is the optimal one. The horizon is the limit of what we can see, but that does not mean that there is nothing beyond. It is relative, it is not an entity, but a reference. That is the use of limits in this work.

I will define the ‘prosecution’ as the state organ or organs responsible for pressing charges and conducting criminal proceedings against a defendant in court. ‘Prosecution’ also connotes the activities led by this organ. In principle, investigation of specified suspects (but not general enquiries) will be considered a sub-element of the prosecutorial activity, unless otherwise stated. Being a party to a trial process bringing forward charges against a person accused of a crime is also part of the prosecutorial activity. The duties of the prosecution vary across jurisdictions, their dependency or autonomy from other public powers and their relation to the police. ‘Private prosecution’ encompasses those cases where a victim or a representative of her is allowed to take active part in the criminal proceeding, either leading it independently or jointly with the public prosecutor. ‘Judge’ is used as a synonym for all relevant adjudicators. Unless specified, it includes both judges and jurors. The terms ‘victim’ and ‘offender’ are both ‘alleged’ categories, in principle,

and consider the possibility that the substantive claim of liability and of being harmed by an offence may be flawed.

The thesis introduces a distinction between 'hard' and 'soft' limits. These are mostly used in Chapter 4 to show that both systems contain both types of instruments, applied to different kinds of crimes: binary rules excluding prosecution of crimes (including the norms distributing the powers to apply these rules, their ambit of applicability, the empirical triggers for their employment, and the determinate responses mandated) and more subtle principles, standards, practices and criteria which define the temporal borders of the criminal law.

Another distinction between 'discretionary' and 'categorical' modes of limitation features in the second part of the thesis, as shorthand concepts to describe two simplified models.[30] The discretionary mode of limitation is based on the English law regulating the effects of the passage of time for the prosecution of indictable (and either way) offences. The categorical mode of limitation is based on the German rules applicable for all crimes (except for aggravated murder and some offences against public international law). These should not be understood as tracking the complexity of the norms and practices actually in place, but as two constructs that will allow for normative comparison and evaluation.

By 'discretion' is to be understood the latitude granted officials to act under a set of norms and in a public capacity.[31] Comparative literature shows different understandings of this concept in Germany and England and Wales. The definition here used encompasses

30 The precise definitions of these two constructs are offered in the introductory words to Part II.

31 A similar definition can be found in Shawn D Bushway and Brian Forst, 'Discretion in the Criminal Justice System', *Oxford Bibliographies* (Oxford University Press 2011). However, their focus on 'formal rules' is not shared here.

discretion as to the prerequisites for the exercise of legal powers (*Beurteilungsspielraum*), and as to adopting a certain decision or drawing a legal conclusion (*Rechtsfolgenermessen*).[32] It is a regulated form of decision-making,[33] although the extent and forms of control over it vary across jurisdictions and areas of the law. In criminal justice — despite criticism of the extent of discretion available to certain legal officials and especially prosecutors in certain legal systems—,[34] discretion is present across the board both in judicial and prosecutorial decisions.[35]

'Categorical' is used in general to describe something as 'direct, explicit, express, unconditional', while in logic when predicated upon a proposition it means 'asserting absolutely or positively; not involving a condition or hypothesis; unqualified'.[36] In this case, the categorical mode of limitation assumes the existence of mandatory rules directing in an unequivocal way the relevant legal consequence for a certain set of facts. As in its Kantian use, 'categorical' is opposed to 'hypothetical'. Even more importantly, these rules

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32 Shannon Fyfe and Alexander Heinze, 'Prosecutorial Discretion' in Kai Ambos and others (eds), *Core Concepts in Criminal Law and Criminal Justice*, vol 2 (Cambridge University Press 2022), 174–177.

33 Even Dworkin's strong sense of discretion 'is not tantamount to license, and does not exclude criticism', Ronald Dworkin, 'The Model of Rules' (1967) 35 University of Chicago Law Review 33.

34 The paradigmatic example is the USA. See Kenneth Culp Davis, *Discretionary Justice: A Preliminary Inquiry* (University of Illinois Press 1976), Angela J Davis, *Arbitrary Justice: The Power of the American Prosecutor* (Oxford University Press 2009), David Alan Sklansky, 'The Problems With Prosecutors' (2018) 1 Annual Review of Criminology 451.

35 Even in a culture sceptic of the good of wide discretion, its existence cannot be denied, see Erick Gatgens, *Ermessen und Willkür im Straf- und Strafverfahrensrecht* (Peter Lang 2007), Thomas Weigend, *Anklagepflicht und Ermessen* (Nomos 1978). For the normatively more open position, see Antony Duff, 'Discretion and Accountability in a Democratic Criminal Law' in Máximo Langer and David Alan Sklansky (eds), *Prosecutors and Democracy* (1st edn, Cambridge University Press 2017).

36 'categorical, n.' (*OED online*, OUP July 2023. https://doi.org/10.1093/OED/9430388631 accessed 9 October 2023.

are unconditional in that they do not require any contingent event to occur for a legal consequence to arise, but the mere passage of time.[37]

Other concepts will, as far as possible, be explained or defined in the text if they seem relevant to the understanding of the contents exposed.

1.4. Justification of the choice of legal systems

This study involves two jurisdictions, Germany and England and Wales. The selection of these two legal systems is based on a several considerations, historical, doctrinal, and theoretical.

On the one hand, these jurisdictions have been some of the most significant law exporters of the nineteenth and twentieth centuries. In particular, concerning the criminal law, Germany became the leading theoretical model for most of the civil law countries in the last century, while England has remained the model for common-law countries. On the other hand, both jurisdictions are close to polar opposites, not only regarding limitation periods themselves but also prosecutorial discretion and the state's control of the penal action. They therefore constitute good examples of the conflicting approaches to limiting prosecutions.

In terms of limitation periods, England retains one of the most extreme positions: non-summary offences remain without limits.[38] Some other common-law countries have adopted some definite limits reaching to categories of offences with higher maximum

[37] The analogy with the Kantian vocabulary does not extend to the deontological character of the categorical imperative, though, only to its unconditionality.

[38] Chapter 2 will be dedicated to this.

penalties.[39] Germany's limitations, while not absolute (aggravated murder is an exception), are generally applicable and consider the passage of time alone as sufficient for their application. Even if the offence never came to the attention of the authorities, if the alleged offender fled the country or if she has reoffended, the limit applies, and it cannot be waived by the accused.[40] That is why these two could be considered quite extreme opposites which permit an interesting comparison of many of their characteristics.

In terms of the state's control over prosecutions, the contrast between England and Germany is also striking.[41] England still permits private prosecutions, has a relatively new centralised public entity which leads the vast majority of prosecutions, often delegating court work to external lawyers, but shares powers with the police in terms of deciding out of court disposals and is not subject to a mandate to prosecute every offence. Germany is very strict in admitting private prosecutions only alongside the public prosecutor,[42] who is restricted by a principle of mandatory prosecution and directs the police in its investigative efforts.

Nevertheless, these two jurisdictions are often compared, as they share sufficient traits to be able to contrast their features meaningfully.[43] Ideologically, both systems see

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39 See Chapter 4.3.1. for examples.

40 Chapter 3, in turn, will refer to Germany.

41 All these elements will be dealt with in detail in Chapter 4. For a general overview and reference, see John Hatchard, Barbara Huber and Richard Vogler (eds), *Comparative Criminal Procedure* (The British Institute of International and Comparative Law 1996).

42 As will be mentioned in Chapter 9.4.2., the victim may act independently of the public prosecutor only in a specific set of offences through what is known as *Privatklage*, regulated in §§ 374 ff of the code for criminal Code of Criminal Procedure.

43 For a large-scale project looking to these elements, see the volumes of Kai Ambos and others, *Core Concepts in Criminal Law and Criminal Justice: Anglo-German Dialogues* (Cambridge University Press 2020, 2022 and forthcoming). With a more empirical approach, Jörg-Martin Jehle and others (eds), *Coping with Overloaded Criminal Justice Systems: The Rise of Prosecutorial Power across Europe* (Springer 2006).

themselves as members of a post-Enlightenment, democratic liberal tradition of the criminal law[44] and share a broadly capitalist political economy.[45] These similarities will allow us to distinguish those factors as possible explanations for the differences. The differences highlighted by the literature on wider institutional settings will be considered, although there seems to be no direct argument to be made in terms of the 'punitiveness' of a society. The selection of Germany broadens the scope beyond English-speaking countries, which due to the linguistic convenience and their common origins tend to be studied more often.

1.5. Overview of the thesis

This introduction has defined the nature and ambit of the research. Chapters two and three explore the elements of the legal regulation and practice of the institutions limiting the prosecution of crimes due to the passage of time in England and Wales and in Germany. The most salient elements are contrasted in Chapter four, in order to gain a better understanding of how they work in their context, both in theory and in practice. The elements of rule-application and discretion-based decision-making will be stressed, in order to understand the real extent of the mechanisms that ought to deal with the difficulties presented by the passage of time. Chapter five discusses the history of time limits in England and Wales and Germany. As well as looking at the commonalities, the chapter describes their points of departure and tries to explain the main elements leading to the

44 Markus D Dubber 'Comparative Criminal Law', in Matthias Reimann and Reinhard Zimmermann, *Oxford Handbook of Comparative Law* (Oxford University Press 2006) 1288 ff.

45 Michael Cavadino and James Dignan, *Penal Systems: A Comparative Approach* (Sage 2006); Nicola Lacey, *The Prisoner's Dilemma: Political Economy and Punishment in Contemporary Democracies* (Cambridge University Press 2008).

current regimes. Importantly, the notions of centralisation of the criminal justice system, and of the role of legislation will drive significant moments of change in both legal systems.

The first part of the thesis, then, contrasts the regulations governing the passage of time for criminal prosecutions, describing also the main characteristics of two modes of limitation that could be analysed in theoretical terms. The second part of the thesis draws on an idealised description of two models, in order to assess their respective strengths and flaws from several perspectives.

In Chapter six, seven, and eight, the justifying aims of the criminal law and of criminal prosecutions are used to assess whether categorical or discretionary limitations perform better. The conditions under which each mode of limitation will show their greater potential are revealed by questioning some of the first intuitions that we would assume come from defending either aim of the criminal law.

Chapters nine, ten, and eleven adopt a multidimensional approach for assessing of both discretion and rule-based limits and the time factor as an element in the drawing of those limits. The victim, the accused and the state's perspectives are also considered. The chapters reveal how the structure of the limits makes a difference for the overall expression of those interests in the criminal law and criminal justice.

Chapter twelve, the Conclusion, sums up the evaluation of both forms of limits when it comes to dealing with the passage of time and for the case of criminal prosecution. These limits are only a small element in complex systems of procedural and substantive law, and a series of more general commitments need to be brought engaged, such as more general beliefs about the role of the criminal law in society and of the prosecution within the criminal law. Under this paradigm and after interests and normative commitments have

been considered, conclusions are drawn about whether certain institutional configurations comply better with them.

PART I. UNDERSTANDING AND COMPARING TIME LIMITS

CHAPTER 2. ENGLAND AND WALES: TIME LIMITS FOR CRIMINAL PROSECUTION?

Nullum tempus occurrit regi — time does not pass for the king — is the traditional maxim used in the common law when it comes to the prosecution of old crimes.[1] Prosecutorial and consequent judicial activity is, in principle, not barred due to the passage of time. Statutory exceptions to this principle have grown, making the contemporary picture, with several mechanisms that attach some sort of consequence to the passage of time.

The aim of this chapter is to offer a panoramic overview of the rules and institutions involved in determining whether an offence will be prosecuted after a 'long' time has passed since its commission, under the current law in England and Wales. This entails describing and analysing the black-letter law as well as its implementation. Classic accounts of time limits in England and Wales[2] seldom acknowledge that whether a 'historic', 'old' or 'non recent' case, as they are often called, will in fact be prosecuted comes down mainly to a decision made by a prosecutor, and to a lesser extent by the police. This chapter will challenge the traditional view.

The chapter will first set out the relationship between rules and discretion in English criminal law in general terms and how this affects 'non recent' crimes in particular. Second, it will describe the rules applicable to summary offences and to indictable offences, in terms of pre-defined limitation periods. Third, the chapter will explain how prosecutorial, police and judicial discretion are granted and regulated to allow or block late prosecutions.

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1 John Frederick Archbold, *A Summary of the Law Relative to Pleading and Evidence in Criminal Cases* (1822) 32; James Fitzjames Stephen, 'History of the Criminal Law of England', vol 2 (MacMillan and Co 1883) ch XVI.

2 See *infra* this Chapter and 4.3.1.

2.1. Rules and discretion

English criminal justice is based on a mix of rules and discretionary powers. Substantive and procedural rules of criminal law are generally understood to be applied within certain margins of discretion by the actors of the criminal justice system.[3] This power is seen to be one of the constituent parts of the criminal justice system and is the main form of the structuring decisions to prosecute.[4]

The prevailing notion of the effects of time for criminal prosecution in England is that expressed by Lord Dyson writing extrajudicially in 2018:

> [I]n balancing the interests of alleged criminals on the one hand and those of their victims, as well as the interest that society as a whole has in the prosecution of serious crimes, the scales come down resoundingly in favour of the latter. It would be unfair to the victims of crime and an affront to society to allow a defendant to escape from the criminal process merely because of the lapse of time. But where Parliament has declined to intervene, the courts have stepped in. Under the common law, the court has the inherent power to stay the proceedings as an abuse of process if, by reason of the passage of time, a defendant would not be able to have a fair trial. A person's right to a fair trial is paramount. As a matter of policy, the State will not countenance the possibility of subjecting anyone to criminal proceedings, even an alleged serial murderer, unless he can be given a fair trial.[5]

The mainstream view is that there is nothing in the mere passage of time that should bar the prosecution of serious offences, and that problematic cases should be dealt with via abuse of process by the courts. The courts, in turn, should also be less prone to stay proceedings

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3 '[B]ecause it extends to all points of decision-making and encompasses procedures and working methods, discretion flows back and forth through all parts of agencies that make up the criminal justice "system" and related controlling agencies'. Loraine Gelsthorpe and Nicola Padfield (eds), *Exercising Discretion: Decision Making in the Criminal Justice System and Beyond* (Willan 2003) 3.

4 Lucia Zedner and Carl-Friedrich Stuckenberg, 'Due Process' in Kai Ambos and others (eds), *Core Concepts in Criminal Law and Criminal Justice* (Cambridge University Press 2019) 307.

5 John Dyson, 'Time to Call It a Day: Some Reflections on Finality and the Law', *Justice: Continuity and Change* (Hart 2018) 135.

in serious cases. But this understanding overlooks the various instances in which time does actually play a part in the actual prosecution or non-prosecution of crimes under English law.

2.2. Limitation periods for summary offences

The general rule applicable for summary offences —the lesser ones, which are determined by statute to be dealt with through a simplified procedure and judged only by magistrates and no jury— is a 6-month limitation period, counted from the commission of an offence to the laying of an information or the making of a complaint.[6] This rule is contained in section 127 of the Magistrates' Court Act ('MCA') and it explicitly limits what the court can do, rather than, for example, the prosecution.[7]

As will be shown in detail in Chapter 4, the history of this provision stems directly from the first acts comprehensively regulating summary jurisdiction in 1848.[8] As for the intention of the legislator in establishing such a period, it has been said that 'the six months' limitation provision in section 104 of the MCA 1952 [an intermediate provision before the current rule] is to ensure that summary offences are charged and tried as soon as is reasonably possible after their alleged commission, so that the recollection of witnesses may still be reasonably clear, and so that there shall be no unnecessary delay in the disposal by magistrates' courts throughout the country of the summary offences brought before them to be tried'.[9] One recent piece of

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6 These are the two ways of starting a summary proceeding, and either one will interrupt the counting of the limitation period and allow for the trial to continue in the magistrates' court.

7 Magistrates Court Act 1980, s 127:

'Limitation of time.

(1) Except as otherwise expressly provided by any enactment and subject to subsection (2) below, a magistrates' court shall not try an information or hear a complaint unless the information was laid, or the complaint made, within 6 months from the time when the offence was committed, or the matter of complaint arose'.

8 11 & 12 Vict. c 43, s 11.

9 *Regina v Newcastle upon Tyne Justices, ex p John Bryce (Contractors) Ltd* [1976] 2 All ER 611.

academic work suggests that the justification is economic: 'the expense of prosecuting a relatively minor offence may seem disproportionate to the public interest in public order'.[10]

Through specific pieces of legislation, many exceptions have been added to the limitation period established in section 127.[11] The legislators have concluded that certain circumstances justify longer or shorter periods, and have thus created a multiplicity of *ad hoc* rules. These range from determining time frames of just 14 days in certain Road Traffic offences[12] to declaring that no period will limit the prosecution of other summary offences.[13] Nevertheless, no explanations for departing from the general rule are given in the histories of these provisions.

One common method for modifying the period of section 127 MCA is to establish different counting rules for specific cases. A frequent example is for the legislator to introduce a 'discovery' rule. In principle, the 6-month limit is kept, but the time will start to count from the moment that the evidence that has come to the knowledge of the prosecutor[14] is considered sufficient to warrant the proceedings.[15] This structure is generally accompanied by another rule,

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10 Samantha Halliday, Susan Lazer and Ann Wood, 'Country Report England and Wales' in Gudrun Hochmayr and Walter Gropp (eds), *Die Verjährung als Herausforderung für die grenzüberschreitende Zusammenarbeit in Strafsachen* (Nomos 2021) 138.

11 At least 50 exclusions can be found in The National Archives on legislation.gov.uk [last visit on 10.03.2023]. A few examples highlight their duration and diversity: Planning (Listed Buildings and Conservation Areas) Act 1990 s 26J(3) excluding all limitation periods for offences contained in the same section; Water Resources Act 1991, s 101 extending the period to 12 months; Bail Act 1976, s 6(10) excluding limitations for failing to surrender in the context of bails.

12 Road Traffic Offenders Act 1988, s 6(1).

13 E.g., Town and Country Planning Act 1990, s 165(9); Modern Slavery Act 2015, s 34(8).

52 It has been decided that '"[t]he prosecutor" [is] not limited to prosecutors who prosecuted pursuant to a power conferred by some statutory provision but applied to anyone initiating a prosecution under the Act'. Thus, it includes private prosecutors or other authorities initiating a prosecution. *Lamont-Perkins v RSPCA* [2012] EWHC 1002 (Admin).

15 E.g., Road Traffic Offenders Act 1988, s 6(1); Animal Welfare Act 2006, s 31 (1)(b); Animals (Scientific Procedures) Act 1986, s 26(3). Exceptionally, this period is of 1 year, e.g. Health and Social Care Act 2008, s 90; Digital Economy Act 2017, s 13.

an ‘outer limit’ of a maximum of 2 or 3 years beginning with the date of the commission of the offence.[16]

There is little trace in the history of these provisions of the reasons behind them. In one debate, Lord Faulks offered an explanation about this decision:

> The Government are concerned that this restricted time limit gives *insufficient time to gather the appropriate evidence* for communications offences, such as trolling, that may be captured under this offence. They have therefore decided to increase to three years the time within which offences under Section 127 of the 2003 Act must be prosecuted, so long as the prosecution is brought within six months of the prosecutor having sufficient evidence to justify proceedings.

The reasoning points to the investigative difficulties of the digital environment.[17] However, this explanation does not apply for most of the other cases where this legislative device has been introduced.[18]

To appreciate the practical impact of these provisions, one may turn to police data. Police statistics show that it is within their practice to register some time-barred offences. For example, in the year ending March 2021, 11,922 offences were assigned the outcome

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16 It is difficult to find a rationale as to why sometimes 2 and sometimes 3 years are set as limits. The use does not correspond to more or less serious offences, or to something that one could intuitively regard as more or less difficult to discover or investigate. Examples are:

3 years: Endangered Species (Import and Export) Act 1976, s 6; Public Passenger Vehicles Act 1981, s 73; Video Recordings Act 1984, s 15; Animal Welfare Act 2006, s 31 (1)(a); Consumer Protection from Unfair Trading Regulations 2008, s 14; Prevention of Social Housing Fraud Act 2013, s 3; Data Protection Act 2018, s 197.

2 years: Coroners and Justice Act 2009 s 8C; Sentencing Act 2020 s 36; Destructive Imported Animals Act 1932 s 6.

Even some exceptional 12-month outer limits can be found, such as the Building Act 1984 s 35A, or one case of a 6-year outer boundary in the Adoption and Children Act 2002, s 138.

17 These difficulties were also mentioned in the discussion on the Computer Misuse Bill, where the reason for retaining the 6-month rule from sufficiency of evidence and not merely the 3-year outer limit was touched upon, although without giving any definitive answers. HC, Standing Committee C, 21 March 1990, 36-38.

18 For instance, for false declarations in the context of financial circumstances orders as per the Sentencing Act 2020 s 36, or the Animal Welfare Act 2006 s 31, Agriculture Act 1993 s 52.

'Prosecution time limit expired' by the police, amounting to 0.3% of all registered offences and 0.55% of those with an identified suspect.[19] Open data shows that the most common offences registered as affected by an expired time limit are assault without injury (8,566), assault with injury (2,596), public fear, alarm or distress (including racially and religiously motivated ones) (860) and harassment and stalking (850), shoplifting (265) and criminal damage (206).[20]

It is worth highlighting that there are also some offences that are registered as not prosecuted due to time limits that are not in theory subject to such a bar, such as some sexual offences (25), four of which are registered as rapes.[21] In previous years, cases of kidnapping and child abduction offences were also registered,[22] as well as making off without payment.[23] The most likely explanation for the inclusion of these offences is a lack of clarity about the applicable law. The police do not record information about the numbers of regulatory offences (which represent the majority of summary offences), as they are mostly prosecuted by other agencies. Hence it cannot be said how often time bars play a role here.

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19 This information excludes fraud offences, the statistics of which are kept separately. Crime outcomes in England and Wales, for the year ending March 2021, are available at https://www.gov.uk/government/statistics/crime-outcomes-in-england-and-wales-2020-to-2021.

20 Public concern about assault in domestic abuse cases led to the introduction in 2022 of a different counting rule for these cases. In accordance with s 39A of the Criminal Justice Act 1988, proceedings must be launched within 2 years of the commission of the offence and within 6 months of the incident being reported to the police. It is still too early to assess the quantitative effect of this new rule.

21 Outcomes open data year ending March 2021, available at https://www.gov.uk/government/statistics/police-recorded-crime-open-data-tables. There is a slight difference in the number of offences for which the time limit expired compared to the aggregate statistic, showing a total of 13,952. This should not affect the orders of magnitude.

22 Kidnapping is a common law offence (thus not time-barred); child abduction is an either way offence Child Abduction Act 1984.

23 Which is an offence triable either-way.

2.3. Limitation periods for indictable offences

The other extreme of the range of periods, is, of course, the absence of time limits for almost all indictable offences —the more serious ones, where jury trial is a right of the defendant—[24] is expressly excluded by the same s 127(2) MCA.[25] To name just a few, and in order to perceive the extent of the ambit of this rule, in regard to making off without payment,[26] assault occasioning actual bodily harm,[27] robbery[28] and torture,[29] the prosecution is unrestricted despite the passage of time. Halliday et al have suggested that this shows a primacy of 'public order policy considerations' in English law.[30]

A few statutory exceptions establish periods of time for indictable offences that are, again, rather heterogenous. A notable case is the limitation of the prosecution for treason. Since

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24 This includes so-called either-way offences, *Kemp v Liebherr (Great Britain) Ltd.* [1987] 1 WLR 607.

25 Magistrates' Court Act 1980, s. 127:

'Limitation of time. […]

(2) Nothing in—

(a) subsection (1) above [the time limit for summary offences]; or

(b) subject to subsection (4) below, any other enactment (however framed or worded) which, as regards any offence to which it applies, would but for this section impose a time-limit on the power of a magistrates' court to try an information summarily or impose a limitation on the time for taking summary proceedings,

shall apply in relation to any indictable offence.

(3) Without prejudice to the generality of paragraph (b) of subsection (2) above, that paragraph includes enactments which impose a time-limit that applies only in certain circumstances (for example, where the proceedings are not instituted by or with the consent of the Director of Public Prosecutions or some other specified authority).

(4) Where, as regards any indictable offence, there is imposed by any enactment (however framed or worded, and whether falling within subsection (2) (b) above or not) a limitation on the time for taking proceedings on indictment for that offence no summary proceedings for that offence shall be taken after the latest time for taking proceedings on indictment'.

26 Theft Act 1978, s 4, which has a maximum punishment of 2 years' imprisonment or a fine.

27 Offences Against the Person Act 1861, s 47, which has a maximum punishment of 5 years' imprisonment.

28 Theft Act 1968, s 8, which has a maximum punishment of life imprisonment.

29 Criminal Justice Act 1988, s 134, which has a maximum punishment of life imprisonment.

30 Halliday, Lazer and Wood (n 10) 138.

at least 1695,[31] a time bar has been established, preventing prosecution three years after the commission of the offence. In the Theatres Act 1968, prosecution on indictment for the offence of giving an obscene performance is limited to two years,[32] as is the prosecution of obscene publications.[33] A contemporary example of the introduction of limitation periods to indictable offences is the Consumer Protection from Unfair Trading Regulations 2008, which for indictable offences contains a limitation of 3 years from the commission of the crime or 1 year from its discovery, whichever is earlier.[34] In the area of the formalities for marriages there is also a group of time-limited offences.[35] A fifth case is the Customs and Excise Management Act 1979, which contains a 20-year long period.[36]

No explanation is given in the legislative debate as to why to limit the prosecution of these indictable offences. The House of Lords ventured a reflection in 2004 in *R v J*:

> It is not always easy to discern the policy behind the provisions limiting the time for bringing proceedings. […] [I]n passing the Theatres Act 1968, Parliament must have taken the view that, if the prosecuting authorities could not decide within two years that the director of an obscene play was worth prosecuting on indictment, that should be an end of the matter. In enacting all these time limits, Parliament has taken a conscious decision to depart from the general rule that proceedings can be taken at any time. Moreover, it has done so, having regard to the spectrum of offending to which the time limit in question applies. Inevitably, in particular cases the time limits may seem to work capriciously

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31 Treason Act 1695, s 5. More recently, the Law Commission has considered the provision to still be in force. Law Commission, 'Codification of the Criminal Law: Treason, Sedition and Allied Offences' (H M Stationery Office 1977) 25.

32 Theatres Act 1968, s 2.

33 Obscene Publications Act 1959, s 2.

34 Consumer Protection from Unfair Trading Regulations 2008, s 14. The same regulation applies for the earlier Trade Descriptions Act 1968, s 19(1), for content still in force.

35 Marriage Act 1949 s 75 (Offences relating to solemnization of marriages), Marriage Act 1949 s 76 (Offences relating to registering marriages) and Marriage (Registrar General's Licence) Act 1970, s 16.

36 Customs and Excise Management Act 1979, s 146A. Such a period is comparable with the ones that other jurisdictions have as generally applicable limitations for crimes threatened with punishments of more than 10 years' imprisonment and in many cases, it is the limitation for crimes which carry life-time imprisonment (e.g. France, Italy and Spain). The Customs and Excise Management Act 1979, by contrast, contains indictable offences that could be sanctioned by a monetary penalty or 2 years' imprisonment (e.g. s 168(2)(b)) and are subject to the same 20-year limitation period.

> and to give immunity to someone who deserves to be prosecuted. Especially after so many years of enacting and re-enacting time limits, Parliament must be taken to have been well aware of this risk, but to have decided none the less that the overall benefits of the limits outweigh their disadvantages.[37]

There have been just a few areas where some discussion has taken place.[38] The most significant was the repeal of the time limit, which until 2004 was one year, to prosecute unlawful sexual intercourse with a girl between the ages of 13 and 16.[39] This provision had a history traceable to at least 1885, when sex with a girl in such an age range was criminalised for the first time, with a much shorter limit of 3 months,[40] which was gradually extended.

It has been said that the offence was originally aimed at brothels and the time limit was to prevent girls from blaming (innocent) wealthy men for possible pregnancies, a rationale that does not seem to fit our current concerns.[41] Another problem was the circumvention of this rule through charging a lesser offence of indecent assault, which was not time-barred.[42] This was a usual practice until the House of Lords decided the matter in *J*.[43] It was found that if the age-

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37 *R v J* [2004] UKHL 42.

38 For two other discussions, see John Jackson and Jenny Johnstone, 'Statutes of Limitation in the United Kingdom' (2022) 49 DPCE Online 3887.

39 Sexual Offences Act 1956, s 6.

40 Originally in 1885, section 5 of the Criminal Law Amendment Act limited prosecutions to three months; section 27 of the Prevention of Cruelty to Children Act 1904 extended this to six months. The Criminal Law Amendment Act 1922 further extended the limitation period to nine months. Section 1 of the Criminal Law Amendment Act 1928 made a further increase to 12 months.

41 Jonathan Rogers, 'The Time Limit on Prosecutions for Underage Sexual Intercourse in the Sexual Offences Act 1956: A Continuing Problem' in Antony Duff and John Child (eds), *Criminal Law Reform Now: Proposals and Critique* (Hart 2019) 195—196.

42 Sexual Offences Act 1956 s 14. In an interview, a CPS lawyer (CPS2) mentioned that something similar could happen with the time limit to a form of perjury, where 'there are ways around that' by using perverting the course of justice, if appropriate, for example.

43 [2004] UKHL 42.

specific offence better fits the facts, then that one should be considered, or otherwise the decision of Parliament to establish a limitation would be left without meaningful effect.[44]

Even after the repeal of this time limit, some problems persist, as it could be argued that historic offences were still covered by the law of the time of their commission.[45] This means that, in line with general rules, a change in the law has no retroactive effect, unless expressly stated, even if it would be to the benefit of the defendant. But, still, as a procedural norm, it has effect *in actum.*

The general lack of limitation can be seen operating in practice. To name just a few recent cases, there was the conviction of a man after 56 years for committing war crimes (killing two Jewish persons while being a policeman during the Nazi occupation in a town in what is now Belarus),[46] the charging of a bank and four of its executives 9 years after the alleged crime, during the financial crisis of 2008,[47] and the charging of five persons in a bribery case after 10 years for an offence, where they were ultimately sentenced to 20 months' (suspended) imprisonment.[48] The situation is most evident with sexual offences that occurred 10, 20, or 30 years ago, which have become an everyday matter in the English courts.[49]

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44 [2004] UKHL 42. It appears that this conclusion was already clear in the nineteenth century, when Mead and Bodkin wrote (with regard to the 3 month limit for prosecuting carnally knowing a girl of more than 13 and less than 16 years of age): 'If upon indictment for rape, the facts show that instead of that offence, one under this section has been committed, the prisoner would be entitled to be acquitted, unless the prosecution had been commenced within three months [no authority cited]'. Frederick Mead and AH Bodkin, *The Criminal Law Amendment Act, 1885: With Introduction, Notes, and Index* (Shaw & Sons 1885) 51.

45 Rogers (n 41).

46 *R v Sawoniuk* [2000] 2 Cr App Rep 220.

47 *SFO v Barclays PLC and Qatar Holding LLC* [2019] EWCA Crim 1074, which ended in the acquittal of three defendants for substantive reasons in 2020. Fraud by false representation according to sentencing guidelines, for these amounts, from 3 to 7 years' custodial sentence.

48 Serious Fraud Office, 'F.H. Bertling Ltd (Angola operations)', 26 September 2017, available at https://www.sfo.gov.uk/cases/f-h-bertling-angolan-operations.

49 Penney Lewis, *Delayed Prosecution for Childhood Sexual Abuse* (Oxford University Press 2006).

2.4. Analysis of the rules

The following analysis applies to the existing limitation periods, both for the prosecution of summary offences and for the exceptional limits on indictable ones. The relevance of the organising subheadings will become clear when contrasted with the following chapter on Germany and is an attempt to find comparable indicators and categories to understand the rules.

2.4.1. Criteria used for gradation

The only distinction evident in the law for understanding the treatment of time as a limiting factor in England and Wales is the procedural distinction between indictable and summary offences. At common law, all offences are —unless otherwise stated— indictable offences.[50] Thus, the summary offences, their respective proceeding, and the time limitation, are all statutory creations and exceptions to the general rules of the criminal law.

The general criteria to establish a categorical limitation is a procedural one, associated with the trial forms of the English criminal justice system. Nevertheless, an offence-by-offence criterion is also used with some frequency, particularly for establishing different lengths of periods for summary offences, as seen in the previous sections. The exceptions to the rule of indictable offences seem anecdotal and do not show any clear pattern.

2.4.2. What is being limited

The rule contained in the MCA is a temporal limitation to the jurisdiction of the tribunals as well as a limit on prosecutorial activity. The literal interpretation of the statute is clear about

[50] Some summary offences can be dealt with by Crown Courts, which are bound by the same limitation rule of the MCA, *R v Ashton* [2006] 2 Cr App R 15.

what it is limiting: the magistrates' courts' power to try an information or hear a complaint if they were not laid or made in time. In a recent case where the defendant had sought a stay of proceedings as an abuse of process because an information had been laid outside the 6-month time limit, his allegation was rejected by the judge and the proceeding continued; on appeal, the Court of Appeal quashed the conviction and the matter was returned to the district judge, directing that he should decline jurisdiction. Lord Justice Auld held that: 'Only if there is jurisdiction, may the more elastic notion of abuse of process arise for consideration'.[51] To determine whether there is jurisdiction, the judge must be satisfied that the information was laid within 6 months of the crime.[52]

This interpretation could be challenged from a theoretical perspective, as we will see in Chapter 11. Farmer has argued that 'the definition of every offence carries either explicitly or implicitly some specification of the place where the offense may be committed and often some specification of temporal limits […] E.g. in the question of prescription and limitation'.[53] In other areas of the law, it has not always been clear that limitation is a mere matter of procedure.[54] However, the treatment of this debate in the criminal law is close to non-existent.

Some of the specific provisions containing limitation periods restrict 'prosecution' so a literal interpretation might suggest that their purpose is to bar something different from the

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51 *Atkinson v DPP* [2005] 1 WLR 96 DC.

52 Ibid, backed by *Lloyd v Young* [1963] Crim LR 703. Also, *Lamont-Perkins v Royal Society for the Prevention of Cruelty to Animals* [2012] EWHC 1002 (Admin), saying that it should be left to the tribunal to rule as to whether there is jurisdiction to define the most apt procedure to adopt in order to determine the point.

53 Lindsay Farmer, 'Time and Space in Criminal Law' (2010) 13 New Criminal Law Review: An International and Interdisciplinary Journal 333, 337.

54 Mike Macnair has argued that "the rules should be branches of the relevant substantive law of property, of contract or of torts: sharply different concerns plainly affect different causes of action, and the repeated endeavours to create more or less uniform rules of limitation have so far created only uncertainty in the law." Mike Macnair, 'English Limitation Reforms and Controversies 1934—2016' in Harry Dondorp and others (eds), *Limitation and prescription: a comparative legal history* (Duncker & Humblot 2019) 679.

proceedings.[55] That would suggest an instruction to the police and the prosecution forces to refrain from any investigative activity or to hold back from charging, even before the court system is involved in dealing with the case. But that interpretation has not been adopted; rather it has been understood to change the form of interruption of the time period to a more flexible one; any act of prosecution would suffice to interrupt the passage of time.[56]

2.4.3. Reinstatement and extensions of periods

For cases where a limitation period exists, there appears to be no ground in English law for the counting to be altered by external circumstances. If the required action is not taken by the time the period expires (for example, the information is not laid), the court's lack of jurisdiction will have to be declared. Some common grounds for extensions in other jurisdictions are the victim being under-age in sex offences, or the alleged offender having been out of the country or in a public office that grants temporal immunity.

There is no general rule that allows an extension of the existing periods at the discretion of the tribunal. Such a rule exists for a significant part of the tort law.[57] That tort norm allows the court to look past the fact that the statutory limitation period has expired and to permit a claim to proceed or, to put it another way, it allows the court to refuse a defence of limitation.[58] Some relevant factors to be considered by the court are: the reasons for the delay, including whether some facts relevant to the cause of action were not known by the plaintiff before; the

55 E.g., Trade Descriptions Act 1968, s 19(1); Perjury Act 1911, s 4 (2).

56 For example, in Scotland, based on the same provision: *Hamilton (James Gordon) v HM Advocate (No.1)* [1997] SLT 31.

57 Limitation Act 1980, s 32A and 33, allows a discretionary exclusion of the time limit for tort actions in respect of defamation or malicious falsehood and personal injuries or death.

58 *Steedman v BBC* [2002] EMLR 318; *Cain v Francis* [2009] QB 75.

extent to which the relevant evidence is available and cogent; and the conduct of both the defendant and the plaintiff in the interim.[59]

The only provision granting discretion to the judge is contained in the Representation of the People Act 1983, where '[t]he magistrates' court may extend the time within which proceedings must be commenced in pursuance of subsection (1) above to not more than 24 months after the offence was committed'.[60] The extension is only for the offences contained in that Act, and is only available where the court is satisfied upon an application by a constable or Crown Prosecutor that there are 'exceptional circumstances' that justify the granting of the application and that there has been no undue delay in the investigation.[61] If the court refuses, the aggrieved party may appeal to the Crown Court.[62]

To summarise, it seems that there are no general grounds to disapply or extend the existing limitation periods. Once it comes into play, then, it is a very strict set of rules.

2.5. The workings of prosecutorial discretion

Without a strict limit for most of the indictable offences, the decision about whether to prosecute an offence committed a 'long' time ago rests with the prosecutor. The main body in charge of public prosecutions in England and Wales is the Crown Prosecution Service (CPS). Some other agencies have powers to prosecute offences, including the Serious Fraud Office, the Serious Organised Crime Agency and others. These bodies have significant discretion in

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59 In the USA it is common to find such permission to prosecute some or all offences after the expiry of the limitation period when DNA evidence is available (e.g. Florida Statutes § 775.15 (2012) 15a and 16a).

60 Representation of the People Act 1983, s 176 (2B).

61 Representation of the People Act 1983, s 176 (2A). No relevant explanation of the meaning and extent of the 'exceptional circumstances' is evident from cases or scholarship. The special time-limit provided for the offences in this act is one year. A case where this time limit, although not the extension, was applied, led to *Bowman v United Kingdom* (1998) 26 EHRR 1.

62 Representation of the People Act 1983, s 176 (2G).

their decision-making processes compared to other jurisdictions.[63] This discretion has always been a feature of the English criminal justice. Even before the generalised prosecution by a public body, private prosecutors were granted extensive discretion.[64]

The general standard of the CPS for starting or continuing a prosecution is the Full Code Test (FCT),[65] with its two limbs, the evidentiary and the public interest one: 'Prosecutors must be satisfied that there is sufficient evidence to provide a realistic prospect of conviction against each suspect on each charge' and then 'prosecutors must go on to consider whether a prosecution is required in the public interest'.

The code includes a set of questions for both limbs, the most important for the purposes of this enquiry being those regarding proportionality in the public interest assessment: '[t]he more serious the offence, the more likely it is that a prosecution is required' and '[t]he greater the suspect's level of culpability, the more likely it is that a prosecution is required', as well as the economic cost 'to the CPS and the wider criminal justice system, especially where it could be regarded as excessive when weighed against any likely penalty'. Also, the circumstances of the victim and the harm caused to her, as well as the suspect's age and maturity at the time of the offence are to be considered.[66]

63 Chris Lewis, 'The Evolving Role of the English Crown Prosecution Service' in Erik Luna and Marianne Wade (eds), *The Prosecutor in Transnational Perspective* (Oxford University Press 2012) 216.

64 Douglas Hay, 'Controlling the English Prosecutor' (1983) 21 Osgoode Hall Law Journal 165, 198—199.

65 Crown Prosecution Service, 'Code for Crown Prosecutors' (2018).

66 On the evolution and content of the test, see Andrew Ashworth, Mike Redmayne and Liz Campbell, *The Criminal Process* (5th ed., Oxford University Press 2019) 199—208.

With regard to what the CPS calls 'non-recent cases',[67] the likelihood of a prosecution being launched increases with:

(1) the seriousness of the offence;[68]

(2) if there was culpability in hiding the offence by the inculpated person;[69]

(3) if a prosecution would deliver justice to the victims;[70] and

(4) if the prosecution is required to uphold public confidence in the administration of justice.[71]

Prosecutors are expressly instructed not to dismiss non-recent cases by the mere fact of the passage of time because if prosecuted a minor penalty may in practice be imposed. There is no definition of what (or how long) it takes for an offence to be non-recent. For more specific purposes, such as police responses and for policy analysis of sexual crimes, offences committed more than a year before being recorded by the police are considered non-recent.[72] It remains to

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67 Crown Prosecution Service, Non-Recent Cases and Nominal Penalties Guidance, available at https://www.cps.gov.uk/legal-guidance/non-recent-cases-and-nominal-penalties.

68 'Some offences, such as murder and rape, are so serious that a prosecution will nearly always be in the public interest. However, minor non-recent offences would not usually merit prosecution', Non-Recent Cases and Nominal Penalties Guidance.

69 'If the offender has failed to admit any linked offences, the omission from the list of TICs is likely to mean a prosecution is more likely', Non-Recent Cases and Nominal Penalties Guidance.

70 'There may be a number of barriers to reporting an alleged offence at the time it occurred, which can explain the late disclosure of non-recent offences by victims. […] A complaint made some time after the event should therefore be taken just as seriously as a complaint made shortly after the alleged offence was committed.

Although the offence might have been committed some time ago, in some cases the impact over time might have become greater and led to adverse effects on the victim's physical or mental health and their circumstances in general. A prosecution, especially for a more serious non-recent offence, may help the victim through the offender being brought to justice even if the courts are likely to only impose a nominal penalty. An admission or finding of guilt may help the victim comes to terms with the offence committed against them', Non-Recent Cases and Nominal Penalties Guidance.

71 'Prosecutors should consider whether a prosecution is required to uphold public confidence in the administration of justice. The more serious the offending is, the more it is likely to undermine public confidence in the justice system if the offender is able to avoid prosecution because of the length of time since the offence was committed', Non-Recent Cases and Nominal Penalties Guidance.

72 Her Majesty's Inspectorate of Constabulary and Fire & Rescue Services, 'Police Response to Violence against Women and Girls Report' (2021) 28; Office for National Statistics, 'Sexual Offending: Victimisation and the Path through the Criminal Justice System' 36.

be seen whether this use will be restricted to sexual offences or if it will become a generally applicable criterion.

In England and Wales, any private person (natural or legal) also has the right to initiate prosecutions. However, the CPS has a right to take over any such private prosecution, either in order to carry it out or to terminate it.[73] Applying their Code, the CPS should take over private prosecutions where the FCT is not met or when it is met but it would be damaging to the interest of justice.[74] However, the CPS do not have a specific monitoring or alerts system that allows them to examine all private prosecutions. This means that a private prosecution, including for an offence committed long ago, may avoid the scrutiny of the CPS.[75] In these cases, the only control will be judicial.

This discretion for dealing with the decision regarding whether to prosecute in cases where a crime has come to the attention of the authorities later in time, or where there has been inactivity of the prosecutorial bodies for a long period is an expression of the more general prosecutorial discretion in the criminal justice system. As we have seen with the legislative debate above, the mainstream opinion seems to be that this issue is better dealt with on a case-by-case basis, which is achievable through the discretionary exercise undertaken by the prosecution and, in the end, decided by the court.

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73 Prosecution of Offences Act 1985, s 6(2).

74 *R v DPP ex p Duckenfield and Murray* [2000] 1 WLR 55; Crown Prosecution Service, Private Prosecutions Guidance, CPS, available at https://www.cps.gov.uk/legal-guidance/private-prosecutions. Some of the factors considered are unfairness to a defendant, costs, use of court time and confidence in the justice system, *R (on the application of Gujra) (FC) v Crown Prosecution Service* [2012] UKSC 52.

75 More generally, on the small number of private prosecutions actually referred to the CPS, see 'Private Prosecutions: Safeguards' (House of Commons 2020) HC 497 para 47 ff.

2.6. The role of the police and other investigators

The police in England and Wales are highly independent of the prosecution, the courts and government;[76] their investigative activity is not directed by a public prosecutor.[77] Other agencies hold the investigative powers and responsibilities for most regulatory crime.[78]

If the police or other investigative agencies receive notice of an offence that is alleged to have occurred a long time ago, it is often within their discretion to decide whether they will pursue the investigation, assessing again the public interest and evidence basis, but without a centralised institutional control as is potentially available within the CPS. As academic literature has highlighted, current internal police guidance 'details how [certain non-recent] investigations should be conducted, it does not advise how to determine whether they should be conducted'.[79] Minimal guidance is provided for specific operations, such as the 'Operation Hydrant SIO advice',[80] which states:

> There may be occasions where it is legitimate for the SIO [Senior Investigating Officer] to determine that to include a suspect or suspects within an investigation is not in the public interest. For example, this could be where the allegation made is of such a minor nature and so far back in time that it would

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76 For a comparative perspective, see Beatrix Elsner, Paul Smit and Josef Zila, 'Police Case-Ending Possibilities within Criminal Investigations' (2008) 14 European Journal on Criminal Policy and Research 191.

77 Exceptional intervention of the CPS in the investigative phase and charging advice has been introduced recently, see Chris Lewis, 'The Evolving Role of the English Crown Prosecution Service' in Erik Luna and Marianne Wade (eds), *The Prosecutor in Transnational Perspective* (Oxford University Press 2012).

78 'Most of these agencies, which have both investigative and prosecution powers, regard their primary role as securing compliance with the standards laid down by the law. They are often willing to take time to achieve this, and many adopt an approach that may be termed accommodative or conciliatory -using persuasion, education, and negotiation as the principal methods, and leaving the power to prosecute as a background threat which is invoked rarely. Despite claims that some regulatory agencies were becoming more punitive, the prevailing orientation is still towards persuasion and negotiation, not least by the SFO [Serious Fraud Office]', Ashworth, Redmayne and Campbell (n 66) 205—206.

79 Hannah Maslen and Colin Paine, 'When Should the Police Investigate Cases of Non-Recent Child Sexual Abuse?' (2019) 38 Criminal Justice Ethics 65, 67.

80 'Operation Hydrant is the national policing operation established to manage and coordinate the increasing demand on police forces to respond to, investigate and manage non-recent child sexual abuse in institutional settings, or abuse alleged to have been perpetrated by persons of public prominence' College of Policing, 'Operation Hydrant SIO Advice' 3.

> be disproportionate to deploy resources to investigate the circumstances. SIOs should apply caution where evidence of this nature could support or corroborate more serious allegations.[81]

Thus, the same nominal criteria, founded on a seeming lack of public interest, that a prosecutor would apply are already being used by police officers before deploying many efforts in investigating.

A different situation seems to be at play when an offence known to the authorities has not been solved despite some investigative efforts being taken. This is what is often termed 'cold case' scenarios. There have been some centralised efforts to investigate unsolved murders and 'stranger rapes'.[82] The revival of 'cold case investigations' can be linked to a drive to achieve police legitimacy, as well as to technological advances and the growth of victims' rights and pressure groups acting upon the police.[83] Analysis by Allsop highlights the relatively haphazard way in which cases attract public attention. In terms of individual decisions to review unsolved murder cases, she argues that the police not only have discretion but also a wide range of elements to consider, including public profile, efficiency, efficacy, and risk management. [84]

The law on this point certainly allows the police to decide what the appropriate outcome of a crime is: from out of court disposals to decisions to prosecute, dropping the case (either via a decision to take no further action (NFA) or not to proceed with (NPW) it) or maybe even

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81 ibid 51.

82 The Home Office funded a pilot, Operation Advance and Operation Stealth. The National Institute of Justice has also dedicated funds for 'historic crimes', see Cheryl Allsop, 'Motivations, Money and Modern Policing: Accounting for Cold Case Reviews in an Age of Austerity' (2013) 23 Policing and Society 362; Cheryl Allsop, 'Cold Case Homicide Reviews' in Fiona Brookman, Edward R Maguire and Mike Maguire (eds), *The Handbook of Homicide* (John Wiley & Sons 2017).

83 Cheryl Allsop, 'Instrumental and Symbolic Politics in Policing', *Cold Case Reviews: DNA, Detective Work and Unsolved Major Crimes* (Oxford University Press 2018).

84 Allsop, 'Cold Case Homicide Reviews' (n 82) 571.

bringing a case back after several years have passed. However, the latest tendencies have been to create a closer relationship between the CPS and the police, and to assign greater oversight about police decision-making to prosecutors.[85] That is why prosecutorial discretion occupies a primary position when it comes to deciding which cases will and which cases will not face prosecution.

2.7. Abuse of process and instructions to the jury

Once a prosecution has started, the main tool used by the defence to try to put an end to it due to the passage of time is the allegation of abuse of process.[86] Two different paths have been used for this purpose: one is to argue that the defendant cannot receive a fair trial (mostly because of unreliable evidence), and the other is to argue that the delay in bringing the prosecution is in itself an abuse of process.

The first of these concerns will not necessarily lead to a proper stop in the prosecutorial activity. The default way of dealing with these concerns in the English system is through directions given by the judge to the jury (in the case of offences dealt with through a full trial). It is the duty of the judge to do so if the potential difficulties that arise from the delay have become apparent during the trial,[87] and the Judiciary has established guidance for the Crown Courts on how to direct the jury, and has considered it appropriate, for example, to state that '[t]he passage of time is bound to have affected the memories of the witnesses', that 'a person's

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85 Lewis, 'The Evolving Role of the English Crown Prosecution Service' (n 77). The relevance of this change was highlighted by one of the interviewees for this thesis (CPS1).

86 If the challenge of the defence is merely evidentiary, it is also possible to file an application for dismissal. The relevant rules are contained in the Criminal Procedure Rule 3.20, and under the Galbraith test (set out in *R v Galbraith* (1981) 73 Cr App R 124), the judge may dismiss any charge if the evidence against the defendant would not be sufficient for a jury to convict.

87 *R v H (Henry)* [1998] 2 Cr App R 161. Cfr. Karmak, who considers that the general duty of judges to ensure that proceedings are fair does not include a specific duty to alert juries about the consequences of the passage of time, Ingrid Karmark, 'The Fair Trial of Those Accused of Historic Child Sexual Abuse' (University of Kent 2017) 157.

memory may play tricks' and that the 'passage of time may also have put D at a serious disadvantage […] D may not now be able to remember details which could have helped his/her defence [or] D has not been able to call witnesses who could have helped his/her defence because they have died / cannot now be traced / cannot now remember what happened'.[88] Thus, it is expected that any jury adequately directed will be able to deal with these issues and that proceedings should not be stayed.

In the same vein, for delayed complaints, the same guidance deals with the issue, saying that: '[t]he jury should not assume that a late complaint is bound to be false, any more than an immediate complaint would definitely be truthful' and that as the complaints themselves can be evidence themselves, '[i]t is for the jury alone to weigh up all these matters when deciding whether they are sure that [the complainant] has given truthful and reliable evidence'.[89]

Only in extreme cases will courts consider barring the prosecution.[90] It requires serious prejudice so that no fair trial can be held, and even if the delay has been unjustifiable, a stay should be the exception.[91] Examples in the context of delay include that it is impossible to find an alibi for the date and time of the alleged offence,[92] or that the possible evidence for the

88 Judicial College, Crown Court Compendium - Part I Jury and Trial Management and Summing Up, December 2018, ss 10—4, available at https://www.judiciary.uk/publications/crown-court-compendium-published-december-2018/.

89 ibid 10—15.

90 A critique of the extent of the abuse of process doctrine applied to cases of delay can be found in Andrew LT Choo, *Abuse of Process and Judicial Stays of Criminal Proceedings* (Oxford University Press 2008) 77 ff.

91 *R v F (S)* [2011] 2 Cr App R 28; *Attorney-General's Reference (No. 1 of 1990)* (1992) 95 Cr App R 296; *R v Derby Crown Court, ex p Brooks* (1984) 80 Cr App R 164.

92 *R v Telford Justices ex p Badhan* [1991] 2 QB 78 to be contrasted with *R v Wilkinson* [1996] 1 Cr App R 81.

defence has gone missing and that it is not even possible with the available material to challenge or 'exploit gaps' in the prosecution's case.[93]

The procedural debate on abuse of process has also been raised with regard to shorter periods, precisely when some limitation periods have been in play in the legal hypotheses studied above. The debates have arisen from informations laid just before the time limit expired. If the prosecution had not yet made a decision to prosecute, and they had only laid the information with the aim of interrupting the period of limitation and thus gaining time to be able to make a more thorough decision in the future, it can be considered an abuse of process (if it has caused great prejudice to the defendant, etc).[94] Thus the mere fact of the information being laid close to the deadline does not amount to an abuse of process;[95] indeed, it happens very commonly.

Choo has argued that the abuse of process doctrine is insufficient to deal with delayed prosecutions. He has advocated the enactment of specific intraprocedural time limits beyond which a criminal trial should not commence without leave.[96] He does not develop a complete proposal, but it can be deduced that he would establish a default rule of limitation and an exceptional judicial authorisation to prosecute, perhaps similar to the one that exists today for personal torts in England and Wales. He refers to some of the discussion which has taken place in Australia, where it has been said that '[s]etting specific time limits on criminal prosecutions [...] has the advantage of nominating, in advance, a determinate period within which the

93 *R v Ali* [2007] EWCA Crim 691.

94 *R v Brentford Justices ex p Wong* [1981] QB 445.

95 *Lidl UK GMBH v Polychronakis* [2001] LLR 24.

96 He also mentions that '[i]n considering possible strategies that may be adopted to address the problem of delay in bringing cases to trial, the existence in the United States of specific statutory provisions of the kind that are largely absent in England and Wales is of interest', although he does not go as far as advocating directly for their introduction. See Choo (n 90) 88 ff.

prosecuting authority must bring the matter to court, rather than having the period assessed as excessive after the event'.[97] Through interlocking between time limits and abuse of process, he proposes, the right balance can be achieved, avoiding the risks of delayed prosecutions but also not demanding too much of the system.

A final form of judicial control over 'late' prosecutions is the possibility for the Court of Appeals to declare a conviction unsafe, even if the requirements for abuse of process have not been met. Choo mentions that this is considered a form of 'residual discretion', which is used when the 'appellant was put in an impossible position to defend himself'.[98] In any case, he considers that this was a temporary position held by the Court of Appeal, which has not since featured prominently in its decisions.[99]

Abuse of process and other judicial discretionary mechanisms are often portrayed as the functional equivalent in English law to limitation periods elsewhere.[100] As we will see in later chapters, it is not a useful analogy. The extent of its use, and the position within the criminal trial, portray it as a last resource tool rather than as a structural feature. The few cases where abuse of process has been discussed point to exceptional circumstances, rather than to the passage of time itself or to a control of the use and purposes of the criminal law and criminal justice as a whole.

2.8. Conclusion

The initial impression of time not having any effect on the prosecution of crimes in England and Wales is inaccurate. For summary-only offences, there is a general rule of limitation, with

97 Choo (n 90) 96.

98 *R v B* [2003] EWCA Crim 319, *R v Smolinski* [2004] EWCA Crim 1270 [11].

99 Choo (n 90) 79—80.

100 For references see Chapter 4 note 22.

several exceptions contained in the statute. For indictable offences, the discretion of the police, the prosecutor and judicial control operates. Considering sufficiency of evidence, public interest and abuse of process results in only minimal actual prosecution of indictable offences that occurred a long time ago. Guidance and practice place great weight on the public interest assessment, which is within the remit of the police and prosecutorial discretion, mainly guided by an element of 'seriousness' of the offence as the distinguishing criterion to define when an offence ought to be prosecuted even if a long time has passed. The meaning of 'seriousness' is under-theorised. It is not directly associated with the abstract definition of a crime or with a protected interest. Rather, it looks at the concrete configuration of circumstances in the case and its wider repercussions.

The procedural distinction between summary and indictable offences structures this main divide in terms of how time affects the possibility of prosecution. It is also an openly procedural effect that time-limits have, barring prosecution. Limitation periods, where they exist as a categorical rule, have no significant exceptions and there are only a few cases with particular counting rules. Time counts from the commission of the offence, except for a number of offences where the knowledge of the prosecutor becomes relevant. Where no limitation period applies the regulation is also mainly procedural, as no substantive guidance is given as to what is and what is not in the public interest. The controls of how these decisions are made are inter-organisational controls (police-prosecutor-courts), and through the victim's review procedures and through an abuse of process claim.

The next chapter will describe the mechanisms for assessing and attaching legal consequences to lengthy periods passing after the commission of an offence in Germany. For the reader with an English or other common-law background, it will be informative to see the

contrasting role of the legislator so present in assessing the extent of public interest and in defining when an offence becomes officially declared ‘non-recent’.

CHAPTER 3. GERMANY: LIMITATION PERIODS AND 'IMPRESCRIPTIBILITY'

German law contains a small number of statutory provisions in the Criminal Code that define a gradated structure of limitation periods according to the perceived seriousness of the offences, assigning a strict deadline after which prosecution and punishment are barred. Some exceptions and extensions exist, however, which create some dissonance with the apparent simplicity and clarity of the scheme.

This chapter will explore this more nuanced version of the existing regulation and note other relevant, though less visible, areas of the law where time becomes relevant for the criminal law and the prosecution of crimes. The first section will clarify some concepts; the second will describe the limitation rules and their characteristics and doctrinal debates. The third section will explain the extent to which the limitation rules do not apply and the legal consequences of such a void. Finally, the fourth section will describe some judicial mechanisms that are applicable to delayed prosecutions.

3.1. Limitation periods and the concept of *Verjährung* and *Unverjährbarkeit*

The German Criminal Code (*Strafgesetzbuch*, StGB) in its §78 introduces a general limitation period for the prosecution of crimes.[1] The concept it uses is *Verjährung*, which etymologically refers to 'letting a year pass' or 'missing a year'.[2] Historical sources state that 'originally "*Verjährung*" meant not the effect of the passage of time, but the passage of time itself'.[3]

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1 Contrary to the legislative decision in many other European countries, this regulation is contained in the StGB and not in the Code for Criminal Procedure (*Strafprozeßordnung*, StPO). This decision has allowed for debate around the substantive or procedural nature of limitation periods, which will be discussed *infra* in section 3.2.2.

2 Gerhard Köbler, 'Verjähren', *Deutsches Etymologisches Wörterbuch* (Mohr 1995).

3 Karl Birkmeyer, Fritz van Calker and Reinhard Frank, *Vergleichende Darstellung des deutschen und ausländischen Strafrechts* (Verlag von Otto Liebmann 1908) 380. [my translation]

Because of its relation to the ancient Roman institution of *temporalis praescriptio*, it is sometimes used in the translation into English as 'prescription'.[4]

Limitation periods are more than a mere isolated rule; they constitute a legal institution.[5] Time limits are said to share certain principles, aims, and structures across the law. Such elements are present in civil and administrative law, tending to settle states of affairs into legally protected situations,[6] and the criminal law is no exception. Two types of time limits are constituent of the criminal law: limitation periods to the prosecution of crimes (*Verfolgungsverjährung*) and time limits to the execution of punishment for crimes (*Vollstreckungsverjährung*).[7] This thesis only deals with the first. Hence, unless explicitly stated otherwise, in what follows, when referring to 'limitation periods', I refer only to *Verfolgungsverjährung*, the limitation of prosecution.

As is shown in greater detail below, limitation periods cover almost the complete range of criminal offences in German law. By contrast, *Unverjährbarkeit* is the lack of such deadlines, sometimes called 'imprescriptibility'. Within the criminal Criminal Code, only aggravated murder is imprescriptible.[8] The existence of this exception is not widely controversial in the contemporary German legal discourse. Non-limitation in general, in fact,

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4 More on this relationship will be said *infra* in Chapter 5.

5 '[I]nstitution […] denotes a significant practice, relationship, or organization within society, such as the institution of marriage, slavery, or property. Legal institutions in this sense of the word consist at their core of a collection of legal terms and norms, and perhaps also concepts, on a narrow and distinct topic'., Thomas Lundmark, *Charting the Divide between Common and Civil Law* (Oxford University Press 2012) 22.

6 Radbruch, Gustav, *Vorschule der Rechtsphilosophie* (Vandenhoeck & Ruprecht 1965) 31; Annette Guckelberger, *Die Verjährung im öffentlichen Recht* (Mohr Siebeck 2004); Frank Saliger, in Urs Kindhäuser, Ulfrid Neumann and Hans-Ulrich Paeffgen, *Strafgesetzbuch* (Nomos 2017) Vorbemerkungen zu §§ 78ff n 6.

7 See generally Julius Friedrich Heinrich Abegg, *Verjährung rechtskräftig erkannter Strafen* (Maruschke & Berendt 1862); René Bloy, *Die dogmatische Bedeutung der Strafausschließungs- und Strafaufhebungsgründe* (Duncker und Humblot 1976).

8 For the migration of genocide and other offences now contained in the Code of Crimes against International Law, see note 16.

has a history as long as the history of time limitation itself.[9] The long-term evolution has fluctuated greatly, and the exceptional treatment given to the most serious offences has existed in previous eras. However, as we will see in Chapter 5, the liberal Enlightenment influence favouring the existence of generally applicable limitation periods appears to have crystallised in the nineteenth century legislation for all crimes.

The following sections will dive deeper into the structure of limitation periods in German criminal law and the doctrinal debates surrounding them. Later in this chapter, the implications of imprescriptibility will be further explored.

3.2. Range, structure, and rationale for limitation periods

The regulation of time periods for the whole ambit of the criminal law is contained in §78 of the German StGB. The evolution of the range and structure of the periods has not been subject to significant changes since the codification process in the nineteenth century:[10]

> 30 years for crimes punished by life imprisonment[11]
>
> 20 years for crimes punished with a maximum sentence of more than 10 years imprisonment[12]
>
> 10 years for crimes punished with a maximum sentence of more than 5 years and up to 10 years imprisonment[13]

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9 For a summary of this history see Chapter 5. See also Martin Asholt, *Verjährung im Strafrecht* (Mohr Siebeck 2016) 450—462.

10 An interesting exception was the Saxon Particular Criminal Code of 1868, which contained some offences for which the prosecution was not limited and a flat period of 15 years for any other crime prosecutable by public action (and a period of 1 year for private instance offences).

11 These are death result offences, e.g. rape resulting in death (§178 StGB), robbery resulting in death (§251) and arson resulting in death (§306c).

12 E.g. intentional grievous bodily harm (§226 II), extortionate kidnapping (§239a I) or aggravated arson (§306a I).

13 E.g. dangerous assault (§ 224), theft while carrying a weapon or by breaking into a home (§244), or fraud as a member of a gang (§263 V).

5 years for crimes punished with a maximum sentence of more than 1 and up to 5 years imprisonment[14]

3 years for all others[15]

The appropriate limitation period is determined by the maximum legislative sentence assigned to the principal offender without considering any general aggravating or mitigating factors (§78(4) StGB). The exception to these general rules in the criminal law proper is contained in §78(2), which excludes aggravated murder (§211 StGB) from any time limitation.[16] In addition to the general rules, there are specific regimes for press offences regulated by each *Bundesland.*[17] These are generally privileged in that they have shorter periods — usually between 6 months and one year — both for offences related to the content of the publications and for offences against the norms of press laws.[18-19]

Regulatory offences (*Ordnungswidrigkeiten*) are not part of the criminal law but of the administrative sanctioning regime,[20] and are considered a category of less serious

14 E.g. leaving the scene of an accident (§142), simple assault (§223) or theft (§242).

15 E.g. abuse of title (§132a), exhibitionist actions (§183) or negligent perjury (§161). An apparent exception to this general structure is the specific regulation for some copyright offences. Nonetheless, the practical result of the rule contained in §48 KunstUrhG is the same as §78(3)5 StGB.

16 From 1975 to 2002, the same provision contained the exclusion of genocide (at the time contained in §220a StGB), which was later moved to the Code on International Criminal Law (*Völkerstrafgesetzbuch*, VStGB). Together with this change, §5 of the VStGB established that the prosecution of all felonies (*Verbrechen*) contained in the code would not be limited by a time period. The VStGB foresees in its §2 the default application of the general part of the common German criminal law, but it establishes a separate *corpus* of legislation and branch of the law. This means that §78 is applicable for the less serious crimes contained in section 4 of the VStGB, i.e., the violation of supervisory duties and failing to report a crime.

17 Despite being a federal country, Germany has one unitary criminal law system for the whole territory.

18 Wolfgang Mitsch in Volker Erb und Jürgen Schäfer (eds.), *Münchener Kommentar zum Strafgesetzbuch* (C H Beck 2019) §78 n 18.

19 These exceptions will be dealt with again below in Chapter 4.3.1.

20 Infractions were excluded from the criminal law after the Second World War, creating a separate branch of the law. Prior criminal law codes contained a lower infraction category (*Übertretungen*), See Wolfgang Mitsch, *Recht der Ordnungswidrigkeiten* (2nd edn, Springer 2005) 23—24.

wrongdoing.[21] The default rules are contained in the Regulatory Contraventions Act (*Ordnungswidrigkeitengesetz*, OWiG), at §§ 31 to 34 OWiG, establishing periods ranging between 6 months and 3 years according to the fine that can be imposed.

While criminal law offences have only imprisonment and fines as the primary sentences, regulatory offences only have monetary sanctions. Therefore, in both cases, no other penalties are considered for the gradation (seizure, communication of the sentence, driving prohibitions, and limits to the exercise of certain rights or occupations are always secondary punishments, dependent on the principal).

As a matter of internal coherence of the criminal law, limitation periods require justification, as the more general principle of legality (§152 *Strafprozeßordnung*, StPO) demands the prosecution of all criminal acts.[22] Over the years, there has been much theorisation about the justifications for having limitation periods for the prosecution.[23] These arguments are often grouped into two categories: procedural and substantive legitimating grounds. In the first group, the most frequent assertions have to do with the diminishing quality of the evidence,[24] the difficulty of the defence accessing exonerating proof,[25] and the consequent risk of wrongful convictions.[26]

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21 John Hatchard, Barbara Huber and Richard Vogler (eds), *Comparative Criminal Procedure* (The British Institute of International and Comparative Law 1996) 104.

22 Walter Gropp and Arndt Sinn, 'Landesbericht Deutschland' in Gudrun Hochmayr and Walter Gropp (eds), *Die Verjährung als Herausforderung für die grenzüberschreitende Zusammenarbeit in Strafsachen* (Nomos 2021) 88.

23 Justifications will be analysed in depth in Part II. Here I will only offer a quick overview of the German discussion, mainly to show that many possible angles at the issue have been attempted, without satisfactory answers, which contrasts with the —at least in appearance— unchallenged positive landscape.

24 Karl Binding, *Handbuch des Strafrechts*, vol 1 (Duncker & Humblot 1885) 823.

25 Bloy (n 7) 183.

26 Tatjana Hörnle, 'Verfolgungsverjährung: Keine Selbstverständlichkeit', *Festschrift für Werner Beulke zum 70. Geburtstag* (C F Müller 2015) 123 f.

Substantive justifications take a different route. As Gropp and Sinn have recently put it: 'The substantively oriented approaches to the legitimation of the statute of limitations are, so to say, the mirror image of the legitimation of punishment. Because if punishment can no longer be justified due to the passage of time, then the statute of limitations will not only be a legitimate means, but one that is absolutely necessary under the rule of law to prevent that illegitimate punishment'.[27] Hence, these strategies for justification all appeal to the traditional German understandings of the justifications of punishment.[28]

German authors repeatedly state that the *Spezialprävention* as well as *negative Generalprävention* are significantly damaged by the passage of time if an offence is not punished with celerity.[29] If a person has not committed further offences during the time that has elapsed, there is no need for state action. Under the current understanding,[30] if this person were to commit another crime in the future, past criminal behaviour, even if it was never itself punished due to the limitation periods, would serve as a possible consideration to aggravate the new offence under § 46 II StGB. Therefore, the preventive effect is not lost for those who re-offend or are re-convicted in the distant future. Additionally, some have argued that a crime that has occurred a long time ago does not serve as an example to others; as its memory fades, so does its effect.[31]

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27 Gropp and Sinn (n 22) 90. [my translation]

28 For an introduction for foreign lawyers, see Markus Dubber, 'Theories of Crime and Punishment in German Criminal Law' (2005) 53 American journal of comparative law. This thesis will discuss this type of justifications in detail in Chapters 6, 7 and 8.

29 Nikolaus Bosch in Albin Eser and others, *Schönke/Schröder Strafgesetzbuch* (C H Beck 2019) Vorbemerkungen zu den §§ 78 ff n 3; Mitsch (n 18) §78 n 3; Helmut Satzger, 'Die Verjährung im Strafrecht' (2012) 34 JURA — Juristische Ausbildung 434; Thomas Vormbaum, 'Mord Sollte Wieder Verjähren', *Festschrift für Günther Bemmann zum 70. Geburtstag* (Nomos 1997) 501. For a discussion of these terms, see Chapter 6.

30 This conclusion depends on the limitation being understood as procedural in nature, see 3.2.2.

31 v.Globig/Huster cited by Asholt (n 9) 132.

According to a different line of thought, there is the attempt to justify limitations on the grounds of *positive Generalprävention*. The main point is that the efficacy of legal norms has been restored through the passage of time, and thus the need for the criminal law to intervene has been lost.[32]

Theories of punishment based on retribution (*Vergeltung*) have greater difficulty in justifying limitation periods. One option for an attempt based on retributive grounds is a strong version of the identity-change thesis. An assumption that time changes 'human souls' leads Lourié to justify limitation periods. He underlines that the psychological relation between deed and doer gets lost with time and, thus, the criminal sanction does not address the wrong originally committed.[33-34] This theory has nevertheless been criticised by other retributivists, in particular Binding, who claims that there is a complete dissociation between 'mere' suffering and state-imposed punishment.[35]

The justifications noted above all have shortcomings.[36] Most obviously, there are significant inconsistencies between the justifications and the actual shape of limitation periods. Procedural arguments do not account for the gradated structure of the regulation; more serious offences are not more or less easily proven than minor ones, and the risk of wrongful conviction is probably more severe the greater the penalty that is risked. Substantive justifications face the challenge of resisting the contention that they work on pure conjecture; whether the alleged offender has actually 'rehabilitated herself', suffered 'punishment-like hardship' or undergone

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32 A complete overview can be found in ibid 134—156.

33 Samuel Lourié, *Die Kriminalverjährung* (Schlettersche Buchhandlung 1914) 59 f.

34 Jakobs also mentions this element among others justifying limitations, Gunther Jakobs, *Strafrecht Allgemeiner Teil* (de Gruyter 2011) 345.

35 Binding (n 24) 823 n. 5.

36 In this work, I will analyse them in Chapters 6, 7 and 8. For an overview see also Hörnle (n 26).

a profound identity change, and whether the punishment, if imposed, would not have had a deterrent effect, there is no proof. They also cannot account for the existing suspension and restarting of the periods.[37] Thus, some have said that the real reason for having limitation periods is a mere legislative whim.[38] This might well be true.[39]

Courts have often adopted a more pragmatic approach, appealing to legal peace and legal security, which does not demand such intense ontological or axiological commitments:

> Limitation is an institution in the border area between justice and legal certainty. Justice demands to give offenders their atoning punishment. Legal certainty strives for legal peace. If this is disturbed by an offence, it serves legal peace if justice removes the disturbance by interfering with a punishing hand. If, however, legal peace returns by itself through the healing process of time and the legal system is restored, the intervention of the punitive power has no longer any benefits. It only leads to new unrest. Therefore, the law forbids it.[40]

This approach also borders the theories that claim that time *per se* has a healing force and that crime is 'historicised'.[41] The time limit serves as a 'legal selection of past events', a predefined tool assessing the present legal relevance of a crime.[42] The German Constitutional Court, as it does elsewhere in its jurisprudence, has highlighted the application of the principle of proportionality (*Verhältnismäßigkeitsgrundsatz*) in the use of the criminal law as a form or state power that entails encroachments on liberty and property, both to justify and potentially limit this institution.[43]

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37 For an explanation of these concepts see Chapter 3.2.3.

38 E.g. Report on the drafting of the Criminal Code of Hessen, cited by Asholt (n 9) 166.

39 In Chapter 5, I will attempt to show that, even if there might be some arbitrariness in the specific form of limitation periods, there are clear principled (institutional) reasons for the traction they gained at the time of their adoption and for their maintenance.

40 BGHSt 18, 274. [my translation; see Chapter 8 note 46]

41 'Forget and forgive!' ('*Vergessen und Vergeben!*'), exclaims Abegg (n 7) 20.

42 Asholt (n 9) 267.

43 BVerfGE 156, 354, 158; BVerfGK 2, 149, 51.

Controversial in the theoretical discussion as this point has been, no alternative method as gained any traction. Similarly, no legislative proposals in the last almost 200 years would have excluded limitation periods for the prosecution of crimes altogether or would relegate them to a marginal role.[44]

3.2.1. Criteria used for gradation

The structure of the limitation periods does not track the more traditional two-level categories, which can loosely be grouped by the English terms felonies and misdemeanours. In Germany, felonies (*Verbrechen*) are offences punished with one year or more imprisonment, and misdemeanours (*Vergehen*) are those punished at the minimum with less than one-year imprisonment or a monetary penalty.[45] Therefore, both are categorised by the minimum sentence attached to them. Limitation periods, on the other hand, are determined by the most severe threatened punishment. The consequence is that there is no match between the two structures.[46] There is also no match with the procedural availability of alternatives to a full bench trial (such as prosecutorial disposition initiative,[47] *beschleunigtes Verfahren*[48] and *Strafbefehlverfahren*).[49]

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44 For the more significant attempts at reform, see Chapter 5.

45 §12 StGB. The substantive differentiation of these two classes of offences lies in the liability for attempts (by default for felonies, only by express legal disposition for misdemeanours, §23), while on the procedural side there is only a requirement of mandatory legal assistance for felonies (§140(1)2 StPO).

46 A legislative design based on the categories of crimes is adopted in France, for example (Articles 7-9 of the criminal procedure code).

47 §153 and 153a StPO, allowing the prosecutor to halt proceedings for misdemeanours *(Vergehen)* either under certain or no conditions, independently or with the authorisation of the courts.

48 At the request of the public prosecutor, crimes with no evidentiary difficulties can be dealt through this expedited procedure, leading to the imposition of sentences of up to one year, §419 I 2 StPO.

49 Often translated into English as 'penal orders', the *Strafbefehlverfahren* (§407 StPO) can be used for misdemeanours (*Vergehen*), imposing up to a suspended custodial sentence of one year.

The most severe threatened punishment for a crime is generally perceived to reflect the relative seriousness of the offence as defined by the legislature through the statutory maximum penalty.[50] The drafting committee of the StGB decided this scheme 'for reasons of justice and simplification'; however, it did not explain what this entails. A notion of ordinal proportionality between categories of crimes seems to underlie this structure and that the *maxima* defined by the legislature can be assumed to represent an adequate ranking of gravity.[51] Notwithstanding the possibility of one instance of fraud (*maximum* 5 years of imprisonment) being less serious than the most serious possible instance of leaving the scene of a traffic accident (*maximum* 3 years of imprisonment), the general indication of the legislator is that the former is to be seen as worth prosecuting for longer than the latter.[52]

Ordinal proportionality may seem an inadequate way to assess the perceived gravity of crimes in the actual workings of the criminal justice system, for which another measure (for example, the average sentence length for a type of offence) could be seen as more appropriate. Yet, following an *ex post* approach to evaluate the perceived gravity of crimes would be ill-matched with the mentality prevailing in the German legal system in at least two ways. Firstly and most importantly, it would be incompatible with the belief that legislators (and not other operators of the system) ought to make the value-choices about the extent of limitation and, equally, the extent of the criminal law.[53] Legislators only act *ex ante*. The second source of incongruity flows from the fact that German law doctrine has often taken pride in being

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50 Critically, Weigend states that those provisions 'fail to offer significant guidance to the sentencing court for the resolution of individual cases'. Thomas Weigend, 'Sentencing and Punishment in Germany' in Michael Tonry and Richard Frase (eds), *Sentencing and Sanctions in Western Countries* (Oxford University Press 2001) 189.

51 Possibly trying to bridge the different perceptions among legal systems, Andrew von Hirsch, 'Seriousness and Severity', *Censure and Sanctions* (Oxford University Press 1996).

52 Contrast with the examples in Chapter 4.3.1.

53 This perception is crucial for the understanding of limitation periods and will be examined extensively in Chapter 11.

strongly offence- and not offender-centred. Strict 'culpability for the offence' (*Tatschuld*) is the only thing that can be assessed without interrogating the offenders' circumstances. Conversely, any *ex post* determination of sentences contains at least some level of 'offender culpability' (*Täterschuld*).

The *maxima*, hence, work as the only available proxy for the legal weight of an offence, which is compatible with other principles of German criminal law. An *ex post* individualised assessment can be helpful elsewhere, though. The reasoning used for limitations to the prosecution can be contrasted with the one applied for limitation periods for the execution of sentences (*Vollstreckungsverjährung).* Here, it is the sentence imposed on the specific offender for the specific offence that will determine which category of the laddered structure will apply, giving no relevance to the offence committed. Indeed, because there has been no judicial determination of the characteristics of the offence and the facts needed to determine the specific punishment cannot be ascertained, it would be impractical to have a limitation period for the prosecution associated with the specific expected sentence.

Forms of participation in crime, aggravating and mitigating circumstances and the use of the 'especially serious case'[54] clause are irrelevant for determining the adequate period to be applied. Only in the case of tax offences is there an —apparently unjustifiable— exception, which has been criticised as contrary to the principle of equality. The German legislator has decided not to consider ease or difficulty in regard to investigating a certain type of crime as a relevant factor to define more extended limitation periods. Thus, no structural exceptions have

[54] For example, §212 StGB contains the offence of non-qualified murder, with the following structure: '(1) Whosoever kills a person without being a murderer under section 211 shall be convicted of murder and be liable to imprisonment of not less than five years. (2) In especially serious cases the penalty shall be imprisonment for life'. The second part is considered a continuation and a mere specification of the offence determined in (1), and as such the appropriate limitation period is 20 (and not 30) years.

been introduced for crimes that are typically dependent on flimsy evidence or crimes that have been hidden for a long time.

3.2.2. What is being limited

The next most extensive discussion in the German scholarship is the one about its nature. What exactly is being limited in the *Strafverfolgungsverjährung*? The text of the provision of §78 StGB refers to the exclusion of punishment. This formulation is considered neutral as to whether the rule describes the substantive law or is merely a procedural limit on prosecution.[55] The current majority position in Germany holds that limitation periods are a bar to the criminal proceeding, and its formal effect is the stay of any proceedings once the period has expired.[56] This position was reached in 3 stages.

The first phase[57] was characterised by a substantive understanding of the institution. *Strafverfolgungsverjährung* limited the criminal liability itself, leading to the acquittal of defendants whose alleged crimes had occurred outside the determined time frame.[58] There were two main arguments used in the literature to sustain this interpretation were. First, the systematic place that this rule occupied in the legal order (in the Criminal Code, originally in the title 'Grounds for the exclusion or mitigation of punishment';[59] and later as an independent section in the 'general part' of the StGB[60]). Second, the gradated structure, which expressed the substantive disvalue of a conduct. Under this conception, '[i]nvoking limitation did not

55 This was expressly left open by the drafters of the code, Saliger (n 6) Vorbemerkungen zu §§ 78ff n 3.

56 Mitsch (n 18) §78 n 1.

57 For a more detailed description see Asholt (n 9) 295—300.

58 RGSt 6, 37, 41.

59 Fourth section of the RStGB 1871. [my translation]

60 Section seven of the StGB since 1971.

impede the initiation of the investigation, rather, this should in general take place'.[61] Many of the authors who have written extensively on this topic hold a substantive approach even nowadays.[62]

An intermediate phase emerged as a consequence of the reluctance of judges to acquit offenders, according to Asholt.[63] A mixed version started to develop, picturing limitation periods as procedural bars. Although these theories deny that liability itself is extinguished, they still conceive that there is a lifting of the punishment and therefore the substantive relevance of the institution persists.[64] While such a mixed approach is prevalent today amongst some of the leading German criminal scholars,[65] it has not been free from criticism. Lorenz pointed out that once the substantive relevance is recognised, it is counterproductive and futile to acknowledge a mere procedural bar.[66]

The tendency towards a procedural notion was later fully adopted. This movement was parallel and coincident with the changes in the positive law during the Nazi period.[67] The previous phase had already established that the correct procedural consequence of the expiry of the period before conviction was the stay of the proceeding and not the acquittal. In this new phase, the evolution allowed for the parliament to introduce, and for the courts to validate, the

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61 Abegg (n 7) 17. [my translation]. Abegg is describing the conception of the time, based on the example of the Bavarian Code of 1813.

62 Bloy (n 7); Stefan Zimmermann, *Strafrechtliche Vergangenheitsaufarbeitung und Verjährung* (Iuscrim 1997); Young Gi Hong, *Zeitablauf als Grenze des staatlichen Strafanspruchs* (Peter Lang 2005); Asholt (n 9).

63 Asholt (n 9) 300—306.

64 RGSt 41, 167: 'The limitation of the prosecution has the effect, according to the substantive law, of eliminating the state's claim for punishment […]. It is also, on the procedural side, a bar to the criminal procedure, so that the non-expiration of the period amounts to a procedural requirement […]. For this reason […] the stay of the proceeding can be determined'. [my translation]

65 Jakobs (n 34); Mitsch (n 18); Satzger (n 29).

66 Max Lorenz, *Die Verjährung in Der Deutschen Strafgesetzgebung* (C H Beck 1955) 58.

67 See Chapter 5.3.

possibility of retroactive changes in the limitation periods.[68] This doctrine continues to this day,[69] although the extreme of re-opening already expired periods has not been attempted again.

This conception has practical consequences for substantive criminal liability, which are still relevant even after the limitation period has passed: crimes with expired prosecution periods nevertheless can be, and in fact are, considered as aggravating factors at the sentencing stage for a later offence;[70] the act keeps being a crime after the time-period. Nevertheless, there are limits, such as the offence of obstruction of justice (§§ 258, 258a StGB) which cannot be committed anymore in hindering the investigation of an offence whose limitation period has expired,[71] as the predicate offence needs to still be punishable.

However, this procedural interpretation has some shortcomings. Similar to the procedural arguments for justification, the alleged procedural nature of limitation periods does not account for their gradation, which is determined by the seriousness of the offence. One could argue that this is only an apparent 'substantive' determination of the period. In fact, the period that will apply in any individual case will have as much to do with the particular circumstances and events that took place during the commission of the offence and subsequently (how long the effects took to emerge, who the victim was, who the offender was, and when the prosecutor directed the proceedings against this individual). In the end, due to

68 RGSt 76, 64 and RGSt 76, 159, 160, both during the Nazi regime. This reasoning by the courts continued after the transition to the new democratic system, as is shown in BGHSt 2, 301. Later —in 1969— and definitively in this sense, the decision of the Constitutional Court allowed the retroactivity of the change in the limitation periods for prosecuting the Nazi crimes, BVerfGE 25, 269.

69 It was reasserted in BGHSt 2, 300; BGHSt 4, 135; BGHSt 8, 269, and many more.

70 Dennis Bock, 'Die Strafrechtliche Verfolgungsverjährung' 2006 Juristische Schulung 13.

71 Mitsch (n 18) §78 n 11.

procedural elements and decisions, a particular period will result for each individual prosecution.

Another argument invoked against the procedural nature of the institution is that it cannot account for the inexistence of a limitation period for murder, in contrast to all other crimes. The answer of the 'proceduralists' is to claim that neither can a coherent version of the 'substantive' account, as it can only justify murder having the same limitation period as the rest of the offences with the same assigned punishment.

Nowadays the procedural mechanisms for putting this institution into practice are §§170 II, 204, 260 I and 260 III of the code of criminal procedure (StPO), depending on the stage of the proceeding when the period expires. The limitation periods must be raised *ex officio* by the prosecution or the judge, depending on the stage of the proceeding.[72] If the matter is not raised or ignored, the defendant might still bring it to the attention of the court in the context of a revision proceeding.[73]

In terms of their effects, limitation periods bar the imposition of punishment and also of certain 'measures' (*Maßnahmen*): 'measure[s] of improvement and security, confiscation and rendering unusable' of goods (§ 11 Abs. 1 Nr. 8). For our purposes, these measures need to be separated into two kinds, ancillary and independent orders. Characteristically, these measures are imposed as ancillary orders, in the context of a criminal sentence. Such impositions are barred by the expiry of the time limit in the same way as the punishment. Nevertheless, autonomous confiscation (*Einziehung*) remains untouched: '[e]ven if criminal

72 Already in RGSt 66, 328, RGSt 76, 159; BGHSt 4, 226.

73 BGHSt 15, 203. '*Revision* is an appeal on points of law only, […] from conviction and/or sentence' Michael Bohlander, *Principles of German Criminal Procedure* (Hart 2012) 251.

prosecution is ruled out, the perpetrator should still not have a material benefit from the act'.[74] Confiscation has an independent limitation period of 30 years (§76b). The introduction of an expiry of security measures is said to be in line with the attempt to keep them tied to the blameworthiness of an act, as opposed to allowing the criminal law to become offender-centred.[75]

3.2.3. Reinstatement and extensions of periods

The legally established time period begins to run on the day that the offence has been committed or, for result crimes, once the required result occurs.[76] Knowledge on the part of the prosecutorial bodies about the existence of the crime is not relevant for the expiration of the period; the fact that the crime has been kept secret neither suspends nor extends the period.[77] However, as we have seen, some circumstances suspend or interrupt the counting, extending the period by way of freezing or restarting the counting.

Suspension (*Ruhen*) grounds stop the running of the period and allow it to continue when the circumstance envisaged by in the law has ceased. These circumstances are contained in §78b StGB. They include that the alleged victim was a child at the time of the commission

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74 Gropp and Sinn (n 22) 120. With reference to the legislative history of the relevant provisions at BT-Drs. 18/11640, 82.

75 Asholt (n 9) 344—345.

76 For a concise summary of the specific construction of the rule for activity, result, status, permanent offences, as well as omissions, attempts and continuing offences see Bock (n 70). The most relevant change in the evolution of this institution is the current postponement of the beginning of the period until the moment that the result occurs. Before 1975, the relevant provision stated that 'the limitation period begins with the day in which the act is committed, regardless of the moment of the occurrence of the result', §67 of the RStGB 1871. [my translation]. For an extended discussion of the grounds for having two possible starting points, see Manuel Köchel, *Verjährungsbeginn im Wirtschaftsstrafrecht* (Peter Lang 2019).

77 Mitsch (n 18) § 78 n 13. In contrast, in England and the US some of the time limits are counted from the moment that the prosecution authorities know about the offence committed or when they consider the evidence as sufficient, see Chapter 2.

of certain forms of sexual abuse; that the offences were committed by members of a legislative body while they have immunity; and they cover a legal proceeding whose decision is required for the criminal trial and while foreign authorities are processing a request for extradition when the alleged offender is residing abroad.[78] The legitimating reason for this regulation is the consideration that the passage of time should not benefit the defendant while the state has had 'their hands tied' and has not been able to legally prosecute.[79] Therefore, part of the literature supports the interpretation that if such an impediment were to disappear, the period should start running even for underaged victims.[80]

In general, jeopardy arising from a lack of information about the facts falls on the prosecution, and not on the offender. The exception to this logic is the most recent addition to the catalogue of circumstances: the suspension for certain cases of child sexual abuse and other related offences (§78b(1)1). This is clearly a factual, and not a legal impediment to the prosecution. However, it is thought to be of such importance that the legislator introduced this exception (first, in 1994 until the victim's 18th birthday, then until their 21st birthday and finally until their 30th birthday). The recognition of the difficulties for the claimant to come forward and make the prosecutorial agencies aware of the commission of the offence took the form of a suspension of the beginning of the period.

The regulation of the limitation periods for child sexual abuse has been widely debated over the past two decades. First, there has been criticism about why not all forms of sexual abuse against children have been included. Second, it has been questioned why other kinds of

78 Three additional circumstances exist in procedural legislation (i.e. outside of the StGB), and apply once proceedings have already been started: §§153(3), 154e(3) StPO. There is also a special rule for tax offences (§396 AO), which suspends the counting of the period until the administrative proceeding is finished, in order to avoid contradictory decisions in both jurisdictions.

79 Mitsch (n 18) §78b n 2.

80 Gropp and Sinn (n 22) 106.

offences are not equally considered, despite the fact that they may be highly traumatic and they often arise within relationships of dependence with the alleged offender. Third, some have warned that a *de facto* imprescriptibility may arise in some instances by the application of these rules of extension.[81] In practical terms this regulation creates some difficulties, mainly because the changing normative landscape has resulted in a set of rules that only very experienced prosecutors know how to apply correctly.[82]

Once the counting has started (or the suspension has been lifted), only the occurrence of one of the circumstances contained in §78c will 'interrupt' (*unterbrechen*) the counting and return it to zero. The circumstances that restart the counting could be described as those procedural actions 'that make it explicit that the prosecutorial authorities are still investigating or conducting a proceeding'.[83] Some of the actions that restart the counting in this way are the questioning of the defendant, an order to seize assets or a search warrant, and the indictment and any judicial suspension of the procedures due to the absence of the defendant.

Each time one of those events takes place, the counting starts to run again from the beginning; the day of the interruption is the next, first day of the period. This effect may be repeated as many times as one of those circumstances occur, up until double the originally prescribed limitation period runs out (§ 78c(3)).[84] This is called 'absolute limitation'.[85] If this period elapses, any proceedings must be stayed definitively. The joint operation of these rules,

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81 See below Chapter 3.3.

82 A prosecutor specialised in sexual crimes gives an account of the myriad of difficulties faced by police and prosecutors in following track of the applicable norms, StA1 interview held on 26 January 2021.

83 Meyer, 'Die strafrechtliche Verjährung' 2014 Juristische Arbeitsblätter 342. [my translation]

84 For exceptionally brief periods, the absolute limitation period is 3 years. For especially serious tax offences it is two and a half times the original limitation period, §376 (3) AO.

85 Note that absolute limitation does not apply to hypotheses of suspension of the period. This means that in those cases, the overall time passed since the commission of an offence can be much longer than double the period established in §78 StGB.

thus, creates both an overall time limit for prosecuting crimes, and an intra-procedural maximum for achieving a first instance decision.

Whether to establish some judicial extensions attending to the particular circumstances of a case was expressly considered and discarded by the drafting committee of the criminal code, stating that it would be contrary to the 'fundamental thought behind limitation', which disregards such considerations.[86]

3.3. Imprescriptibility, the principle of legality and prosecutorial discretion

War crimes, crimes against humanity and aggravated murder are imprescriptible crimes. Tendencies seen in other legal systems towards the widening of this list are not perceptible in Germany.[87] Aggravated murder is the only exception contained in the *Strafgesetzbuch*. The current exclusion of such murders was introduced in 1979 to deal with the offences committed by Nazi officials.[88] Saliger summarises the considerations given by the legislator, claiming that the change was based on the protection of life as one of the central values of the constitution, the vicious nature of the most serious homicides and the decision to protect this highly regarded legal good.[89]

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86 BT-Drucks IV 650, 258. By contrast, the limitation period for the execution of the sentence can be extended for *up to* one half of the original period, if the convicted is at the time in a locality where the extradition or transfer cannot be achieved.

87 For examples see notes 30, 31 and 32 in Chapter 4 and notes 5, 6 and 7 in Chapter 12. Gropp and Sinn give an update on the recent media and political discussions around limitation periods, without finding real signs of an expansion or restructuring, Gropp and Sinn (n 22). This is also the anecdotal experience collected from talking to German scholars and practitioners.

88 Sambale provides an overview the legislative discussions and highlights that there was no significant attention to the consequences of this provision for 'everyday' murders, Anica Sambale, *Die Verjährungsdiskussion im deutschen Bundestag* (Dr Kovac 2002) 99. More will be said on this change in Chapter 5.

89 Saliger (n 6) §78 n 6.

The main problem with this exception is consistency. It is to be noted that the reason for excluding aggravated murder cannot be the supreme value of life and its protection. This would not be consistent with the fact that the prosecution of all other intentional and non-intentional killings is time-limited. On the other hand, if the reason for having an open possibility to prosecute murder is the seriousness of the offence, then it may seem inconsistent to not have it for other crimes for which life imprisonment is a potential sentence.[90] If the reason is that murder takes a longer time to fade from the social memory, then why not allow a more precise evaluation of public interest on a case-by-case basis, leaving other abhorrent crimes in the domain of the prosecutable for as long as is needed?[91] The evidentiary problems are no less evident for these types of offences.[92] However, it seems that the historical role that this exception played in the prosecution of the crimes committed during the Nazi period is more relevant than systematic, principled or practical considerations.

In theory, where no limitation period applies, the principle of mandatory prosecution operates, due to §170(1) StPO. Any offence for which there is sufficient evidence ought to be prosecuted. The norm is easier stated than applied, as in practice, the investigative efforts put into a case will have a bearing on the chances of reaching this standard. In practical terms, this provision has most often been seen to be used in the prosecution of personnel involved in the

90 Roxin, for example, starts his exposition of the German criminal law by stating that the punishments are the point of reference for all criminal law precepts. Claus Roxin, *Strafrecht Allgemeiner Teil* (4th edn, Beck 2006) para 1.2.

91 This has been particularly debated regarding child sexual abuse. Hörnle stresses, though, that there are no sufficient reasons to add only child sexual abuse to the category of crimes without limitation periods. Tatjana Hörnle, 'Sollen Verjährungsfristen für den sexuellen Missbrauch von Minderjährigen verlängert werden?' 2010 Goltdammer's Archiv 388.

92 The clearest expression of this problem can be seen by comparing murder to other types of homicide. Homicides require a less demanding *mens rea*, which is easier to prove. Still, it is murder, where it is more complex to generate the required persuasion of the court about a subjective element of the offence, that is the one that can theoretically be dealt with when more time has passed. Mitsch (n 18) para 2.

operation of concentration and extermination camps by the Nazi regime.[93] This openly political aim of dealing with the past has driven some interpretive discussion on the point about whether aiding and abetting aggravated murder was also covered by the exemption from limitation.[94] The debate has now been settled in favour of such as possibility, also with some substantive changes allowing to convict without the need to prove specific contributions to the killings.

Extended periods for murder have also been applied in cases that were not prosecuted in the Democratic German Republic.[95] Exceptionally, there are reports of 'common' aggravated murders, which end up being prosecuted a long time after the commission of the offence, mainly due to them having been considered 'cold cases' for a long time until further evidence emerges.[96]

Other than the clear-cut exception of murder, some authors have started to cluster a range of phenomena under the notion of *de facto* imprescriptibility. One such hypothesis occurs with negligent crimes.[97] There are also those cases where the result contained in the definition of the offence does not follow the conduct immediately (78a(2) StGB), significantly extending

93 Some have criticised these prosecutions for being selective, Friedrich Dencker, 'Vergangenheitsbewältigung durch Strafrecht? Lehren aus der Justizgeschichte der Bundesrepublik' (1990) 73 Kritische Vierteljahresschrift für Gesetzgebung und Rechtswissenschaft 299; Heiner Alwart, 'Strafprozess im stahlharten Gehäuse der Vergangenheit' (2022) 77 JuristenZeitung 715. Other isolated voices have claimed for eliminating the exception, Vormbaum (n 29).

94 The much criticised decision in LG Hamburg NStZ 1981, 141 was later reverted after the decision in the Demjanjuk case in 2011 (LG München II, *Beschluss* of 12 May 2011 — 1 KS 115 JS 12496/08), which has now become an established interpretation.

95 E.g., BGHSt 39, 353.

96 Some examples described in Annette Marquardt, 'Cold Case-Erfahrungen aus Sicht der Staatsanwaltschaft' [2022] Polizei Aktuell, available at https://ksv-polizeipraxis.de/cold-case-erfahrungen-aus-sicht-der-staatsanwaltschaft/.

97 Gudrun Hochmayr and Walter Gropp, *Die Verjährung als Herausforderung für die grenzüberschreitende Zusammenarbeit in Strafsachen: Entwicklung eines Harmonisierungsvorschlags* (Nomos Verlag 2021) 100, 602. Examples include cases of failing infrastructure or machinery, with constructors being prosecuted decades later.

the beginning of the period.[98] In a similar position are the sexual offences against underaged victims. The more serious of them may run out at the 50th birthday of the alleged victim for starting the proceedings, with the absolute limitation operating at their 70th birthday.

One thread within the German scholarship has noted a relationship between the limitation periods in their jurisdiction and other, more general structural principles of the criminal justice system. The German system is based on the premise that there is a general duty to prosecute all crimes (*Legalitätsprinzip*) and an exceptional ambit for discretion that is legally delimited (*Opportunitätsprinzip*). This is also the only place where individual cases can be weighed or at least where there is less need to typify and classify hypothetical cases into general norms.[99]

The duty to prosecute under the legality principle is a maxim of German criminal procedure (§152 II, 170 StPO): 'The purpose is to avoid inequality before the law and discrepancies in prosecution policies. If an investigation discloses sufficient evidence to justify prosecution, the authority must bring charges […]. This principle applies equally to the police'.[100] For less serious offences, though, this principle is complemented by the principle of discretionary prosecution under the expediency principle (§153, 154 StPO).

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98 Sabine Gless, '„. . . hebt die Zeit sich selber auf " — Strafverfolgung in Spätschadensfällen' in Hans-Ullrich Paeffgen and others (eds), *Strafrechtswissenschaft als Analyse und Konstruktion. Festschrift für Ingeborg Puppe zum 70. Geburtstag* (Duncker & Humblot 2011). Especially in the area of economic crime and corruption, there is a perception that the courts have extended the interpretation of §78a StGB to allow for lengthier prosecution opportunities, Daniel Zapf, 'Zur Entwicklung der Verfolgungsverjährung bei Korruptionsdelikten in der Rechtsprechung' (2018) 2 NZWiSt 6. Calling for a restrictive approach Esther Nazarian, *Der Beginn der Strafverfolgungsverjährung § 78a StGB* (Peter Lang 2010).

99 Hörnle (n 91) 390.

100 Hatchard, Huber and Vogler (n 21) 108. Similarly: '[T]he German rule of compulsory prosecution of serious crime is no happenstance. The statutory standards, limitations, and remedies have been meticulously designed to fit the institutional structure and to serve the larger policies of the German criminal justice system. The rule is meant to achieve ends that are immensely important in the German tradition: treating like cases alike, obeying faithfully the legislative determination to characterize

One way to look at the relationship between these principles and time limits is to see limitation periods as a 'negative' use of the principle of legality. In that vein, Mitsch argues that they are not a sign of the opportunity or expediency principle.[101] The *logic* of the legality principle is to be found in limitation periods. Instead of opening up a space for discretion and allowing for a more probable dismissal of the case by the prosecutor, the negative application of the same logic of the legality principle implies a categorical limit to the prosecution. The duty of the prosecution is so extreme, in terms of being bound to apply the limitation period when the factual situation falls in the legal hypotheses, that it is a criminal offence to intentionally or knowingly ignore a limitation period.[102]

External observers have pointed out the relationship between time limits with legality and expediency as well:

> The rationale in German jurisprudence for setting by statute a time limitation, or prescription, on criminal prosecutions lies in the likelihood of error of judgment -a likelihood that grows with time. […under] the so-called *Legalitätsprinzip*, public prosecutors are obliged to prosecute in all other cases of provable criminal liability. It is this principle in German and European law, for which prescription is looked upon as a necessary corrective, that is compensated in common law countries by an expanded *Opportunitätsprinzip*, protecting the state against undue risk of error in criminal proceedings. The danger of increased likelihood of error that has inspired the judicial practice of prescription is partly solved in common law countries also by tight procedural safeguards and the right of the court to acquit where proof of guilt appears impossible by reason of passage of time. German law, on the other hand, has a history of wariness about balancing the right of judges to act in this way with

something as a serious crime, preventing political interference or other corruption from inhibiting prosecution, and more' John H Langbein, 'Land without Plea Bargaining: How the Germans Do It' (1979) 78 Michigan Law Review 204, 211.

101 Mitsch (n 20) 236. It must be highlighted that he does this in the context of discussing limitation periods for administrative infractions (*Ordnungswidrigkeiten*), not the criminal law proper. However, there does not seem to be a reason in his other writings to think that this comment could not belong there as well.

102 Martin Heger, in *Lackner/Kühl Strafgesetzbuch* (C H Beck 2018) §344 n 3. The applicability of this offence for unduly prosecuting an offence after the limitation periods has expired is mentioned *obiter* in BGHSt 51, 72.

the European preference for giving the judge responsibility to discover the truth.[103]

Such an interpretation seems consistent with the fact that crimes of international criminal law are imprescriptible under German law. Here, the influence of international criminal law is felt, where the opportunity principle dominates, introducing considerations about seriousness, the interests of the victim and the 'interest of justice' (Article 53 of the Rome Statute).[104]

As is well known, the legality principle has been said to be in crisis or in demise, and at the very least it has been retreating due to modifications during the last decades, giving prosecutors more tools to dispose (either autonomously or by requesting the court's approval) of many crimes without a substantive decision on the merits being required.[105] This is certainly so for *lesser* offences. If this logic were transposed into the logic of limitation periods, however, it would mean allowing for *less serious* crimes to be brought to justice at any time. Conversely, this would mean the retention of the limitations for more serious offences (even if they are structured on long periods of time, but clear, uniform and legislatively determined). But, as we have seen, the express introduction of imprescriptible crimes reaches *precisely* the most serious crimes in the legal system. If *de facto* imprescriptibility is in fact expanding, and judicial interpretation is making the prosecution of lesser offences, such as economic crimes, also prosecutable a long time after the commission of the acts, this might well be an expression of

103 Robert A Monson, 'The West German Statute of Limitations on Murder: A Political, Legal, and Historical Exposition' (1982) 30 The American Journal of Comparative Law 605, 605—606.

104 Wolfgang Naucke, 'Legalitätsprinzip, strafrechtlich' [2013] Enzyklopädie zur Rechtsphilosophie 30. This is coupled with an expansive extra-territorial jurisdiction of German courts.

105 Alexander Heinze and Shannon Fyfe, 'The Role of the Prosecutor' in Kai Ambos and others, *Core Concepts in Criminal Law and Criminal Justice: Anglo-German Dialogues*, vol 1 (Cambridge University Press 2020) 368—372; 'Zur Stellung der Staatsanwaltschaft im postmodernen Strafverfahren', *Rechtsstaatlicher Strafprozess und Bürgerrechte, Gedächtnisschrift für Edda Weßlau* (Duncker & Humblot 2016).

a growth in an opportunity/discretion-based mentality. We will assess these arguments comparatively in the next chapter.

3.4. Judicial control of 'over-lengthy' proceedings

As we have seen, absolute limitation periods are one way of controlling the excessive duration of criminal proceedings. But even before the expiration of the time limit, an undue delay in prosecuting and judging an alleged offence can lead to an infringement of human rights and the principles of the rule of law (*Rechtstaat*).[106] For the Germans, any intraprocedural delay deserves consideration if the outcome for the defendant is negative, as it is contrary to the 'principle of acceleration' (*Beschleunigungsgebot*). Two different hypotheses are recognised when there is a breach of the 'principle of acceleration'. On the one hand, cases of 'above average' duration of proceedings are dealt with through a possible reduction in sentence, even if the delay is not attributable to a failure of the criminal justice system.[107] On the other hand, if the delay amounts to an infringement of the rule of law ('*rechtsstaatswidrige Verfahrensverzögerung'*) or an infraction of the art 6 ECHR protections ('*konventionswidrige Verfahrensverzögerung'*), the courts have adopted an evolving stance towards the adequate consequences.

Previously, the courts favoured a remedy reducing the sentence before it was imposed, or alternatively a stay of the proceedings if the breach was so egregious that it was not possible to weigh it.[108] One notable exception in the German law is aggravated murder. Because this offence has a mandatory life sentence, there is no range within which to apply any mitigation

106 BGHSt 46, 159 f.

107 BGH NJW 1999, 1198.

108 These could be channelled through the use of the opportunity principle (§153 II StPO), the partial drops (§§154 II, 154a II StPO) or through special rules of sentencing determination (§§59, 60 StGB).

for the perpetrator.[109] However, for secondary participants, the conjoint effect of the lack of a limitation period and the discount in sentencing for the passage of time allows for a reduced punishment.[110] Thus, the exclusion is related to how the seriousness of the offence is perceived, but mediated through what the statute defines as the appropriate punishment. In addition to these devices, since 2011 there has been a law allowing monetary claims for compensation for these delays.[111] Nowadays the dominant solution is to consider part of the sentence served.[112]

As a whole, this is an area that has not been legislated and that depends largely on judicial developments.[113] It brings together considerations of the passage of time in a realm of judicial discretion. Even if in the past the stay of proceedings was considered a suitable remedy for delay, the courts have now found alternative solutions.[114]

3.5. Conclusion

This chapter has described the regulation of categorical and generally applicable rules that bar criminal prosecutions in Germany. It has also introduced some of the central theoretical, doctrinal and policy debates that have coexisted with a seemingly stable regulation. In turn, the relationship with other more general principles and rules of the wider criminal law and

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109 'Eine Reduzierung der wegen Mordes verwirkten lebenslangen Freiheitsstrafe wegen rechtsstaatswidriger Verfahrensverzögerungen kommt aufgrund der strukturellen Besonderheiten des Mordtatbestandes nicht in Betracht' BVerfG NStZ 2006, 680.

110 As an effect of §27 in relation to §49 StGB.

111 *Gesetz über den Rechtsschutz bei überlangen Gerichtsverfahren und strafrechtlichen Ermittlungsverfahren*, BGBl I 2302, in force since 3 December 2011.

112 BGHSt 52, 124 of 2008.

113 Sarah Isabell Eckhardt, *Überlange Verfahrensdauer und Verhältnismäßigkeit* (Nomos 2020).

114 A contrast with the situation in England and Wales will be offered in the next chapter of this thesis.

procedure has been briefly explored. Most tellingly, the relationship with the principle of legality and the role of the prosecutor, the judge and the legislator has been deconstructed.

Even if apparently restricted to narrow areas of the law, imprescriptibility (*de iure* and *de facto*) has gained some ground in German law. The express exceptions to limitation are, nevertheless, covered by a principle of mandatory prosecution, and in theory should not give rise to a selective use of the criminal law by the prosecution. The characteristic rigidity of categorical rules dominates the landscape. However, the conflation of different circumstances can in some cases lead to periods that are much more variable when applied than they seem in on paper.

Some contrasts with the English regulation may already have become apparent. The next chapter will combine these disparities alongside broader legal concepts in each jurisdiction, with a view to ascertaining the similarities and differences. After that, we will look back at other concomitant developments in order to theorise about the historical reasons for the disparities in terms of their shape and rationale.

CHAPTER 4. BETWEEN EQUIVALENCES AND FOUNDATIONAL DIFFERENCES: A COMPARISON OF TIME LIMITS

The country descriptions offered in the previous two chapters have documented the web of rules and powers that regulate the temporal limits to the criminal law. It is time to contrast them to gain more insights into how and why they generate the effects they generate and the role they play in the broader context of the criminal law and justice.

This chapter will challenge the idea that only one legal system has time limits. It will also define more precisely in what sense the existing mechanisms can be seen as functionally equivalent, with a view to then contrasting wider features of how they play out and relate to other parts of the legal system and the criminal justice. The aim of clarifying this is to address the research question that motivates this part of this thesis, namely, why these two legal systems adopt such different positions when regulating the reaction of the criminal law towards the passage of time.

This chapter will first analyse the mechanisms described in functional terms and then construct a comparative system based on 'hard' and 'soft' limits as structuring elements of the law. These will be used to contrast these legal systems with their respective legal families and procedural traditions. Finally, it will discuss how these instruments relate to other parts of the law and criminal justice system to achieve the results that are observable in either case.

4.1. General comparative overview

In England and Wales, as we have seen, the mixture of institutions that take the place that generally applicable limitation periods have elsewhere is a combination of prosecutorial discretion and the police, with guidance from the CPS, and the abuse of process doctrine. The regulatory dispersion of the various limitation periods for summary offences, as well as the

scattered limits for indictable offences suggests a lack of an explicit agreement on the applicable principles and common goals. These statutory provisions do not employ a common wording, and establish varying starting points. There is no evidence of parliamentary debate on those provisions and no trace of them in preparatory papers. This feature is not exclusive to this element of the law, as the English criminal law and criminal procedure are known for their preference for offence-by-offence solutions and regulations.[1] Awareness of the legislator in terms of what is being done when introducing limits (or not) seems to be close to non-existent.

In both legal systems, the limits are related to the expected punishment and procedures determined for each offence. The English criminal justice system relies heavily on an assessment of the seriousness of the offence at the individual level in sentencing (harm and culpability). The law, nevertheless, retains a procedural and binary distinction between summary and indictable offences (either-way offences being by definition a sub-category of indictable ones), which also has an effect for the purpose of limitation, as well as determining the appropriate tribunal, procedure, and punishment. In reality, however, there is no real prosecution *ad aeternum,* and the phrase 'time does not pass for the king' is only partially true. Time does pass, and some effects are perceived by the criminal law, which reacts in accordance.

In Germany, limitation periods are structurally and symbolically related to the primarily statutory determination of the relevance of criminal offences, and the belief that the legal framework of threatened punishment can appropriately capture the individual seriousness of offences. In addition to that, the implementation of the limits negates the principles of mandatory investigation (conducted by the police) and prosecution (tied to specified criteria and still subject to relatively narrow exceptions), in that it inhibits these powers and annuls

[1] Grant Lamond, 'Core Principles of English Criminal Law' in Matthew Dyson and Benjamin Vogel (eds), *The Limits of Criminal Law: Anglo-German Concepts and Principles* (Intersentia 2019) 37.

these duties. Also, the understanding is that this mechanism is an imperative rule (*d'ordre public)*, i.e. it is mandatory for state agents to raise the issue and applies *ipso jure*.

As things stand, the decision to stay prosecutions due to the passage of time is in principle made by the legislator. The *Staatsanwalschaft* need only apply the rule to the particular case, and, if necessary, the courts will apply the provision finding an 'obstacle to proceedings' (*Prozesshindernis*).

Beyond the apparent drastic divide in means, however, the two models are not complete opposites in terms of results. Rather, neither in Germany nor in England and Wales are offences often prosecuted after a long time has passed (be it 5, 10 or 20 years depending on the case). The disparity is greater when we notice that one of them considers that the mere passage of time is the relevant factor. The other, in contrast, requires certain events (not just any event, but also no specific set of events) to have occurred in time to be able to tip the scales away from the implicit assumption that for most crimes the need to prosecute them decreases over time. This assessment requires having some operator of the system to assess that, and that is the divergent choice that both systems have made.

Some authors have expressed this difference in terms of the 'legality principle and mandatory prosecution' vs the 'opportunity principle and discretion' as the structuring elements of the prosecutorial activity in both legal systems that determine the existence of limitation periods.[2] This realisation, unfortunately, has mostly not gone beyond being an

[2] Robert A Monson, 'The West German Statute of Limitations on Murder: A Political, Legal, and Historical Exposition' (1982) 30 The American Journal of Comparative Law 605, 605—606; Wolfgang Mitsch, *Recht der Ordnungswidrigkeiten* (2nd edn, Springer 2005) 236; John Jackson and Jenny Johnstone, 'Statutes of Limitation in the United Kingdom' (2022) 49 DPCE Online 3888.

assertion.[3] For this reason, a more detailed analysis both in functional and in structural terms will follow.

4.2. Functional equivalence?

Crimes are generally not prosecuted after a long time has passed; that seems to be a partial answer to the initial question asked, about how, if at all, time affects the prosecution of crimes. In other words, there is a shared intuition in both systems that the passage of time undermines the state's interest and capacity to prosecute crimes committed long ago. The 'mere' passage of time, irrespective of the particular circumstances and events that have occurred during that time, still seems to bear a relevant force. Thus, a set of norms allows and determines the legal form of this disengagement of the state from the prosecutorial activity.

The reality in both legal systems is consistent with the result. The mechanisms described in the previous chapters work coherently to achieve it. The German mechanism is openly recognised and admitted. By contrast, the English one is also endorsed as achieving the correct result, through a series of institutions that in themselves are seen as adequate, but which are not often seen as participating of that same function.[4]

The same goes for the more specific functions highlighted by the German literature on limitation periods: the mechanisms that operate jointly in England and Wales and consider time as a factor will also serve for diminishing the workload of the system and avoiding miscarriages of justice. However, presupposing that either of these is the principal function of time limits would narrow the examination too soon, as they both — maybe together with some more

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3 Recently, with more analysis, Richard Vogler, 'Why Is There No Statute of Limitations for Criminal Cases in England and Wales?' (2022) 49 DPCE Online.

4 Zweigert and Kötz highlight a warning that resonates with the present exercise: 'The beginner often jumps to the conclusion that a foreign system has "nothing to report" on a particular problem […] they are unconsciously looking at the problem with the eyes of their own system'. Konrad Zweigert and Hein Kötz, *Introduction to Comparative Law* (3rd edn, Clarendon Press 1998) 35.

functions — could be at play simultaneously. The disputed question about whether there is a function or aim of the criminal law as a whole, and how the passage of time affects this, will also be covered in this thesis, in Chapters 6 and 7. For the time being, then, in order to cover them all, the most neutral formulation possible of this inquiry is whether the passage of time affects the prosecutorial activity, at any point and through any mechanism that these two legal systems contain.

The shared result would seemingly be in line with the expected *praesumptio similitudinis*:[5] the presumption that the practical results will be similar across jurisdictions. However, it would be premature to conclude that these systems perform the exact same function and that the practical results are always the same. In both legal systems there are tensions that have been resolved favouring different practical results in parts of the law.[6] Where and how the differences appear demands further exploration. The two systems of limits are thus functional equivalents to a large degree, but not entirely. In terms of results, the exceptional but possible unlimited prosecution of more serious crimes in England and Wales still contrasts with the German result and needs to be explored.

The difference from the point of view of the functional question posited above is that 'the passage of time *per se*' can be trumped by particular circumstances or events. Those circumstances or events might be related or unrelated to the commission of the offence itself, and they can determine the prosecution after a long time in the English system. Although there is no explicit separate function that these other mechanisms should serve, apart from the general functioning of the criminal justice, the same cannot be said about the exceptions in Germany

5 ibid 40.

6 See especially Chapters 2.2, 2.3 and 3.3.

for murder and crimes against humanity. Thus, it is inappropriate to understand them in the same way.

Two findings allow us to treat the two systems together in our analysis: first, the identified intuition that crimes usually become less relevant and manageable over time, and second, the discovery that even in England and Wales —despite appearances— there are mechanisms in place to translate this into an operative legal consideration. The rejection of the ideal of functional equivalence as a tenet of comparative law[7] does not necessarily mean that faced with mechanisms that indeed can be understood as serving a common function, we need to turn a blind eye or not consider this comparatively relevant. This does say something about their content and relations, which may have been invisible otherwise. Nonetheless, it can be recognised that retaining a critical eye towards uniformity and functionalism allows for exploring deeper and more significant relations across the law and culture of different legal systems. In this spirit, it is important to consider several elements when investigating the passage of time and its relevance for the prosecution of crimes. They can all be encapsulated in the idea that there are additional institutions and actors that contribute to the overall stabilisation of the legal approach to this need, which results in legal systems harnessing two structurally different mechanisms within them.

4.3. Comparing the structures

To compare the structures in place for regulating the effect of the passage of time more deeply, we first need construct the basic set of elements that give shape to the significance of the passage of time for prosecutions, the conceptual forms that will allow us to deal with the law comparatively. The criminal law of both legal systems, if looked at comprehensively, contains several norms that define the borders of its own operation. Here, the temporal borders will be

[7] See the methodological discussion in Chapter 1.2.

contrasted. I propose to understand these borders as belonging to two kinds: hard limits and soft limits.

After understanding these structures, this section will analyse the structures in the context of the legal families and procedural traditions often used by comparatists to highlight similarities and differences.

4.3.1. Existence of 'hard' limits

Hard temporal limits in the law are relatively easy to identify. To a significant extent, they are contained in legal rules, often in statutes. These take the form of deadlines, containing a starting point, a duration and potentially some causes for extension. These rules are accompanied by a series of norms that give competences in terms of who can and who must act in order for them to be applied. Whoever the rule-applicator might be (typically the prosecutor and the judge, but also, for example, the police), she will be constrained, and the outcome of the evaluation will be expected to be the same in every case that shares the relevant circumstance, i.e. the passage of time.

Rules of the type we are dealing with here contain, as an empirical trigger, the passage of a certain amount of time.[8] They do not contain, as such, any particular events or processes that have transpired during that time, except for the events that cause an interruption or suspension of the period, which are also formulated in a rule-like structure.[9] The determinate response is the barring of proceedings or the exclusion of the jurisdiction of a specific criminal court.

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8 Pierre Schlag, 'Rules and Standards' (1985) 33 UCLA Law Review 382—383.

9 This is not necessarily a universal feature. France, for example, used to have an open clause, closer to a standard than a rule, for defining when the period should be suspended (*Code d'Instruction criminelle* 1808, Art. 637). Germany itself did, when the specific procedural acts were not individualised as they are now (§68 StGB before 1975).

Rules also have the capacity to contain their own exceptions, which are potentially exactly as hard as the general rule: there is no apparent evaluation or modulation here either. For that reason, the fact that the German limitation periods for press offences are shorter is not in itself a denial of the notion of a hard limit. The same applies to the English rule for summary offences (s 127 MCA), when contrasted with the exceptions contained in specific norms, such as the Water Resources Act 1991, s 101, which extends the period to 12 months, or the Road Traffic Offenders Act 1988, s 6(2), which shortens it.

What I am calling a 'hard limit' is not the 'rule' on its own. The mere limitation period, for example, does not provide the whole of the working mechanism that is required to understand the law of limitation. The hard limit is the conjunction of the rule together with the powers or duties to apply such a rule. To that extent, even something that is sometimes called a 'principle' can have a 'hard effect', such as the case of the principle of mandatory prosecution (§170 I StPO). Also, the distribution of powers allowing the police in England and Wales to deal on their own with cases, registering and dismissing them without recourse to the CPS,[10] is part of the workings of the hard rule there.

The extent of 'hard limits' for the prosecution of crimes due to the passage of time can be summarised in a table.

[10] A brief summary of those powers can be found in Andrew Sanders and Richard Young, 'Police Powers' in Tim Newburn, *Handbook of Policing* (Routledge 2008). Chapter 2 of this thesis contains more detail on the distribution of powers of prosecutors and police.

Table 4.1 - Comparison of 'hard' time limits in England and Wales and Germany

	England & Wales	Germany
Offences with applicable hard limits	All summary offences, with some exceptions, plus some exceptional indictable offences.	All offences but aggravated murder (and crimes contained in the Code of Crimes Against International Law *(Völkerstrafgesetzbuch))*.
When does the period start?	Periods count from the commission of the offence (MCA). Rules for specific offences count from 'sufficiency of evidence' or 'knowledge' of the prosecutor or 'discovery'.	Periods count from the day after the act has ended or the result has occurred.
What is being barred?	Periods bar 'trying' the information (MCA). Other rules bar 'conviction', 'proceedings', or 'prosecution'.	Periods bar 'punishing the act and ordering measures' (StGB). Procedural thesis: period bars proceedings (leading position). Substantive thesis: periods put an end to criminal liability or the capacity of the state to take action.
Exceptions in counting rules	No exceptional counting rules apply.	Rule-like suspensions and interruptions apply (§§78b, c StGB)
Actors applying the limits	Police, prosecutors and judges apply them. Police will stop investigations; prosecutors may discontinue proceedings; judges will stay proceedings.	All are bounded by it. Any party or the judge *ex officio* may raise it. Duty of all public officials to take it into account. In most cases, prosecutors will request the stay of the proceedings (§206a StPO).

As can be seen in Table 4.1., hard limits are present regulating the effect of the passage of time in both German and English law. They are more common and more frequently operative in the former, but they are not absent in the latter. They differ in the range of offences covered. Most of the times they apply from the commission of the offence, although in Germany there are several mechanisms extending the duration of the period. In both countries the procedural view of their nature and effects dominates. All actors of the criminal justice system are bound by them, although the burden of raising the issue of limitation lies differently in the two jurisdictions.

4.3.2. Existence of 'soft' limits

Soft limits are harder to identify. Standards, factors, presumptions, and principles are forms of soft limits, providing criteria and considerations and a domain of legal consequences. Again, other norms of the system assign the powers and discretion realms in order to apply these criteria.

These boundaries are more apparent in English law than in German law, but they exist in both legal systems. Prosecutorial discretion plays a central role in English law in general[11] and extends to the determination of the temporal boundaries of the prosecutorial exercise.[12] Discretion is thought to have a vital function in delivering justice, not only as a marginal exception for unclear or insufficient rules.[13] The need for individualised justice is a central concern, and general rules are not necessarily considered a guarantee of fairness.[14] Where there have been attempts at, or a discussion about, introducing limitation periods, the general stance in favour of discretion has been upheld. This flexibility should in general allow for prosecution decisions to be based on the merits of the case.[15]

The central element in the discretionary limitation of the criminal law is contained in the specific powers of the public prosecutor, based on the Code for Crown Prosecutors and related guidance. At the judicial level, the element that constitutes the soft limit is applying the established case law on abuse of process. While the practical use of this instrument to control

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11 Discretion is said to be 'the fabric of the criminal law', Jeremy Horder, *Ashworth's Principles of Criminal Law* (9th edn, Oxford University Press 2019) 4.

12 See Chapter 2.5.

13 Keith Hawkins, *Law as Last Resort: Prosecution Decision-Making in a Regulatory Agency* (Oxford University Press 2003) 424 ff.

14 'Discretion can individualize the implementation of the law, softening the harshness or injustices that sometimes arise from rules dispassionately applied. Discretion, ironically, is sometimes needed to promote the purpose of a rule'. Keith Hawkins, 'Discretion', *The New Oxford Companion to Law* (Oxford University Press 2008).

15 Home Affairs Committee, 'The Conduct of Investigations into Past Cases of Abuse in Children's Homes' (H M Stationery Office 2002) Fourth Report para 89.

late prosecutions is relatively marginal, it is the main structure that has generally been recognised in the comparative literature on the topic.[16]

Both of these decision-making procedures are constructed based on what Sunstein calls 'factors':

> We might contrast both untrammeled discretion and rule-bound procedures with approaches that allow particular judgments to emerge through the decision-maker's assessment and weighing of a number of relevant factors, whose precise content has not been specified in advance. The key point is that several factors are pertinent to the decision, but there is no rule, simple or complex, to apply. There is no rule because the factors are not described exhaustively and precisely in advance, and because their weight has not been fully specified. Hence the decision-maker cannot rely simply on 'finding the facts' and 'applying the law'. The content of the law is not given; part of it must be found. There is a degree of ex post allocation of legal entitlements.[17]

Factors allow for multiple and diverse criteria to be incorporated in the making of a decision, to avoid having to describe all of the relevant factors *ex ante* and elaborate how they are to be weighted. Thus, to some extent they are open, as there need not be a *numerus clausus* and value-laden questions can be postponed.

All in all, there seems to be an unspoken norm about the passage of time in England. Late prosecutions are rare. In integrating such a norm and the factor-based decision criteria given above, the alleged maxim that 'time does not pass for the king' and the practice of the actors in English criminal justice, I propose that as a whole they constitute a soft limit constraining the temporal reach of the criminal law.

The finding of mostly hard limits for Germany in the previous section does not mean they have no soft limits. Discretion has a place as well. It could sensibly be said that the official

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16 John Jones in Antonio Cassese and Mireille Delmas-Marty (eds), *Jurisdictions Nationales et Crimes Internationaux* (Presses Universitaires de France 2002) 62. Susanne Forster, 'Verjährung in England und Wales' in Ulrich Sieber and Karin Cornils (eds), *Nationales Strafrecht in rechtsvergleichender Darstellung*, vol 5 (Dunker & Humboldt 2010) 566 ff; Jackson and Johnstone (n 2).

17 Cass Sunstein, 'The Problem with Rules' 83 California Law Review 693—694.

mechanism for terminating most criminal offences (as a result of §§170 II, 153, 153a, 153b StPO) is a tentative use of a soft limit, where the public prosecutor exercises discretion, sometimes controlled by the judge in the compliance of the outer limits of the use of this power, while the hard limit constituted by the limitation period finally arrives and makes the case no longer 'recoverable'.

German law and its legal culture allow greater discretion and greater power to autonomously dispose of cases for its lesser offences. In the more serious ones, all of the guidance ought to be legal mandates in the form of rules. Thus, the higher in the hierarchy of crimes we are, the more reason there is to control and make consistent decisions and procedures. That is why it would be contradictory, from the German perspective, if we were talking about eliminating limitation periods in favour of an 'opportunity principle', to do it for the most serious ones (as is the case in England and Wales). What would be more in accordance with the notion would be to claim strict legal control either by barring or by mandating, but not by allowing for specific assessment.

This comparison of the structures has shown that both legal systems share a mixture of hard and soft elements for limiting the reach of the criminal law over time. On the surface, the conclusion remains that Germany uses hard limits with primacy over soft limits, and English law uses mainly soft limits, with hard limits restricted to certain parts of the criminal law. However, the examination of the two kinds of limits has allowed us to see how many legal structures are deployed (rules, factors, presumptions, powers and discretion realms) to build the normative blocks of the law of limitation.

4.3.1. Legal families, comparative jurisprudence and procedural traditions

These structural differences might be seen as corresponding to two ubiquitous analytical devices of comparative law. The law on time limits for prosecutions in England could be seen as representative of the wider common law tradition and of the adversarial procedural model, while in Germany it could be seen as representative of civil law and the inquisitorial procedure. While this perception has some merit, it would be hasty to assign them the whole weight of the explanation.

First, the fact that England and Wales rely mostly on soft limits and only to a minor extent on hard limits is largely true of the rest of common law countries. One of the rationalisations behind this is that the idea of strict time limits is a statutory feature,[18] and thus is alien to at least the origins of the criminal law in judge made decisions in the common law. This also expresses some of the features highlighted by studies on the self-perception of English legal actors about their system, such as the incomplete autonomy of the law from other spheres of society, the lesser determinable character of its content, as well as the greater attention paid to individual justice rather than the predictability of the law as a value, when compared to Germany.[19]

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[18] Already in 1822: 'At common law there was no time limited for commencing a suit by the King' John Frederick Archbold, *A Summary of the Law Relative to Pleading and Evidence in Criminal Cases* (1822) 32.

[19] These are the 'theses' developed by Lundmark in order to assess the allegiance of legal systems to the normative model behind either the civil or the common law. Thomas Lundmark, *Charting the Divide between Common and Civil Law* (Oxford University Press 2012) 96 ff.

However, several common law countries have introduced a stricter limitation. From the US[20] to India[21] and New Zealand,[22] common law countries have at least adopted strict limits to cover wider groups of crimes, often appealing also to the severity of the threatened punishment as a way of indexing the period within which prosecution is allowed and for setting an upper barrier above which prosecutions could take place without any limit.

It must also be said that there is nothing intrinsic in time limits or any logical requirement that demands that they be placed on a statutory footing. Scotland and Jersey, both of which are mixed legal systems with an intense common law influence, have recognised something like custom-based limits to prosecution. In Scotland, the influence of Roman Law used to lead to the discharge of defendants under the argument that there was a customary limitation period of 20 years even for murder accusations.[23] In Jersey, on the other hand, applying customary Norman law, an identical period of 20 years is mentioned and until 1999 may have been applicable for the most serious offences.[24] In fact, in Jersey, a statutory rule removing limitations was introduced in 1999.[25]

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20 'The Statute of Limitations in Criminal Law: A Penetrable Barrier to Prosecution' (1954) 102 University of Pennsylvania Law Review 630; Charles Doyle, 'Statute of Limitation in Federal Criminal Cases: An Overview' (Congressional Research Service 2017).

21 Code of Criminal Procedure of India, s 468.

22 Criminal Procedure Act 2011 of New Zealand, s 25.

23 *Sugden v HMA* [1934] ScotHC HCJ_1, David Hume, *Commentaries on the Law of Scotland, Respecting Crimes*, vol 2 (second edition, Bell & Bradfute 1819) 113—114. Richard Whittington-Egan, 'A Dickens of a Different Christmas Carol' (2000) 150 New Law Journal. Irvine Smith, "Criminal Procedure" in *An Introduction to Scottish Legal History* (Stair Society vol 20) (1958) at 443-444 and O F Robinson (ed), *Sir George Mackenzie: The Laws and Customs of Scotland in Matters Criminal* (Stair Society vol 59) (2012) 397-399.

24 Steven Pallot, 'The Limits (If Any) of "Prescription Criminelle"' [1998] Jersey Law Review 159; Legislation Committee, 'Draft Criminal Procedure (Prescription of Offences) (Jersey) Law 199' (1999).

25 Criminal Procedure (Prescription of Offences) (Jersey) Law 1999.

Civil law countries other than Germany tend to have hard limits for the prosecution of crimes, based on limitation periods that are very similar to the ones studied here.[26] As mechanisms, these types of rules have been crafted in a way that reflects many of the characteristics associated with the civil law thinking. They allow for a highly autonomous understanding of the law, which need not rely on the needs of politics, economics or other influences of everyday life; the norms are complete in themselves —there are no lacunas or cases without a clear resolution according to them; as to any particular case there is one applicable norm that is readily determinable—; and the result of the application of the law is highly predictable.[27]

However, most civil law jurisdictions have also excluded more serious offences (such as crimes against humanity)[28] and left them to some form of prosecutorial and judicial discretion.[29] Another group of offences has sometimes been excluded from strict limitation are child sexual offences,[30] some forms of corruption,[31] and terrorism.[32] Even more broadly, the existing realms of discretion across the system have sometimes allowed for stabilisation of the law unattached to the strict adherence to what would seem on the face of it to be the effect of the statutory provisions. For example, in France, the legislated rules were interpreted and

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26 The main variance points are the following: some legal systems index the period to the exact punishment threatened for an offence, and do not follow a ladder with only 3 or 4 levels (e.g. Argentina, Italy); some legal systems allow for the accused to resign the limitation and be tried at their choice even if the period has expired (Peru, Italy); some legal systems extend the period if the accused has been prosecuted for another offence in the interim (Chile, Argentina, Austria); some legal systems have shorter periods for young offenders (Sweden).

27 Lundmark (n 19).

28 Ruth A Kok, *Statutory Limitations in International Criminal Law* (TMC Asser Press 2007).

29 The principle of mandatory prosecution is widespread but not universal. Influential jurisdictions such as France work on the basis of the 'principle of opportunity'.

30 E.g. Art. 21 bis *Loi contenant le titre préliminaire du code de procédure pénale* of Belgium; Art. 94 bis *Código Penal* of Chile; Art. 101.3.e *Strafgesetzbuch* of Switzerland.

31 E.g. Argentina through judicial interpretation of Art. 36 of the National Constitution.

32 E.g. Art. 101.3d *Strafgesetzbuch* of Switzerland, Art. 131.3 *Código Penal* of Spain.

stretched by the courts to an extent that some consider *contra legem,*[33] with the aim of achieving a more flexible system.[34] Some argue that this effect could also happen with the current German regulation, achieving a *de facto* extension of limitation.[35]

The categorisation into common law or civil law is, then, for this purpose, pedagogic but lacking in depth in terms of understanding the divergence and complexity of the law. It highlights a broad allegiance and shared structures, but also some blind spots in assuming that it will have sufficient explanatory value.

At the level of contrasting forms of criminal procedure, again, we can divide the analysis into structures associated with adversarial and inquisitorial procedural traditions. However, it would be a mistake to simply attach them to a broad categorisation of types of criminal procedures.

Some of the traits associated with the counterpoint between procedural traditions do match the idea of allowing the defendant to fend for herself and try to remedy at trial what could, in her view, be an unfair prosecution.[36] But once again, however, such an alignment is disproven by conspicuous cases: the USA makes intensive use of statutes of limitation.[37] Many legal systems that would now call themselves mixed or primarily adversarial, such as the reformed Latin-American procedural systems, have generally applicable limitation periods.[38]

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33 Jean Danet, 'La préscription de l'action publique, un enjeu de politique criminelle' (2006) 28 Archives de politique criminelle 73, 84.

34 In the end, and very much in line with the characteristics expressed above, a legislative reform in 2017 reconstructed the shape and the pre-eminence of the statute as the source of the law in the matter. See Etienne Vergès, 'La prescription de l'action publique rénovée' (2017) 1 Revue de science criminelle et de droit pénal comparé 91.

35 See Chapter 3.3 above.

36 Chrisje Brants, 'Comparing Criminal Process as Part of Legal Culture' in David Nelken (ed), *Comparative Criminal Justice and Globalization* (Routledge 2011) 63.

37 See *supra* n 20.

38 Máximo Langer, 'Revolution in Latin American Criminal Procedure: Diffusion of Legal Ideas from the Periphery' (2007) 55 The American Journal of Comparative Law 617.

And, indeed, Germany and France would classify their criminal procedures as mixed, and not inquisitorial, by contrast to their criminal procedures before the nineteenth century.

At the same time, a simplistic derivation of the alleged 'logic' behind these traditions does not seem to underpin the current law. The features often attached to the idea of 'inquisitorialism' would at first sight call for the state to retain the power to prosecute[39] without temporal limits. Also, contrary to much of what allegedly characterises inquisitorial systems, having strict time limits does away with the expectation of finding out the material truth[40] about a case, and is satisfied with a procedural declaration of stay. Quite to the contrary, the notion that adversarial criminal procedures are more closely protective of defendants' rights and place a higher burden on the state and higher restrictions on prosecuting[41] would also justify having hard rather than soft limits.

What sets these countries (the USA, jurisdictions in Latin America, Germany and France) apart from England and Wales is not the adversarial vs inquisitorial tradition but, much more, until recently, the very different picture in terms of the organisation of the prosecutorial powers. All of these countries have for centuries relied on a system of public prosecution. In contrast, for a long time, after the reforms of the early nineteenth century, England had a system that combined private prosecution with a decentralised police system. I contend that this difference is much more significant, and for that reason, the next chapter will be dedicated to understanding this evolution and will test this as an explanatory hypothesis regarding the

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39 On what he sees as a perpetuation of the old and oppressive inquisitorial principles adopted by the *ancien régime* even to our days in Germany, see Volker Haas, *Strafbegriff, Staatsverständnis und Prozessstruktur: zur Ausübung hoheitlicher Gewalt durch Staatsanwaltschaft und erkennendes Gericht im deutschen Strafverfahren* (Mohr Siebeck 2008).

40 Critical, Ingo Müller, 'Der Wert der „materiellen Wahrheit"' (1977) 5 Leviathan 522.

41 Mirjan Damaška, 'Models of Criminal Procedure' (2001) 51 Zbornik PFZ 477.

difference. The types of powers that those prosecutors have nowadays and how this relates to time limits will be explored further below.[42]

4.4. Operation in context, relations with other legal institutions and powers

The function of regulating the effects of the passage of time for the prosecution of offences is, thus, served by different types of structures. These different structures tend to give a similar practical result but are built differently and are associated with the powers of different legal actors, resulting in what, here, have been called soft and hard limits. In order to continue the role that these mechanisms play in England and Wales and Germany, we ought to also look at the broader extension of the criminal law.

4.4.1. Charging decisions and prosecutorial decision-making

A comprehensive comparative perspective cannot be achieved by only contrasting the directly applicable norms regulating the passage of time for the prosecution of crimes without understanding how prosecutors make the decision regarding whether or not to prosecute.

The English prosecutor has the power to decide about the adequacy and relevance of prosecuting offences that become known to her. The English CPS was only created in 1987 as the first general prosecutorial authority in the country's history.[43] Since then, its role has evolved, and its powers have been extended. It does not sit under a single ministry but is answerable to Parliament through the Attorney General.[44] As such, it could be said to have a significant level of autonomy, although that is not to say that it entirely achieves political

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42 See Chapter 4.4.2.

43 Neil Walker, 'The Antinomies of the Law Officers' in Maurice Sunkin and Sebastian Payne, *The Nature of the Crown: A Legal and Political Analysis* (Oxford University Press 1999) 139.

44 Prosecution of Offences Act 1985, ss 2 and 3.

independence. More accurately, it is headed by the 'politically appointed director of public prosecutions' and, '[a]s members of the executive branch, prosecutors' priorities are set by political officials who take public opinion and political considerations into account'.[45]

The prosecutors not only have the larger share of the charging decision under their command, but also a practical arm, which reaches to advising the police.[46] They also have norm-setting powers. Guidelines complement the legislation, either where a case has not gone well or where there is a perceived gap in the legislation.[47] The procedure through which this takes place is consultation, adding a dialoguing and potentially democratic face to the CPS's powers.[48] But at the same time, the failure to follow their own guidance will not necessarily lead to any consequence and, in particular, will not lead to a stay in the proceedings or abuse of process.[49] The discretion granted to the prosecution also impacts the kinds of cases that reach court, because the prosecutor will only put cases before the court where there is little risk of failure.

This clearly contrasts with the situation in Germany. The central notion is that prosecutors are and ought to be 'apolitical figures who function as second judges in Germany's inquisitorial criminal justice system'.[50] Other non-legal elements, such as 'public attitudes, emotions, and preferences are regarded as fundamentally inappropriate considerations in

45 Michael Tonry, 'Prosecutors and Politics in Comparative Perspective' (2012) 41 Crime and Justice 1.

46 On the evolution of these powers, see Chris Lewis, 'The Evolving Role of the English Crown Prosecution Service' in Erik Luna and Marianne Wade (eds), *The Prosecutor in Transnational Perspective* (Oxford University Press 2012).

47 Jacqueline S Hodgson, 'The Democratic Accountability of Prosecutors in England and Wales and France: Independence, Discretion and Managerialism' in Máximo Langer and David Alan Sklansky (eds), *Prosecutors and Democracy* (Cambridge University Press 2017) 87.

48 ibid 102.

49 *R v A (RJ)* [2012] 2 Cr App R 8 CA [83], [84].

50 Shawn Marie Boyne, 'Prosecutorial Accountability in the Rechtsstaat: The Tension between Law, Politics, and the Public Interest'. [2016] Indiana University Robert H. McKinney School of Law Research Paper 4.

making prosecutorial or judicial decisions about individuals'.[51] But all in all, individual prosecutors are relatively free in the exercise of their constitutional powers. It is the criminal law as a whole that must be subject to stringent institutional demands, but the *Staatsanwalt* carries a symbolic weight for the whole system.[52] The subordination of the prosecutors' office to the executive power has been a concern since the beginning of the modern German criminal justice system[53] and remains so now,[54] and it is seen as risking undue politicisation. This potentially explains an intuitive approach regarding how and why any decision about the limits of the state's prosecutorial powers would not be left to the prosecutorial agency itself, and such power would be reclaimed by the legislature instead.

A legally established boundary could help avoid some biases that may arise from the personal involvement of the prosecutor in the investigation, prosecution, and collecting inculpatory and exculpatory evidence.[55] Otherwise there is a risk that her convictions about the truth of the case could prevail, instead of complying with a balanced investigation for both parties. The existence of an objectivity duty amounts to a presumption that the investigation will be impartial, but it certainly cannot secure it.[56] In a mixed inquisitorial system like the German one, there are no parties in equality of arms[57] to expose the deficiencies in the evidence obtained by the prosecution or contest whether there is a public interest in prosecuting.

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51 Tonry (n 45) 12.

52 Klaus Ferdinand Gärditz, *Staat und Strafrechtspflege* (Schöningh 2015) 24—27.

53 Thomas Weigend, *Anklagepflicht und Ermessen* (Nomos 1976) 28.

54 Recently commented, e.g. by Kai Ambos, 'The German Public Prosecutor as (No) Judicial Authority within the Meaning of the European Arrest Warrant: A Case Note on the CJEU's Judgment in OG (C-508/18) and PI (C 82/19 PPU)' (2019) 10 New Journal of European Criminal Law 399.

55 §§160-161 StPO.

56 For example, it is a rare occurrence that prosecutors will actually present evidence in favour of the offender. Jörg-Martin Jehle and others (eds), *Coping with Overloaded Criminal Justice Systems: The Rise of Prosecutorial Power across Europe* (Springer 2006) 212.

57 'The idea of fairness and equality of arms is somewhat different from that of the adversarial model underlying many common law systems. It is not so much about balancing the positions of the defence and the prosecution; rather, based on the realisation that the prosecution is always in a stronger position,

The decision-making powers of the two organs are structured on the basis of different premises and orientations, when one goes beyond the formal assessment of the sufficiency of evidence and the already somewhat dissimilar way in which they understand the public interest in prosecution.

The distinctive power granted to the English prosecutor to evaluate the public interest in prosecution suggests that the statutory law is not necessarily sufficient to capture the public interest, and that there are both situations where prosecuting would advance it and other where it would not. In her decision, she is guided by the factors contained in the Full Code Test, as well as other more specific guidance for non-recent offences.[58]

At the risk of repetition, we can once more state that the German system has a restrictive place for the consideration of the concept of 'public interest', which is mainly determined by statute.[59] It could be said, then, that a 'positive' public interest is presupposed, and there are only some exceptional 'negative' forms of it. The concept of public interest is understood to be either one of the interests of the state as the representative of the general public and its will, or one of the 'public sphere'. In any case, the 'lack of public interest' would not be a reason not to prosecute, with the exception of petty offences.[60] An increased public interest in prosecution ought not to change the prosecutor's approach to a specific case.

There is another way in which the 'interest' of the criminal justice is described as being altered over time. This has been expressed in Germany in terms of contrasting a static 'deservedness of punishment' (*Strafwürdigkeit*) with a changing 'need for punishment'

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the emphasis is on protecting the rights of the defence versus the prosecution and the court'. Michael Bohlander, *Principles of German Criminal Procedure* (Hart 2012) 144.

58 See above Chapter 2.5.

59 Such as in §§ 153(a), 153(d) StPO. Critical, Thomas Weigend, 'Das „Opportunitätsprinzip" zwischen Einzelfallgerechtigkeit und Systemeffizienz' (1997) 109 Zeitschrift für die gesamte Strafrechtswissenschaft.

60 In the general provision of § 153 StPO.

(*Strafbedürfnis*). The first would be defined by the presence of the elements of the offence (and the absence of any reason excluding criminal liability). In Asholt's terms, it is an axiom of the German conception that wrong is timeless. The axiom is taken for granted, and there is almost never an inquiry into its justifications.[61] The second implies a purposive analysis of the relevance of the offence. The passage of time does not make offences diachronically more or less relevant. They are either relevant or not. And for the law of limitation, a certain fact loses its legal relevance instantaneously, by the declaration of the law, and not before.[62]

To summarise, there is a dynamic consideration of the factors that determine public interest under the English conception. Under the German conception, however, public interest seems to mostly refer to a characteristic predicated upon the criminal justice and its role in society. For the English law, several sub-objectives can be served by prosecution in the public interest, many of which are not usually described as objectives of the criminal justice in its most common quasi-immediate operation after an offence has been committed. There is a burden onto the prosecutor to identify which of these objectives can be achieved and how to pursue them. And she is empowered to make that decision.

4.4.2. Judicial assessment of fairness and compensation for overlength of proceedings

These two legal systems are often said to have some diverging conceptions about the role of the judge. The passive role of the common law judge is often contrasted with the active, truth-seeker inquisitorial judge.[63] Both, however, share the role of controlling the parties, in particular the prosecution, and more generally the whole workings of the criminal justice.

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61 Martin Asholt, *Verjährung im Strafrecht* (Mohr Siebeck 2016) 329.

62 René Bloy, *Die dogmatische Bedeutung der Strafausschließungs- und Strafaufhebungsgründe* (Duncker und Humblot 1976) 203 ff; Stefan Zimmermann, *Strafrechtliche Vergangenheitsaufarbeitung und Verjährung* (Iuscrim 1997) 58 ff; Asholt (n 61) 327—330.

63 Mirjan Damaška, 'Evidentiary Barriers to Conviction and Two Models of Criminal Procedure: A Comparative Study' (1973) 121 University of Pennsylvania Law Review 506, 564.

Judges use of an array of mechanisms when the passage of time affects the defendant in ways that are seen as unfair.

The adversarial procedure and the jury trial allow for an image where the English judge might be in a better position than the German judge to assess the unfairness of certain pieces of old evidence, which is the most common case of finding an abuse of process for offences committed long ago. The separation between judge and jury allows for the former to assess the admissibility of the evidence without prejudging its relevance for the verdict. The concentration of factual and legal adjudication in the person of the judge or panel of judges in Germany might indeed recommend the adoption of an external rule barring her from even being in contact with stale evidence. The Germans, here, rely on the notion of limitation to make the decision for them.

The main focus of this thesis is the delay between the commission of the offence and the trial, but it is also important to keep in mind how Germany and England deal with the time between the initiation of the prosecution and the trial. Both aspects are covered by the mechanisms judicially barring procedures. Furthermore, in Germany, the 'absolute limitation'[64] has the dual function of limiting prosecutions and proceedings as a whole. England and Wales use the mechanism of 'abuse of process' for staying proceedings, coupled with the need for adequate directions to the jury.[65]

Article 6 of the European Convention on Human Rights (ECHR) has had an impact in England and Wales, allowing for a more varied set of remedies such as a public acknowledgement of the breach and promoting action to expedite hearings.[66] These remedies

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64 § 78c(3) StGB. See above at the end of Chapter 3.2.3..

65 See *supra* Chapter 2.7. Also, see PJ Richardson (ed), *Archbold Criminal Pleading, Evidence and Practice 2017* (Sweet & Maxwell/Thomson Reuters 2016) 4—79. with references.

66 *Attorney General's Reference No. 2 of 2001* [2003] UKHL 68 at [24].

are available together with the common law principles for staying procedures. More recently, they have developed the notion of finding a mitigating factor when in breach of Art. 6 ECHR,[67] with some authors saying that 'this is becoming a frequently pleaded point'.[68] It has even become a principle: 'a judge retains the discretion to do justice on the particular facts of a case, for example in the case of excessive delay, and may therefore reduce an otherwise appropriate sentence accordingly'.[69]

The ECHR has similarly had an impact in Germany, where the doctrine of 'overlength of the proceedings' has also been developed by the courts.[70] This is contrasted with the legislative determination of limitation periods, for which the mere passage of time suffices.[71] A simple 'above average' duration of proceedings is dealt with through a possible reduction in sentence.[72] If the delay amounts to an infringement of the rule of law or an infraction of the art 6 ECHR protections part of the sentence imposed is to be considered as already served.[73] This entails that the infringements do not affect the wrongfulness, guilt or deserved punishment, and conversely that the seriousness of the offence and of the culpability will also play no role in defining the compensation due.[74]

Protracted proceedings can infringe defendants' fundamental rights. The types of harms and situations thereby considered in Germany are, for instance, the uncertainty of the outcome of the process, the reactions of the public and family consequences, which could be considered

67 *R v Prenga* [2017] EWCA Crim 2149 [37].

68 Lyndon Harris, 'Commentary on R. v Whiston-Dew (Rodney); R. v Richards (Michael Wyndham)' [2020] Criminal Law Review 641.

69 *R v Kerrigan (David Joseph)* [2014] EWCA Crim 2348 [40].

70 See Chapter 3.4.

71 BVerfG NJW 1984, 967. [my translation]

72 BGH NJW 99, 1198.

73 The landmark case is BGHSt 52, 124 of 2008.

74 BGH 54, 138.

quasi-punitive.[75] The anxiety experienced by the defendant, as well as the possibility of changes in the defendant's life during the period of delay, which can possibly amount to changes in character, have been identified as grounds in England.[76] This approach contrasts with the more traditional English criteria for abuse of process, which are rigorously related to the chances of having a fair trial and controlling the integrity of the system. The German criteria resonate with the same type of arguments given in favour of limiting prosecutions.[77]

Mechanisms for dealing with undue delay, thus, are not completely isolated from considerations regarding the passage of time between the commission of the offence and the start of the prosecution, and a full analysis requires to consider both together.

4.4.3. Sentencing and the effect of time since the commission of the offence in determining punishment

The passage of time since the commission of the offence is perceived to have a role in criminal justice after conviction, even when no undue delay has taken place. The sentencing consequences may be more or less important to the limits to prosecution. If the prosecution internalises consideration of the likely sentence in their assessment, the significance might be greater.

Under English law, time can affect sentencing. 'Due allowance for the passage of time may be appropriate', states the leading judgment on the matter.[78]

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75 BGH NStZ 1999, 181, see Gerhard Schäfer, Günther Sander and Gerhard Gemmeren, *Praxis der Strafzumessung* (C H Beck 2017) para 748.

76 *Mills (Kenneth Anthony) v HM Advocate (No.2)* [2004] 1 AC 441, Lord Hope (at [54]).

77 See Chapter 3.4.

78 *R v H* [2011] EWCA Crim 2753.

The passage of time can cut both ways, as mitigation and aggravation.[79] Courts have held that:

> The passing of the years may demonstrate aggravating features if, for example, the defendant has continued to commit sexual crime or he represents a continuing risk to the public. On the other hand, mitigation may be found in an unblemished life over the years since the offences were committed, particularly if accompanied by evidence of positive good character.[80]

This ambivalence can only be solved on a case-by-case basis, as there is no general guidance or established principle on the matter. It seems more accurate to say that it is not merely the time but what has happened in that time that is relevant for the effects on sentencing. Not only can it both aggravate and mitigate, but it can also play no role at all. For example, in *R v Carroll*,[81] an offence of rape and attempted grievous bodily harm was committed in 1996, but the scientific evidence to identify the attacker was only available in 2013. When it came to sentencing the offender, no mention of time was made, and no diachronic consideration of those elements was offered.

In a different case in 2007, the issue of the passage of time was addressed but was discarded due to the 'seriousness of the offence'.[82] This logic appears to be more deeply built into the sentencing practices in England.[83] In less serious cases there is an institutional concern

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79 More generally, the principle regulating which sentence regime applies was established in *R v Forbes* [2016] EWCA Crim 1388.

80 [2011] EWCA Crim 2753.

81 [2014] EWCA Crim 2818.

82 *R v Humble (John Samuel)* [2007] 1 Cr App R (S) [113]: 'The authorities such as they are on sentence in this area are limited. There is no guideline case. Sentences range from a non-custodial disposal in an exceptional case to short prison sentences, up to sentences of this sort of length in the most serious cases. *In a case so serious as this, the issues of personal mitigation and the passage of time lose much of their importance'.* [emphasis added]. The case dealt with accusations of perverting the course of justice against a man who had sent letters and a tape to the police officer and a newspaper falsely claiming to be the author of a series of murders committed in the 1970s.

83 'Exactly why mitigation counts for less in [extremely serious] cases is unclear. One possible explanation is that when the crime is most egregious (intentional homicide), pleas in mitigation become less credible. […] The same diminished-mitigation argument should apply to historical offenses'. Julian V Roberts, 'The Time of Punishment. Proportionality and the Sentencing of Historical Offences' in Michael H Tonry (ed), *Of one-eyed and toothless miscreants: making the punishment fit the crime?* (Oxford University Press 2020) 175—176.

that the effect of the passage of time in sentencing could create other problems. A lengthy period might in itself be the cause of a 'nominal penalty'.[84] Because there is an awareness that prosecutors might discard cases due to the trivial sentence that can be predicted, the CPS guidance on non-recent offences is mainly concerned with insisting that there are other reasons, apart from the expected sentence, that should be borne in mind when deciding to prosecute. Once again, the connection between the prosecutorial role and the passage of time cannot be considered in isolation, as the prosecutor has a continuing role in assisting the court when deciding on sentence.[85] The interconnectedness of the rules across the law need to be kept in mind.

In Germany, a different picture appears. Any lengthy passage of time between the commission of an offence and sentencing (not caused by the defendant) is a ground for mitigation.[86] According to the scholarship, this is:

> …because the need for sanctions diminishes over time for most offences. The punishment to be imposed according to the degree of censure would no longer seem fair in these cases, especially if the perpetrator has since been free from punishment; he has changed his life for the better, has successfully tried to behave in a socially just manner and punishment may now have a de-socializing effect.[87]

The hypothetical circumstances just mentioned (such as the possibility that the accused has had no other convictions, or that she has reformed) are not requirements for mitigation to apply. The 'behaviour after the offence' (*Nachtatverhalten*) is a separate category. So, if a long time were to have passed *and* the offender were to have reformed, this would mean that both grounds for mitigation would need to be added together.

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84 See discussion of this guideline and its complement in the Code for Crown Prosecutors in Chapter 2.5 and later in 5.4.

85 Rules 24.11 and 25.16 of the Criminal Procedure Rules 2020.

86 BVerfG NJW 1993, 3254, 3255; NJW 2003, 2225 f; BGH NStZ 1986, 217, 218; NStZ 1992, 229.

87 Schäfer, Sander and Gemmeren (n 75) para 746. [my translation]

This mitigation ground is not explicitly in the statute, such as is the case in some other legal systems.[88] It has been a jurisprudential development and is recognised among the factors that the court needs to consider according to §46 StGB. This ground for mitigation is applicable across the board, and courts have decided that this includes cases that could be called 'historical child sexual offences'.[89] Clearly, serious offences are also affected by the passage of time.

Courts have argued that the duration of the assigned limitation period serves as a benchmark for determining which amount of time should be considered significant for sentencing purposes.[90] There is, therefore, an internal connection between limitations for prosecution and diminished punishment. As a consequence, the extension introduced in the limitation periods for certain sexual offences against children also has an effect in mitigation; consistency demands that here, too, a longer time transpires in order for the offender to be entitled to a lesser punishment.[91] The criminal relevance of a fact does not disappear from one day to the next (when the limitation period expires);there is a gradual decrease in the need for punishment (expressed in the diminishing sentence). The deadline in §78 StGB would only mark the end of that journey.[92]

In sum, the role of the prosecutor and the judge, their reference to statutes and the adoption (or not) of the passage of time *per se* as an element of mitigation are important features to contrast in order to understand how limitations work in England and Wales and Germany.

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88 § 57 Abs. 1 S. 2 Austrian StGB, Art. 103 *Código Penal* of Chile. Switzerland allows a reduction in sentence for those offences which are exceptionally excluded from limitation Art. 101.2 Swiss StGB.

89 BGH NStZ 2016, 277 (*Anfragebeschluss*), NStZ-RR 2016, 241 (*Antwortbeschluss*); NStZ-RR 2018, 32 (*Vorlagebeschluss*).

90 BGH NSt 92, 229 f; BGH NStZ-RR 16, 336.

91 BGH NStZ 2006, 393.

92 Tatjana Hörnle, *Tatproportionale Strafzumessung* (Duncker & Humblot 1999) 351. Hörnle is sceptic about this generalised line of argument.

4.5. Conclusions and looking forward

This chapter has addressed structural, functional and institutional similarities and differences between England and Wales and Germany with regard to the passage of time and the prosecution of crimes. It has shown that both legal systems operate on the basis of a mixture of soft and hard limits but that the pre-eminence given to each of them is strikingly different. England and Wales use predominantly prosecutorial discretion for what can be considered the core of the criminal law (indictable, *mala in se* offences). Germany uses general mandatory rules. This has led many to simplify the picture and say that in England 'time does not pass for the king', while in Germany there is a strict limitation regime. Both statements have been qualified. Nonetheless, the structures described do indeed address the perceived need for establishing some legal regulation of the reaction in the face of offences committed a long time ago.

There is a functional equivalence that allows for undertaking a more detailed comparison of these two compounded mechanisms by understanding their position within the broader framework of the criminal law and criminal justice. Neither of these mechanisms negates that crimes have been committed, and thus they do not attack the concept of responsibility.

The regulation of decisions about whether to prosecute also impacts how an assessment about the passage of time (or an assessment about what has happened during a period of time) can be and is done in each system. The more extensive discretion generally granted to English prosecutors allows for assigning them the responsibility for such an evaluation, while the legally constrained ideal role of the German prosecutor requires this consideration to be taken off their hands.

The judicial role in assessing the fairness of prosecuting a person for an offence committed a long time ago has been channelled through the concepts of 'abuse of procedure' and the 'overlength of procedures'. Both concepts are mainly used for addressing infringements of the 'reasonable time' principle contained in Art. 6 of the ECHR. In this case, the tables turn, and the German judge gains discretionary space to stay the procedure. Yet, in both legal systems these are seen as exceptional mechanisms, which are not to be used except in extreme circumstances. This last resort tool allows cases perceived as endangering the commission of unfairness in the individual case to be halted. Other judicial remedies have gained terrain lately.

In the realm of sentencing, the effects of the passage of time are also felt, notwithstanding the fact that it is incorporated within the more widely known tools available to each legal system. Germany favours a discount in sentencing based on the mere passage of time and related to the structure of limitation periods. England allows for a discretionary consideration (in one case explicitly contained in the pertinent guidelines), which considers what has happened during that time, rather than the passage of time *per se*. In Germany the effect is not altered by the offender's behaviour; the decay leading to mitigation will take place regardless. In England, sentencing tries to capture elements of the offender, the victim and even real changes in society within the same idea as the passage of time.

But the answer to the question of why different legal systems structure their approach to time for the prosecution of crimes differently requires more analysis. The history of these institutions will thus be addressed in the following chapter. The interpretation offered there will differ from some other historical accounts of the development of limitation periods (in that it will stress the discontinuities with the Roman institutions) and will provide an original interpretation of the mixture of rules and discretion available in England.

CHAPTER 5. UNDERSTANDING THE ORIGINS AND EVOLUTION OF TIME LIMITS FOR THE PROSECUTION OF CRIMES

Studying particular historical paths, influences and some contingent events in both England and Wales and Germany contributes to a better understanding of their laws limiting the deployment of the criminal law due to the passage of time. This chapter describes the German development, showing how the current limitation structure is in fact a departure from its pre-modern origins. The chapter also proposes a reading of the evolution of the English law in this area, highlighting the use of limitation periods in certain politically loaded areas of the criminal law, and the adjustments introduced with the creation of a more centralised criminal justice system.

5.1. From the antique to early modernity

The first sources referring to limitation periods are found in the work of Demosthenes, in the fourth century BC.[1] Mainly procedural and evidentiary concerns justified the existence of time limits, and a notion of fairness is introduced in these texts, which appeals to the reasonableness of barring prosecution.[2]

The German literature recognises a direct influence of the Roman system —through medieval Italian law— in the adoption of limits for the prosecution of crimes. The first introduction of such limits occurred during the reign of Augustus, with the *Lex Iulia Adulterii*

1 Otto Wilhelm Rudolf Dambach, *Beiträge zu der Lehre von der Criminal-Verjährung* (Verlag von Guttentag 1860) 10 ff.

2 Martin Asholt, *Verjährung im Strafrecht* (Mohr Siebeck 2016) 91—92.

Coercendis (of year 18 BC), which contained a period of 5 years for adultery.[3] By the early 300s AD, it would become a general rule for *crimina publica* to be punishable up until 20 years after their commission,[4] excluding some offences, such as parricide and apostacy (due to the official adoption of the catholic religion), which would be prosecutable even after death.[5]

The origin of the Latin name *praescriptio* (or more fully *temporalis praescriptio)*[6] gives its name to a procedural device. It was introduced during the period where the praetor would write a note before the rest of the formula addressed to the judge (hence *prae scribere*). The notice raising the question of the passage of time would then allow the judge to not hear the claim.[7] This does not mean, however, that limitations are necessarily only of a procedural nature. The same praetorial note was used in civil limitation periods, which are nowadays mostly considered substantive in nature.[8]

During the Middle Ages, the evidence suggests that there may well have been isolated and non-systematic limitation rules in local territories. In France, there were attempts to introduce brief limitation periods at the local level, such as the Charte d'Aigues-Mortes by

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3 It is debatable whether this provision covered only adultery, or whether it applied to all other offences contained in the act. This was Ulpian's interpretation, 1.29. §6 D ad legem Juliam de adult. (48,5) see Dambach (n 1) 25—26.

4 So it is concluded, for example, from the Justinian Codex, where by referring to the action for falsehoods, it is stated that it is not excluded from the general twenty-year limitation ('Querela falsi temporalibus praescriptionibus non excluditur, nisi viginti annorum praescriptione, sicut cetera quoque crimina' (Diocletianus Maximus), L. 9.22.12). This interpretation has not been uncontroversial, see JAC Thomas, 'Prescription of Crimes in Roman Law' (1962) 9 Revue internationale des droits de l'antiquité.

5 Max Lorenz, *Die Verjährung im Strafrechte* (Heinrich Mercy Sohn 1934) 13—14; Enrico Pessina, *Elementi di Diritto Penale* (Stamperia della Regia Università 1869) 139.

6 Julius Friedrich Heinrich Abegg, *Verjährung rechtskräftig erkannter Strafen* (Maruschke & Berendt 1862) 4.

7 Robert A Monson, 'The West German Statute of Limitations on Murder: A Political, Legal, and Historical Exposition' (1982) 30 The American Journal of Comparative Law 605, n 2; Cerrada Moreno (n 1) 321.

8 Richard Loening, 'Die Verjährung' in Karl Birkmeyer, Fritz van Calker and Reinhard Frank (eds), *Vergleichende Darstellung des deutschen und ausländischen Strafrechts* (Verlag von Otto Liebmann 1908) 396.

Louis IX in 1246.[9] In Spain, on the contrary, the Fuero Juzgo (1241) and the Siete Partidas (1265) contained generally applicable limitation periods as well as specific regulations for some exceptional cases.[10] The much older Visigothic code Liber Iudiciorum seems to have contained a thirty-year general rule,[11] and some canon criminal law contained a twenty-year period.[12]

In Germany during this period, the first forms of private vengeance (*Rache* and *Selbsthilfe)* were slowly replaced by procedures that were administered by the state through courts. This transformation was associated with the imposition of brief time limits, often with a year-and-a-day rule for private actions through courts, which is where the term 'ver-jähren' originates.[13] However, the systematic and comprehensive rules of limitation that we are familiar with nowadays were not based on such scattered norms. What led to the adoption of general rules was the emergence of the Inquisition as a unified power combining prosecution, evidence, and judgment in the same hands, replacing the old appeals (*Anklage*) process. 'These short deadlines were no longer sufficient when criminal prosecution was in principle taken on by public authorities in the public interest'.[14]

A limitation rule was incompatible with the inquisitorial desire to remove all of the obstacles to a prosecution. Concerns about the inquisitorial judge having his hands tied were

9 Bertrand Louvel, 'Discours prononcé à l'Assemblée nationale devant la mission d'information sur la prescription en matière pénale de la Commission des lois constitutionnelles, de la législation et de l'administration générale de la République' (2015) 3.

10 Cerrada Moreno (n 1) 322—323.

11 Liber Iudiciorum X, 2, 3 (dated between 642 and 672 AD).

12 Félix Mª Pedreira, 'Breve referencia a la historia de la prescripción de las infracciones penales: especial consideración de la problemática surgida en el Derecho Romano a través de dos aportaciones fundamentales' [2007] Revista de Derecho de la UNED 439.

13 Loening (n 8) 386—387. See explanation about the meaning of *Verjährung* in Chapter 3.1.

14 ibid 389.

still present in the work of some authors at the end of the eighteenth century.[15] In the view of Loening, the Inquisition would have led to a total abolition of time limits, had it not been for the significant authority that the Roman law still bore, which allowed for countering and containing such developments.[16]

Following Loening's reasoning, the limited Roman influence in England explains why until the nineteenth century 'with regard to the limitation periods in the criminal law, [English law…] remained in the same position of the end of the Middle Ages'.[17] Indeed, the situation in England comprised limitations on the private prosecution of certain criminal offences, but the king was allowed to prosecute some offences at any time. For example, the Rape Act 1275[18] gave only 40 days for a private person to prosecute but did not bar the king from doing so later. Similarly, under the Act against Offences committed in Parks and Ponds,[19] trespass in those spaces could be prosecuted by individuals only for a year after the commission, and later only by the king. In Early Modernity and the Elizabethan era, some statutes gave brief periods for the alleged victim to come forward (e.g. 20 days to the victim of robbery).[20]

Several scattered examples of limitation periods that are not restricted explicitly to private prosecutors also exist. These include 20 days for prosecuting swearing and cursing,[21]

15 For instance, see Karl August Gründler, Systematische Entwickelung der Lehre von der Verjährung der peinlichen Strafe, nach gemeinen und besondern Rechten (Hemmerde und Schwetschke 1796) v—viii.

16 Loening (n 8) 390.

17 ibid. [my translation]

18 3 Ed 1 c 13.

19 3 Ed 1 c 20 of 1275.

20 1584, 27 Eliz c 13.

21 21 Jac 1 c 20 s 3 in 1623.

12 months for stealing deer,[22] 3 months for blasphemy,[23] 6 months for falsification of coinage,[24] 6 months for destroying turnpikes in highways or locks,[25] 3 years for marrying without a licence,[26] and 12 months for sitting or voting in parliament as a priest without due election.[27]

As shown above, the situation in England was not very different from that elsewhere on the European continent at the end of the Middle Ages and until Early Modernity, with the only but possibly very significant exception that there seems to have been no adoption of the general 20-year Roman limitation rule.

Unsurprisingly, the Roman influence was felt in Scotland. Mackenzie recounts that the 'prescription of twenty years in crimes has in effect become the law of the nations', noting that it was also the law in Scotland, that prescription could only be abrogated by an express statute, which did not exist.[28] Baron Hume also approvingly mentioned that traditional considerations 'plead[ed] powerfully in support of that equitable rule of the Roman law, (recommended also by the general practice of nations in modern times,) which gives the accused his *quietus* at the end of the twenty years',[29] while he asserted and exemplified the existence of such a defence of limitation in Scotland in cases between the mid-sixteenth and early nineteenth century.

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22 3 & 4 Will & Mar c 10 s 1 of 1691. The time was originally 12 months, and was extended to three in the Black Act 1723 (9 George 1 c.22), which expressed that 'the shortness of the time […] has been a great encouragement to offenders'. The period was once again restricted to 12 months by 16 G 3 c 30 in 1766.

23 9 Will 3 c 35, Blasphemy Act 1697.

24 8 & 9 W 3 c 26 s 1, 3; 1 Ann c 9, s 2, 4; 7 Ann c 25, s 2 Perpetuation, etc., of Acts 1708.

25 8 Geo 2 c 20 s 10 of 1735.

26 26 Geo 2 c 33 (2) of 1753.

27 41 Geo 3 c 63 of 1801, regulating the eligibility of persons in holy orders to sit in the House of Commons.

28 Cited in Thomas Krause, 'Networking across the North Sea: The Influence of German Civilian Authors on Sir George MacKenzie's "Laws and Customs of Scotland on Matters Criminal"' [2018] Edinburgh Law Review 369.

29 David Hume, Commentaries on the Law of Scotland, Respecting Crimes, vol 2 (second edition, Bell & Bradfute 1819) 134.

After the middle-ages in Germany, limitation periods were absent from the main bodies of written criminal law, for instance, in the Constitutio Carolina of 1530.[30] It was not until the Enlightenment and the codification processes that this institution was subjected to theoretical scrutiny and was also applied generally. That scrutiny worked in parallel with a more general movement where the criminal justice system was to abandon its pure inquisitorial forms and theocratic justification, to be reformed according to the modern ideologies.[31]

5.2. The Enlightenment: opposition and support

Two opposing positions regarding the need for, and adequacy of, limiting the prosecution of crimes due to the passage of time arose during the Enlightenment. Each position was based on conflicting values that were sustained in the criminal law theory of the time.

One strand of Enlightenment influence recognised some use of limitation periods but was critical of their overarching application. Bentham, for example, was of the view that even if it was sensible to restrict the prosecution of less serious crimes, it would not be appropriate to introduce a barrier to the power of the criminal law to deal with the most serious crimes because of the passage of time. In Germany, this argument was adopted by many influential authors.[32] In particular, the influential work of Feuerbach adopted it: Feuerbach claimed that

30 Otto Wilhelm Rudolf Dambach, 'Über den Rechtsgrund der Verjährung im preußischen Strafrecht' [1861] Goltdammer's Archiv.

31 Thomas Vormbaum, *A Modern History of German Criminal Law* (Michael Bohlander ed, Springer Berlin Heidelberg 2014) 19 ff.

32 Asholt (n 2) 18.

limitation periods, although already very common in his time, were impossible to justify; instead, they were an act of mercy, contrary to the aim of deterring criminal offending.[33]

Another strand of thought was more consistent with the idea of generally applicable strict time limits. This, the most important influence for the introduction of the modern form of limitation periods in Germany, was grounded in the French doctrine and legislation. Before the formal introduction of the periods in the *Code Pénal* of 1791, French authors already considered that there was a general principle of limitation.[34] Many drew an analogy with civil limitation, but took the need for criminal limits to be much more necessary:

> As is not considered fair that the dominium and ownership of things should always be uncertain and in suspense, prescription has generally been introduced; it is cruel that the life of a man, who has unfortunately allowed himself to commit crime, should always be uncertain and insecure on the part of this crime, which threatens him from the moment it is committed.[35]

If civil limitation is about 'fairness', criminal limitation is about 'cruelty', as Danet highlights. The worth of a person's life and freedom needs to be factored in as something that is under threat while criminal prosecution hangs over their heads. Respect for that life and freedom entails putting in place a limit for any crime, even the most serious ones.[36]

The evolution of French law was also crucial. The 1791 code introduced a 3-year limitation period from the day on which the existence of the crime was known or legally

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33 Paul Johann Anselm Feuerbach, *Kritik des Kleinschrodischen Entwurfs zu einem peinlichen Gesetzbuche für die Chur-Pfalz-Bayrischen Staaten* (Tasché & Müller 1804) 242—243.

34 Jean Danet, 'La préscription de l'action publique, un enjeu de politique criminelle' (2006) 28 Archives de politique criminelle 73, 77—78.

35 Catellan (1727), cited in Jean Danet and others, 'Prescription, amnistie et grâce en France' (Université de Nantes 2006) 24. [my translation]. Similarly Hévin (1746) 'si la prescription a été introduite pour confirmer les possessions, & ne dominia rerum perpetuo sint incerta, combien y-a-t-il plus de raison de la recevoir quand elle confirme la vie des hommes infiniment plus précieuse que tout le reste?', ibid 25.

36 Danet and others (n 35) n 48.

established.[37] Similar structures were preserved by later revolutionary decisions and by Napoleon[38] in the codification efforts in other parts of Europe.[39] The most significant advancement of the Napoleonic code was the gradated structure, which achieved a form of proportionality between the gravity of offences and the length of the period. This proposal is attributed to Beccaria, although he would not have supported the general application of time limits to all offences.[40] The Code also introduced the modificatory mechanisms known as suspensions and interruptions.[41]

These ideas had a great impact on Germanic legal culture, but there were still some signs of scepticism towards all-encompassing limitation rules. Indeed, in Austria, the absolute monarchy thinking was still embodied in the Josephine Laws (1787-1803),[42] which rejected and repealed the previously existing limitation periods, set out in the *Constitutio Criminalis Theresiana* just a few years before (1768).[43] Then, limitation was reinserted by the 1803 Code, although for a person to benefit from it required some signs of 'betterment', such as not having committed any other offence since.[44]

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37 Code pénal of 1791, Title 6, Articles 1-3.

38 Napoleon's *Code d'instruction criminelle* of 1808 introduced the beginning of the counting from the commission of the offence, article 637.

39 Lorenz (n 5) 15; Danet (n 34); Pedreira (n 12) 441 ff.

40 Ruth A Kok, *Statutory Limitations in International Criminal Law* (TMC Asser Press 2007) 26; Cesare Beccaria, 'Crimes and Punishments' in James Anson Farrer (tr), *Crimes and punishments: including a new translation of Beccaria's 'Dei delitti e delle pene'* (Chatto & Windus 1880) ch XXX.

41 For an explanation, see Chapter 3.2.3. on Germany.

42 Asholt (n 2) 23.

43 *Constitutio Criminalis Theresiana*, Article 16.

44 *Gesetzbuch über Verbrechen und schwere Polizey-Übertretungen (Strafgesetzbuch)* 1803, §§ 206-209.

These conflicting influences led to a changing picture during the nineteenth century. Asholt distinguishes three phases in this period, which correspond to three overlapping lines of argument with temporal peaks, rather than strictly delimited and distinguishable segments.[45]

The first is represented by the Austrian[46] and Bavarian[47] legislation, which incorporated a general limitation period, but which had to include many restrictions in order to satisfy its opponents in the legislature. These restrictions included no longer having any profits from the offence, having made reparations to the extent of her means, not having fled abroad and not having committed other crimes in the interim.[48]

In a second phase, exceptions based on preventive grounds became less frequent. The prevailing argument in this period appears to have been the attempt to avoid miscarriages of justice and unjustified convictions. This argument was incompatible with maintaining some of the prior limits, because the strength of the case against a defendant would not have changed due to her good or bad behaviour in the interim. Following Nagler, Asholt agrees that it was pragmatic and not theoretical arguments that pushed the limitations forward and that it was parliamentary and not scholarly debate that facilitated such a development.[49]

In the final phase, just before Germany's unification, a more welcoming approach to this institution played out more generally. States began adopting unrestricted, universally

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45 Asholt (n 2) 23.

46 §208 *Gesetzbuch über Verbrechen und schwere Polizey-Übertretungen (Strafgesetzbuch)* 1803.

47 Art. 139(2) Bavarian Criminal Code of 1813. Before that, in 1810, the preferred conception was that the passage of time ought to be recognised as a habilitating criterion for the exercise of mercy, Art. 144(2) of the 1810 draft.

48 Some jurisdictions still retain this as a criterion, e.g., § 58 Austrian StGB, article 96 of the Chilean Criminal Code. Other countries, like Germany and France, have adopted 'purer' limitation periods where the passage of time *per se* constitutes the limit.

49 Asholt (n 2) 27.

applicable and exceptionless time limits to the prosecution.[50] In 1871, the year of unification, the first common criminal code emerged. It contained a gradated limitation structure for all crimes, from 3 months for lesser offences to 20 years for the most serious ones.[51] The question about the theoretical base for such an institution seems to have been omitted, alluding to a mixture of considerations, such as staleness of the evidence, loss of social relevance and the little empirical evidence for the rejection in terms of preventive reasons.[52]

England and Wales also had some categorial time limits. The best-known example is the limitation to the prosecution of treason after three years, which was introduced in 1695.[53] This exception deserves further analysis, among other reasons because it was influential beyond the borders of the British Isles and the common law system. In fact, it was so influential that the renowned Italian thinker Filangieri proposed adopting the English regulation as a model, instead of following the 20-year limitation inherited from Rome at the beginning of the modern era. He claimed that limitation was the 'last seal of the protection of the citizen's freedom' to secure 'his life, honour and liberty' in establishing a limit for criminal accusations, and promoted following the English 3-year limit.[54] This was in his view in line with overcoming the problems of an inquisitorial system and in line with a new one based on a wider accusatorial system.

In England, however, little is written about the reasons for having adopted this period. Although the exception for treason may seem like a very small one, it needs to be recognised

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50 E.g., Hamburg Criminal Code 1869 and the Penal Code of the North German Confederation 1870.

51 §§ 66-69 RStGB 1871. At that time, what now constitutes regulatory offences were still a part of the criminal law, see *infra* p. 14.

52 Asholt (n 2) 33—34.

53 7 & 8 Will 3 c 3, s 5, 6 Treason Act 1695 and later 11 & 12 Vict c 12, s 4 Treason Felony Act 1848

54 Cayetano Filangieri, *Ciencia de la Legislación*, vol VII (3rd edn, Imprenta de Nuñez 1822) 23, 71—72. [my translation].

that it was more a category of crimes than one specific form of conduct, which included several forms of forging, counterfeiting, not recognising the authority of the church or stealing cattle via statutory provisions and an expansive judicial interpretation.[55] England had, then, around the beginning of the Enlightenment, a quite wide-reaching rule of limitation.[56]

It seems paradoxical that the maxim 'time does not pass for the king' is contradicted by a bar on the capacity of the king to prosecute the purest example of an offence against him. Perhaps this surprise fades a bit if one considers that the 1695 Act was aimed at restricting the excessive use of treason and granting procedural benefits to the accused.[57] King William had been governing as a result of the Glorious Revolution, considered an early expression of the political ideas of the Enlightenment,[58] which had been legally enshrined in the Bill of Rights of 1689. Only a few years earlier, in the Habeas Corpus Act of 1679, a two-year limit was established for prosecuting offences against that act,[59] and even before that, in 1670, the prosecution of seditious conventicles had been limited to three months.[60] Together with the

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55 John H Baker, *The Oxford History of the Laws of England*, vol VI (Oxford University Press 2003) ch 32. For a continental comment, see Filangieri (n 54) 47 ff.

56 Filangieri seems to have misread section 5 of the Treason Act 1695, believing the 3-year rule to be applicable to all offences ('[The statute] prohibits prosecuting in trial crimes of any sort if the indictment has not been laid within three years of the commission of the crime. Only offences against the life of the King are excepted' [my translation]). This excerpt has been wrongly reproduced by some scholars as establishing general time limits for any kind of offence in England and Wales, e.g. Pedreira (n 12) 442; Ettore Dezza, *Geschichte des Strafprozessrechts in der Frühen Neuzeit* (Thomas Vormbaum tr, Springer 2017) 143.

57 A commentator states that its concern with legal procedure: 'reflect[s] its essentially modern character; it stands almost at the fountain-head of the modern movement for the regularization and humanization of judicial procedure'. Samuel Rezneck, 'The Statute of 1696: A Pioneer Measure in the Reform of Judicial Procedure in England' (1930) 2 The Journal of Modern History 5, 6.

58 Robert Tombs, *The English and Their History* (Penguin 2015) 275—287.

59 31 Cha 2 c 2, s XVI. It is claimed that Charles was forced to pass this Act, and later considered it a mistake, Helen A Nutting, 'The Most Wholesome Law — The Habeas Corpus Act of 1679' (1960) 65 The American Historical Review 527.

60 22 Cha 2 c 1, s 13.

more famous limitation for treason, taken together, these suggest a significant concern with political crimes and the adequacy of prosecuting them long afterwards in this period.[61]

In the early nineteenth century, there would again be examples of clusters of time limits introduced in the context of political agitation. The Criminal Libel Act 1819 contained a limit of 6 months for the prosecution of such offences. 1819 was a year of tumultuous riots, and hundreds of prosecutions for seditious libel were brought, in a time where the possibility of *criminal* libel was justified in terms of being a 'breach of the [King's] peace'.[62] The acts against the practice of military training[63] and prohibiting seditious meetings[64] of the same year contained a 6-month time limit as well. The growth in other forms of public order offences led to a 'relative relegation of treason and sedition prosecutions during the first half of the century'.[65]

These examples show how the king's most direct interests were also subject to limitation periods. Possibly one difficulty in recognising that these norms were restricting the *state's* interest is due to the much more general reluctance of the common law to address the

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61 This does not mean that any such rules actually impeded political use of the state apparatus. 'Three of the would-be assassins were still imprisoned well into the 1730s, having never been brought to trial. The penultimate survivor, Major John Bernardi, died a state prisoner in 1736 at the age of 81, after what the young Samuel Johnson termed "a confinement of more than forty years, without any crime proved against him". Two years later Robert Blackbourn, the last surviving assassin, was released to the relative liberty of the rules of the King's Bench Prison in Southwark'., Wilfrid Prest, 'Legality, Liberty, and Oppression in Post-Revolutionary England, 1689—1760' in Katie Barclay and Amy Milka, *Cultural Histories of Law, Media and Emotion* (Routledge 2022).

62 Michael Lobban, 'From Seditious Libel to Unlawful Assembly: Peterloo and the Changing Face of Political Crime c1770-1820' (1990) 10 Oxford Journal of Legal Studies 307. Other forms of libel are mere civil claims.

63 60 Geo 3 and 1 Geo 4 c 1 s 7.

64 60 Geo 3 and 1 Geo 4 c 6 s 38.

65 William Cornish and others, The Oxford History of the Laws of England, vol XIII (Oxford University Press 2010) 334.

state *qua* state as a legal entity.[66] But one might think that these early developments are related to the examples that flourished precisely in the nineteenth century, when a 'centralised bureaucracy challenged older conceptions of authority',[67] and when the role of the king or the crown in criminal law was to become restricted to their position as the general claimant.

After the varied forms of conduct that were categorised under the offence of treason, the next norm that established a limitation period for a category of crimes in England and Wales was the Summary Jurisdiction Act 1848.[68] The same general rule introduced in 1848 has survived until today for summary offences: a 6 month-limitation to begin proceedings, starting from the commission of an offence[69] —although plenty of exceptions have arisen.

According to Stephen, summary jurisdiction developed inorganically and without fixed regulated procedures until 1848.[70] Before that, the powers of magistrates had undergone a process of expansion. Initially, they were only concerned with matters of small importance and what could be called 'administrative legislation', developing later to some proper crimes, like theft and embezzlement.[71] So, in 1848 summary jurisdiction was defined and regulated, including the geographically and time-limited powers of the magistrates.

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66 Janet McLean, *Searching for the State in British Legal Thought: Competing Conceptions of the Public Sphere* (Cambridge University Press 2012); Kenneth Dyson, *The State Tradition in Western Europe: A Study of an Idea and Institution* (Martin Robertson 1980).

67 McLean (n 66) 10, 215, passim.

68 Summary Jurisdiction Act 1848, 11 & 12 Vict c 43 s 11.

69 Magistrates' Court Act 1980, s 127.

70 James Fitzjames Stephen, 'History of the Criminal Law of England', vol 2 (MacMillan and Co 1883) 123, 124.

71 There was a 'conversion of many forms of criminality from indictable to summary', Cornish and others (n 65) 4.

Before a summary jurisdiction was created, most crimes were dealt with through lengthy and expensive procedures at courts of Assize and Quarter Sessions.[72] The changes introduced 'made punishment for the mass of less serious offences speedier, more certain, and less severe'.[73] This also entailed a counterpart in its justification: 'The justices would be far more likely to convict and punish persons accused of trifling offences in the absence of "strict legal proof" than would a jury […] offenders would lose the traditional protection of trial by jury and be subject to the more capricious decisions of local magistrates'.[74] Notwithstanding the fact that practitioner manuals of the time indicate that the rules of evidence and standard of proof were the same in summary jurisdictions as in ordinary trials, there have been long debates about the accuracy of that claim. Baker has even argued that there was in fact a presumption of guilt for theft offences tried in summary jurisdiction.[75] By the early 1900s, these changes had led to the summary jurisdiction covering 80% of all trials.[76]

To some extent, during this evolution, there were also forces that constrained the effects of the summary jurisdiction in other senses. For example, between the Summary Jurisdiction Act 1848 and the one of 1879, the extent of the punishments that could be imposed through these proceedings was halved (from 6 to 3 months' imprisonment). Some procedural changes were also aimed at achieving a greater balance of powers between parties, like the change in 1836, allowing the presence of defence lawyers, and in 1879, 'granting the "converse innovation" of offering an accused under 16 charged with a summary offence which carried

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72 For some notions on the quantitative aspects see David Philips, *Crime and Authority in Victorian England : The Black Country 1835-1860* (Rowman & Littlefield 1977) 131.

73 Leon Radzinowicz and Roger Hood, *A History of English Criminal Law*, vol 5 The Emergence of Penal Policy (Stevens & Sons) 623.

74 ibid 619—620.

75 Cornish and others (n 65) 108.

76 ibid 4. This is not the same as saying that 80% of all crimes tried were summary offences and thus subject to the limitation rule. Either way offences are indictable, although they can be tried summarily.

the possibility of at least three months' imprisonment the right to elect for trial by jury'.[77] Contrary to what had been common in other areas of criminal justice, 'the principal authoritative shaping forces of laws and practices were Parliament and the superior courts',[78] and not as much the bottom-up phenomenon of magistrates and lawyers.

The emergence of the summary jurisdiction (with its limitation rule) was a parallel phenomenon to the creation of the police forces and the intertwining of this new executive power with the administration of justice.[79] The number of cases being tried increased quickly, especially in metropolitan London, and here there was a divergence from the traditional form of prosecution, which was mainly dependent on the individual initiative of victims, to one led and conducted by public officials. Indeed, the fact that time limitations are tied to these changes in prosecution and jurisdiction can be observed from a precursor of the generally applicable limitation of section 11 of the Summary Jurisdiction Act: The Metropolitan Police Courts Act 1839, instituted nine years before, was territorially limited to the broader London area and 'prescribed six months as the limit of time within which offences [were] punishable on summary conviction before a police magistrate sitting at one of the police courts in the metropolis'.[80] This might explain why the current rule of limitation periods in England and Wales is a rule of procedure related to the powers of the courts.[81] In England and Wales the discussion was first about the appropriate procedure that should be followed by the police and

77 ibid XI, pp. 929—930.

78 ibid 5.

79 Philips (n 72) 50.

80 Cunningham, W, *The Summary Jurisdiction Acts* (Shaw & Sons 1884) 30. With reference to the Metropolitan Police Courts Act 1839, 2 & 3 Vict c 71 s 44.

81 By contrast, in other countries these rules are contained in the substantive (general) parts of the criminal law.

magistrates (and the justices of the peace) and later about determining the powers of the tribunals, but it has never been about the extinction of substantive criminal liability.

The police were not only preventing and dealing with crimes on the street, they also became 'public prosecutors by default'.[82] However, these two functions were still 'not, in general, seen to be the central state's business'.[83] This was a reason for keeping private prosecutions[84] and prosecution associations.[85] But sooner rather than later, the professionalisation of the police became a reality, while the creation of a structured, nationwide prosecution system did not. It would take another one hundred years to become a significant topic.

5.3. Mid nineteenth to early twentieth centuries

In Germany, a period of stability in the regulation of limitation periods followed the introduction of the Criminal Code of 1871. From the national unification to the Nazi period, there were no significant changes in the law of criminal limitations. The dominant understanding was that limitation periods were a substantive element that temporally circumscribed criminal liability and that the gradated structure of the limitation periods reflected the legislatively defined gravity of offences.

Two main changes took place in the first half of the twentieth century. Under the Nazi regime, both the positive law and the theoretical debate made an important turn. In 1942, new legislation was introduced, §66 II RStGB (*Reichstrafgesetzbuch*), which gave the state

82 Cornish and others (n 65) 63.

83 ibid 6.

84 It is claimed that the 'growth of policing and of the summary jurisdiction had also the effect of reducing the burden of private prosecutions', ibid 61.

85 Although the actual efficacy of such arrangements has been controverted, ibid 62.

prosecutor discretion to prosecute crimes punishable with the death penalty or life imprisonment without any limitation period.[86] This was the only concrete legislative change, after many years of debate. Most of the proposals had contained a three-layered system, with a period of 'mandatory prosecution', a stage of 'possible prosecution' and a level of 'excluded prosecution' due to the passage of time, including a special regime of no limitation for capital offences.[87] The proposal in the end did not succeed for lack of time: both the intended substantive and procedural criminal reforms were stopped at the beginning of the war. It was difficult to gather political impulse under those conditions, and, following Eberhard Schmidt, it can be entertained that achieving legal certainty through a new codification and crafting of generally applicable laws was not among the ideological priorities of Hitler's regime.[88]

The other change was the shift from considering limitation periods a substantive device to asserting their procedural nature. The more dramatic consequence of this shift was opening up the possibility to give them retroactive effect without affecting the more general constraints of the criminal law principles. In two cases the courts allowed the retroactive effect of legal extensions in limitation periods,[89] overcoming the prior notion that it would have been contrary to the principle of *nullum crime sine lege previa*. One of the cases was particularly extreme, because it was not the mere extension of a currently running period, but an already expired one, which was 'brought back to life'. The origins of this procedural conception have been traced

86 Also, there was an attempt to eliminate the privileged status of the press offences (considered forms of high treason), Asholt (n 2) 42 n. 148.

87 ibid 42—44. See also the Soviet case in Chapter 11.1. The German and Soviet examples appear to have been extraordinary and exceptional among the civil-law countries at the time.

88 Eberhardt Schmidt, *Einführung in die Geschichte der deutschen Strafrechtspflege* (3rd edition, Vandenhoeck & Ruprecht 1998) 449—450.

89 RGSt 76, 64 and RGSt 76, 159, both in 1942.

back by some authors to developments in judicial decisions from the former period.[90] But it was during the Nazi regime that this new conception solidified.

The context of these two developments was other legislative changes, which show the general drift of the Nazi regime away from liberal ideas in criminal law, a drift seen in their the repeal of the prohibition of analogy and the retroactive application of substantive criminal laws.[91] The Nazi legislation had intended to put in place a general extension of the criminal law and specifically an increased number of offences to which the death penalty was applicable.[92] In procedural terms, the main attempts at change included 'an empowerment of the public prosecution; a strict separation of the pre-trial phase under exclusive domain of the public prosecution and a trial under the power of the court; […] relaxation of the principle of mandatory prosecution (*Legalitätsprinzip*), […] elimination of the prohibition of *reformatio in peius*'.[93] These changes gave the state more leeway to use criminal prosecutions for policy and political purposes.

As we have seen, by the mid-nineteenth century, limitations in England and Wales had been imposed on a collection of offences. Most practitioner books of the time contain a list of about 10 statutes containing limitations and some cases of their application as well as some trials of crimes that were tried after a long time, showing the lack of limitation.[94] The authors of the time seemed to think that there were no more than a few exceptions to the general rule

90 RGSt 41, 167; 65, 287.

91 Jürgen Baumann, *Strafrecht Allgemeiner Teil* (Verlag Ernst und Werner Gieseking 1977) 84.

92 Vormbaum (n 31) 141 ff.

93 Schmidt (n 88) 451.

94 John Jervis (ed), *Archbold's Criminal Law* (18th edn, 1849) 63—64; Seymour F Harris and Charles L Attenborough, *Principles of the Criminal Law: A Concise Exposition of the Nature of Crime, the Various Offences Punishable by the English Law, the Law of Criminal Procedure, and the Law of Summary Convictions* (12th ed., Stevens and Haynes 1912) 345—346; Kenny, Courtney, *Outlines of Criminal Law* (Cambridge University Press 1902) 409.

against limitation.[95] Such an account seems to correctly portray the general awareness in the epoch, but not to account for the actual proliferation of disparate rules.[96]

In a cursory review of statutes of the time, it is also possible to find other examples, such as assault and battery (Offences Against the Person Act 1828, originating as a summary provision)[97] and burning a ship (Destroying Vessels Act 1793).[98] They protect different interests, ranging from property in the case of the Game Laws (Night Poaching Act 1828)[99] to sexual autonomy (having consensual sexual intercourse with a girl between 13 and 16 years of age, Criminal Law Amendment Act 1885).[100] The Corrupt and Illegal Practices Prevention Act 1883[101] regulated elections, and contained a limitation period for 'corrupt practices' such as the offences of treating, undue influence, bribery and personation. The Game Laws established a 12-month period (while expressly establishing a 6-month period for summary ones)[102] and the Prevention of Smuggling Act 1845 a 3-year period for indictments.[103] The same year that the general rule for all summary offences was introduced, an extremely short period for the felony of treason was prescribed: 6 days for spoken words.[104]

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95 In his first edition, Archbold says: 'I am not aware of any other cases in which a time is limited for commencing a prosecution'. John Frederick Archbold, *A Summary of the Law Relative to Pleading and Evidence in Criminal Cases* (1822) 32.

96 For more examples, see the description of current law in Chapter 2.3.

97 9 Geo 4 c 31 s 34.

98 33 Geo 3 c 67 s 8.

99 9 Geo 4 c 69 s 4.

100 48 & 49 Vict c 69 s 5.

101 46 & 47 Vict c 51 s 51. In turn, this act was repealed by the Representation of the People Act 1949 (c 68).

102 9 Geo 4 c 69 s 4, *R v Hull* [1860] 2 F & F 16.

103 8 & 9 Vict c 87 s 134.

104 11 & 12 Vict c 12 s 4 in 1848.

This tendency to add exceptions without a distinguishable pattern continued in the twentieth century. In the recent past, there has also been some debate about introducing or changing the limits for some indictable offences.[105] This discussion has always been restricted to particular cases, and as far as the literature recalls, there has never been a serious attempt to introduce a general limitation period through legislation.

A final element worth introducing at this point of the history has to do with prosecutorial organs. The creation of the office of the Director of Public Prosecutions in 1880 was intellectually motivated by Bentham's proposal a century earlier. [106] He had compared the 'open' English system —where individual members of the public bore the responsibility for initiating criminal proceedings— with the 'closed' French system — where it was the responsibility of officials. But instead of creating a model of control over the majority of prosecutions, a form of supervision was introduced, all of which was executed from London. This meant that in practice, prosecutions did not change much. The DPP assumed responsibility for the prosecutions that would previously have been the responsibility of the Solicitor to the Treasury (i.e. substantial and complex frauds, and some collusive arrangements) and capital cases. Already the 1886 Regulations resorted to regulating the intervention of the DPP based on the 'public interest' as the criteria to define its role, but this was understood to imply 'a narrow range of cases'.[107] Thus, the creation of the office of the DPP was not a systemic change introducing public prosecutions. However, it was a contribution to shaping and defining some

105 See next section.

106 Thomas Hetherington, *Prosecution and the Public Interest* (Waterlow Publishers 1989) 4—10. Bentham's proposal was about the organisation of the courts. However, he included an Art XXVI requiring the drafting of a Penal Code 'of which the object shall be to render the punishments in every case as proportionate, as mild, and as appropriate, as possible; never losing sight of the maxim, that every lot or degree of punishment which is not necessary, is a violation of the rights of man, and an offence committed by the legislator against society'. Thus, there was a mandate to the legislator to reduce the scope and intensity of the criminal law.

107 Cornish and others (n 65) 69—70.

of the criteria that are expressed in the English and Welsh prosecutorial structure, even to date; these are picked up in the next section.

5.4. Conflicts of the second half of the twentieth and the beginning of the twenty-first centuries

In 1953, the changes to the positive criminal law derived from National Socialism were declared invalid and the law was returned to its prior content.[108] It was decided that limitations themselves were a sensible institution and, without much debate, they were kept by the commission that was working to reform the criminal law in 1954 through to 1962.[109]

The first relevant change was the introduction of the so-called 'Laws for the Punishment of Nazi Officials' (*Ahndungsgesetze*),[110] which considered that the factual impossibility of prosecuting crimes between 1933 and 1945 amounted to a suspension of the limitation period (often before the beginning of the counting), effectively allowing for prosecution up to 15 years later. When this extension was expiring, there were debates in 1960,[111] 1965[112] and 1969,[113] about retaining the power to prosecute, but it took until 1979 before the time limit for aggravated murder was eliminated and this reform was retroactively enacted for all running

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108 *Drittes Strafrechtsänderungsgesetz* of 06.08.1953. 'Were all laws passed between 30 January 1933 and 8 May 1945 to be abolished? This solution was never given any serious consideration. Rather, one part of these laws was to be repealed, another part to remain in force. The understanding behind this was that National Socialist law should be abolished, but non-National Socialist law should continue to be valid'. Vormbaum (n 31) 211.

109 Asholt (n 2) 45 ff.

110 These laws were adopted by the different states, e.g. *Verhandlung auf Grund des hessischen Gesetzes zur Ahndung nationalsozialistischer Straftaten* of 29.05.1946, and so also on 31.05.1946 and 27.06.1947.

111 These attempts by the Social-Democrat Party were not successful. The period for prosecuting murders was at that moment threatening to expire in 1965. By this time all other crimes besides murder were already impossible to prosecute because their periods had already expired.

112 The discussions ended in the *Gesetz zur Berechnung strafrechtlicher Verjährungsfristen 1965*, which established that the time from 08.05.1945 to 31.12.1949 was not to be counted towards the period, extending in effect the possibility to prosecute murders.

113 The *Zweites Gesetz zur Reform des Strafrechts* of 09.05.1969, extended the period for all future crimes punished by life imprisonment to 30 years. The *Neuntes Strafrechtsänderungsgesetz* of 11.06.1969 made this extension applicable to past offences whose period was still running.

periods.[114] At that point, all offences but murder were already beyond their time limits. The courts decided that this regulation was not problematic.[115]

The §66 II StGB rule discussed above, which allowed the prosecutor to conduct proceedings despite the limitation when life imprisonment or death penalty was the 'expected' sentence,[116] was never reintroduced. The commentaries of the time considered this norm to be based on highly authoritarian grounds.[117] Wills mentions that it was considered intolerable to the *Rechtstaat*-ideas to leave the decision over precisely the most serious offences to the discretion of the prosecutor. Nevertheless, in his view the introduction of the provision did not have a Nazi character *per se*.[118]

Only a few decades afterwards, some special rules were introduced once again to deal with the reunification process, intended at prosecuting crimes committed in the former German Democratic Republic. Here the focus was not only on the most serious offences but rather on generating a more general process of regaining or imposing the normative and value systems that West Germany had developed, on the East German population.[119] For this reason, offences considered less serious, such as economic crime, and situations that occurred during the

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114 *Sechszehntes Strafrechtsänderungsgesetz* of 16.07.1979.

115 BVerfGE 25, 269; before, BGHSt 4, 135; BGHSt 4, 379; BGHSt 8, 269.

116 According to Asholt, this entails the prosecutor forecasting the 'concrete penalty that would come out in the case, when mitigating and aggravating factors are considered and all the circumstances of the particular case' Asholt (n 2) 445 fn 775. [my translation].

117 Johannes Nagler, Heinrich Jagusch and Edmund Mezger, *Leipziger Kommentar* (de Gruyter 1954) 524. More sources at Asholt (n 2) 47 fn 180.

118 Günther Willms, 'Zur Frage rückwirkender Beseitigung der Verjährung' (1969) 24 Juristenzeitung 4, 161—162. Vormbaum, writing at the end of the century, is much more severe, calling this introduction a collection of hysteric populism, authoritarian state thought and activism lacking consideration for the *Rechtstaat*. Thomas Vormbaum, 'Mord sollte wieder verjähren', *Festschrift für Günther Bemmann zum 70. Geburtstag* (Nomos 1997) 495. This repeal took place in 1953.

119 Asholt (n 2) 61.

unification and not only before it, were addressed by statutes,[120] suspending the running of the limitation periods even for offences with low penalties, which would have been barred after one or five years. The doctrines developed during the aftermath of the Nazi regime were also applied in order to suspend all limitation periods for crimes committed between 1949 and 1990 and not prosecuted due to the connivance of the Socialist Unity Party (SED).[121]

Despite the differences in the two experiences and the most important systematic legacy of the period (the firm procedural conception of the institution), both processes are viewed as cases of a restructuring of the legal system, for which extreme measures were required. Other, less structural changes in limitation continued occurring. The design of some of the specificities of the law of limitation, particularly the interruption and suspension, saw modifications. This entailed recognising that the passage of time *per se* was not sufficient ground to consider that a criminal offence had become irrelevant to the aims of the criminal justice, this time for reasons not related to the character of the offender. It meant that at least some other factors (like the impossibility to prosecute for legal grounds, on the one hand, and the use and abuse of the available means to bypass the deadlines by the prosecution, on the other)[122] needed to be addressed. A *numerus clausus* of suspension hypotheses and interruption grounds was introduced in 1975 and the catalogue of grounds for suspension was extended, as it was perceived that the open-ended clause contained in the law was being interpreted in an overly expansive fashion.

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120 *Zweites Gesetz zur Verlängerung strafrechtlicher Verjährungsfristen* of 27.09.1993, BGBl. I 1993, 1657, and *Drittes Verjährungsgesetz* of 22.12.1997, BGBl. I 1997, 3223. See Anica Sambale, *Die Verjährungsdiskussion im deutschen Bundestag* (Dr Kovac 2002) 240 ff; Klaus Marxen, Thomas Vormbaum and Gerhard Werle, *Die strafrechtliche Aufarbeitung von DDR-Unrecht: Eine Bilanz* (2nd edn, De Gruyter 2020) 5—8.

121 *Erstes Verjährungsgesetz* of 26.03.1993, BGBl. I 1993, 392.

122 Gerd Geilen, 'Missbräuchliche Unterbrechung der Verjährung', *Strafrecht, Biorecht, Rechtsphilosophie. Festschrift für Hans-Ludwig Schreiber zum 70. Geburtstag am 10. Mai 2003* (C F Müller Verlag 2003).

Back in England, the effects of leaving the possibility to prosecute indictable crimes open have been most visible in the changes to prosecutorial policy observable in the last decades with regard to child sexual abuse. Despite not seeming problematic until the 1990s, recent decades have seen a huge increase in 'non-recent' allegations of that kind.[123] The particularities of sexual abuse and the related trauma were also considered reasons to abandon the proposal to introduce time limits in this area. The Home Affairs Committee of Parliament, when looking into abuses committed in children's homes, concluded:

> 'We are inclined to agree that the prosecution of offences relating to child abuse should not be time-barred. In our view, prosecution decisions should continue to be based on the merits of the case, having regard to public interest factors, such as delay. Whilst a limitation provision may protect innocent defendants from fabricated allegations that are difficult to refute, it may also prevent guilty defendants from being brought to justice. For these reasons, we decline to recommend the introduction of a statutory limitation period'.[124]

Some academics have apparently agreed with this conclusion in broader terms, and not only in relation to child abuse: '[the Committee] decided against it, and this seems right. Delay should not be an absolute bar to trial; it needs to be considered along with counter-balancing factors in the individual case'.[125]

With the creation of the Crown Prosecution Service in 1985, and the concentration of the decisions to prosecute or not prosecute indictable offences committed a long time ago in one centralised public organ, the need to guide these decisions with some level of uniformity became clear. This explains first, the introduction of the criterion of the passage of time within the public interest limb of the Full Code Test, and then its implicit consideration there, tied to

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123 Penney Lewis and Alastair Mullis, 'Delayed Criminal Prosecutions for Childhood Sexual Abuse Ensuring a Fair Trial' (1999) 115 Law Quarterly Review 265.

124 Home Affairs Committee, 'The Conduct of Investigations into Past Cases of Abuse in Children's Homes' (H M Stationery Office 2002) Fourth Report para 89.

125 Andrew Ashworth and Mike Redmayne, *The Criminal Process* (4th ed., Oxford University Press 2010) 275. This issue is no longer discussed in the newest edition of this work.

specific guidance on non-recent offences.[126] There has always been some guidance regarding how to deal with offences committed a long time ago. But the dominating mode of incorporating time limits has changed in recent decades, while remaining in line with the more general discretion-based decision-making in criminal justice.

The first Code for Crown Prosecutors in 1985 contained a list of factors 'which can properly lead to a decision not to prosecute', including:

> Staleness: Regard must be had not only to the date when the last known offence was committed, but also the length of time which is likely to elapse before the matter can be brought to trial. *The Crown Prosecutor should be slow to prosecute if the last offence was committed three or more years before the probable date of trial*, unless, despite its staleness, an immediate custodial sentence of some length is likely to be imposed. Less regard will be paid to staleness, however, if it has been contributed to by the accused himself, the complexity of the case has necessitated lengthy police investigation or the particular characteristics of the offence have themselves contributed to the delay in its coming to light. Generally, the graver the allegation the less significance will be attached to the element of staleness.[127]

A more concise version was contained in the 1994 version of the Code, which made no reference to any specific amount of time, but still considered a long delay between the offence taking place and the date of the trial a common public interest factor against prosecution, subject to similar counterhypotheses.[128] Since 2013, the criteria of staleness has disappeared from the explicit considerations included in the public interest limb of the Full Code Test, which has also changed the listing of criteria in favour and against prosecution for a series of questions that the prosecutor ought to answer for the overall assessment of the public interest.[129]

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126 See above Chapter 2.5 and 2.6.

127 Code for Crown Prosecutors 1985, 1st edition, 8(ii). [emphasis added]

128 Code for Crown Prosecutors 1994, 3rd edition, 6.5.

129 Code for Crown Prosecutors 2013, 7th edition, 4.11.

Since at least 2018, the specific guidance on non-recent offences has defined the criteria mentioned in Chapter 2.

Even more recent discussions emerged with the proposals that aimed to limit the prosecution of certain crimes by members of the armed forces. The issue had been raised before as an amendment during the debate of the Armed Forces Act 2016, in very general terms: 'No member of the armed forces may be prosecuted for any offence alleged to have taken place more than 20 years ago while the member of the armed forces was engaged in military operations outside the United Kingdom'. The opinions of Members of Parliament were divided. Some considered that limitation periods were 'quite contrary to our practice' by contrast to the solutions found by some of the British allies, and thus it would be less disruptive to 'simply have a blanket immunity'.[130] Others considered that exempting members of the armed forces from all of the criminal justice system was excessive, but most importantly that 'there is [in our system] no limitation on serious criminal cases, and that is part of the criminal law'[131] and that '[t]here may be cases that clearly should not be dealt with after 20 years; there may be other cases that need to be looked at'.[132] In the end the amendment was withdrawn. But the debate has continued with other bills on Overseas Operations and related to the Northern Ireland Troubles. In any case, the tendency lately seems to have been to favour alternative approaches, such as introducing a 'presumption against prosecution'[133] or case-by-case immunity decisions.[134]

130 Lord Hope of Craighead (CB) HL Deb 3 March 2016, vol 769, col GC148.

131 Lord Thomas of Gresford (LD) HL Deb 3 March 2016, vol 769, col GC150.

132 Baroness Smith of Newnham (LD) at House of Lords, Grand Committee, Thursday 3 March 2016.

133 Overseas Operations (Service Personnel and Veterans) Act 2021, s 2. For an analysis see John Jackson and Jenny Johnstone, 'Statutes of Limitation in the United Kingdom' (2022) 49 DPCE Online.

134 Northern Ireland Troubles (Legacy and Reconciliation) Bill 2022-2023, s 18, at the time of writing.

The contrary situation, when an already time-barred offence has been modified to allow for later prosecution, has also emerged. The perception of an insufficiency of the brief six months for summary offences has recently driven the addition of yet another exception to the application of article 127 Magistrates' Court Act 1980, for common assault in domestic abuse contexts,[135] by introducing an extended period of up to two years since the commission of the offence as long as the prosecution is started before six months from when the complainant has given a witness statement or a recorded interview.[136] In a press release the government asserted that the retention of a limit was to 'prevent the police from being inundated with historical reports'.[137]

5.5. The conceptual break with the tradition — an intellectual history of limitation periods

The last sections have shown a significant temporal coincidence between the procedural reforms in both jurisdictions and the introduction of general and categorical limitation periods, leaving behind (at least for great portions of the criminal law) the offence-by-offence basis that had been predominant so far. In Germany, this process was closely tied to the attempts to create a balance between inquisitorial and accusatorial features of criminal justice, and the division of powers entailed in the creation of a *Staatsanwaltschaft*. In England, it was first tied to the structuring of the notion of treason and other politically loaded offences and later to the

135 Police, Crime, Sentencing and Courts Act 2022, s 49.

136 As we have seen, battery and assault offences are the largest category of registered crimes ended by police because of being outside of their limitation period, see Chapter 2.2.

137 Ministry of Justice, 'Domestic Abuse Victims in England and Wales to Be given More Time to Report Assaults' *GOV.UK* available at https://www.gov.uk/government/news/domestic-abuse-victims-in-england-and-wales-to-be-given-more-time-to-report-assaults, accessed 15 March 2023. A year before, the government had responded in the negative to a petition, arguing that for more serious cases, other charges not subject to time limits were available, and that there was a countervailing interest in disposing swiftly of summary offences, see https://petition.parliament.uk/petitions/555276, accessed 15 March 2023.

concentration of summary prosecutions in the hands of the police and their decision in the hands of the new magistrates' jurisdiction. These changes were in turn accompanied by some distinct legal and philosophical ideas, although these were certainly not univocal in the direction they would push for.

In this section I would like to propose a reading of these changes that reinforces the notion of a conceptual break with the Roman origins of categorical limitation periods. Even if the existence of a 20-year general limit is plausibly seen as an influential source for the development of the structures that we now know as time limits for prosecutions in the civil law world, I contend that the older version does not carry the same significance and purpose, and that the two are structurally so different that they need to be understood as separate phenomena.

The first argument in favour of this interpretation is obvious: while the current limitation periods are not in *absolute* terms close to the Roman 20-year rule except for the most serious offences, they are also *relatively* much briefer when contrasted with the now much longer life expectancy and the often-mentioned acceleration of social life in the last two centuries.[138] The 6-month rule for English summary offences, and the 3, 5 and 10 years that cover the outmost majority of offences and actually committed crimes in Germany look nothing like a rule that almost implies a 'generational change'.

Second, it can be noted that the Romans did not have a gradated system representing the seriousness of offences, and correlated time limits. At an early time, the magistrate would have had relative discretion to determine whether the crime was capital or non-capital,

[138] Generally, Hartmut Rosa and Jonathan Trejo-Mathys, *Social Acceleration: A New Theory of Modernity* (Columbia University Press 2013); Lorenz Schulz, 'Time and Law: How Life-World Acceleration Affects Imputation in Criminal Law' Beiheft 18 Rechtstheorie 405; Asholt (n 2). I have tried to develop and explain the relationship between these factors and the current structure of limitation periods in Carla Sepúlveda Penna, 'La teoría del tiempo y la forma de la prescripción del delito' (2021) July Enfoques Penales available at https://crimint.org/producto/enfoques-penales-julio-2021/.

subjecting the final decision regarding the sentence to the people. Later, in a period starting in the mid-second century BC, a *poena legalis* was pre-defined for offences by statute. In a third period during the Principate, the senate, the emperor and various delegated courts would apply the *poena legis* or mitigate or aggravate it at their discretion.[139] Punishments were structured in what has been described as a "ladder" of criminal penalties, with *poena capitalis*, including deportations, at the top, and corporal punishments above monetary ones.[140] Nevertheless, there was only one general period and scattered exceptions that were not associated with the assigned punishment.

The centrality of gravity is now paramount. It gives limitation periods their shape, despite the fact that they are mostly considered procedural devices and often based on evidentiary concerns. The fact that the *ex ante* categorisation by the legislator of a crime of their comparative weight and allegedly about their lasting memory is now present across the regulation of the passage of time for the prosecution of crimes (even allowing for some effects at sentencing and undue delays, as has been discussed in earlier chapters) was not present in the Roman idea of limitation.

Finally, I posit that the growing relevance of statutory criminal law at the time of the generalised adoption of modern limitation periods amounts to a qualitative difference in their nature. As Zucca has recently put it:

> [T]he emergence of criminal law in the eighteenth century changed the constitutional structure of punishment in the following way: punishment was no longer a unilateral, vertical, and arbitrary exercise of power; instead, it became a legal instrument that addressed both political authorities and individuals and guaranteed that political authorities and individuals would be held accountable

139 Richard A Bauman, Crime and Punishment in Ancient Rome (Routledge 2012) 3—5.

140 Yulia Pershina, 'The System of Punishments in the Ancient Rome' (2017) 1 Modern European Researches 78.

> if they pursued their private interests in a way that was incompatible with the common interest of the society.[141]

It was the regulation not only of individual, but also of public conduct, that became characteristic of the criminal law. The criminal law was no longer a collection of prohibitions and mandates, backed by the threat of a punishment. There was a new power invested in the police, who were charged with crime prevention and evidence gathering. It 'was created to assist the judicial branch and to secure the daily implementation of criminal laws. Each institutional actor is part of the system of criminal justice, and, as such, it is subject to legal constraints and legal boundaries'.[142] That is why it is consistent that limitation rules are general, covering either the whole realm of the criminal law or at least a certain jurisdiction: because they are not only defining a individual conduct as compliant or not with the law, but they are crucially speaking to the state officials and courts as to how they can exercise their powers. This at least applies to the areas dominated by these new powers of policing and prosecution, both in England and in Germany. This was certainly a characteristic that pre-modern limitation periods lacked.

Among the critical principles that emerged to regulate this new understanding of the criminal law was the legality principle, the primacy of the law. Some related legal provisions had existed in ancient Rome as well, but they were not considered binding in an absolute manner.[143] The Enlightenment brought the notion of a single sovereign imposing social control, as well as legal individualism as the leading ideology. Still, one way to express the differences that persisted between different legal traditions in this regard is the use of the principle of legality. While in the sphere of the common law is was considered a protecting 'shield' from

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141 Lorenzo Zucca, 'The Constitution of Criminal Law' (2020) 70 University of Toronto Law Journal 27, 29.

142 ibid 33—34.

143 Gabriel Hallevy, *A Modern Treatise on the Principle of Legality in Criminal Law* (Springer 2010) 8.

unjustified use of the criminal law, in the civil law it was also an offensive weapon or 'sword'. As highlighted by Hallevy: 'in these legal systems, equality is a value that cannot be easily disregarded, and whenever the criminal law is applied to an individual, the principle of legality requires the same application to other individuals in the same circumstances'.[144]

The difference between legality as a shield and legality as a shield and sword can also add some more information about why in England it was not felt that a categorical mechanism was required beyond the summary jurisdiction, as we will see in what follows.

5.6. Explaining 'nullum tempus occurit regi'

The received wisdom in the history of the common law is that the maxim has always been *nullum tempus occurrit regi* (time does not pass for the King).[145] The concept of the 'common law' was closely tied to the natural law doctrines and to a declaratory conception of the role of courts (courts as discovering, not creating the law).[146] The content of the common law began as committed to memory and custom,[147] a 'non-written' law, which makes the exercise of attempting to discover the origins a very difficult one.[148] But the attitude that the sovereign had a capability to conduct prosecutions unlimited by time as a doctrine of the common law can nevertheless be analysed to some extent. At least two possible elements can be examined: first, whether it is something common to all non-written legal systems that the prosecution is not

144 ibid 11.

145 Stephen (n 70); Jervis (n 94); Richard Whittington-Egan, 'A Dickens of a Different Christmas Carol' (2000) 150 New Law Journal.

146 Peter Mirfield, 'A Challenge to the Declaratory Theory of Law' (2008) 124 Law Quarterly Review 190, 190.

147 William Blackstone, *The Law Students' First Book, Being Chiefly an Abridgment of Blackstone's Commentaries* (R Hastings 1848) 9. '*Leges sola memoria et usu retinebant'* Jeremy Bentham, *A Comment on the Commentaries: A Criticism of William Blackstone's Commentaries on the Laws of England* (Clarendon Press 1928) 157.

148 Similarly, Sir Edward Coke (1552—1634) commented that 'the grounds of our common laws' were 'beyond the *memorie* or register of any beginning'. Edward Coke and others, *The Reports of Sir Edward Coke, Knt.: In Thirteen Parts* (A new ed, J Butterworth and Son 1826) vols 8, 'To the reader'.

limited; and second, whether there are other concomitant principles that help us understand the reasons for, and systematic position of this doctrine.

Despite that common belief, the English rejection of limitation periods cannot be purely explained by the fact that the common law is a customary and judicially created law. As we have seen before,[149] it is not of the essence of limitation periods to be contained in statutes; they might as well be developed in common law. This does not deny that non-limitation was a feature of the *English* common law, but at least it reduces the claim to one of the particular development of English law.

A possible explanation for this doctrine is based on a different dictum of English public law: 'the King can do no wrong'. The common origin of the two maxims is explained by Kenny, who clarifies their relation:

> it was impossible that [the King's] delay in pressing claims, whether civil or criminal, could be due to any blameable negligence. Accordingly at common law it was a rule that those claims remained unaffected by lapse of time.[150]

The maxim that the sovereign cannot err was of constitutional significance in English law.[151] Indeed, it is possible to say that there is something in the conception of the state that is being expressed here. Blackstone wrote that the maxim expressed three characteristics: the king's sovereignty, his absolute perfection (where he also locates the maxim that no time passes for him) and his perpetuity.[152]

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149 See above, Chapter 4.3.1.

150 Kenny (n 94) 409.

151 Blackstone (n 147) 353.

152 ibid 57—59.

The most complex implication of this interpretation is that it appears to suggest that throughout the development of the common law. The king was perceived to be the holder and main bearer of the criminal prosecutorial power. It seems to be focusing on the king's prerogative in starting criminal proceedings. That can easily be said nowadays, where the crown, represented in the Crown Prosecution Service, is indeed the main prosecutor. This has not been the case in history, though.

The criminal law in England and Wales developed as an adversarial and privately interested conflict resolution mechanism.[153] Up until the nineteenth century, the intervention of the crown occurred in the most important cases, but they were by far the least common as most prosecutions were brought by victims or representatives of the victims.[154] The absence of limitations, in stark contrast with the private law,[155] was also applicable for private parties seeking criminal prosecution, but for some specific and scattered exceptions.[156] For these reasons, if under some interpretations the justices of the peace were the first public

153 '[T]he prosecution of offences is left entirely to private persons, or to public officers who act in their capacity of private persons" Stephen (n 70) 493; Andrew Ashworth, Mike Redmayne and Liz Campbell, *The Criminal Process* (5th ed., Oxford University Press 2019) 194.

154 Philips (n 72) ch 4; John H Langbein, 'The Origins of Public Prosecution at Common Law' (1973) 17 American Journal of Legal History 317. Critics of the so called 'myth of private prosecution' have said that it is not true that official bodies did participate on rare occasions. It must be said, though, that this movement of expansion of the public prosecution arose in London and especially during the nineteenth century, as we will see in what follows. Bruce Smith, 'The Myth of Private Prosecution in England 1750-1850', in Markus Dubber and Lindsay Farmer, *Modern Histories of Crime and Punishment* (Stanford University Press 2007).

155 A civil limitation of actions applicable to the Crown was introduced in 1769 by 9 Geo 3 c 16. Even before, in 1623, 21 Jac 1 c 16 limited certain recoveries of land and actions for some torts, like assault, menace, battery, wounding or imprisonment. Blackstone seems to have been referring only to the civil maxim when he refers to the notion that time shall not pass for the king: '*Nullum tempus occurrit regi* has been standing maxim upon all occasions: for the law intends that the king is always busied for the public good, and therefore has not leisure to assert his right within the times limited to subjects'. Blackstone (n 147) 58. For the evolution of the civil rules in England, see Matthew Dyson, 'Prescriptions and Prolegomena; What the End of Tort Can Tell Us About Its Beginning' in Sonja Meier and Nils Jansen (eds), *Iurium itinera, Historische Rechtsvergleichung und vergleichende Rechtsgeschichte* (Mohr Siebeck 2022).

156 See above, sections 5.1. and 5.2.

prosecutors,[157] it would have been a contradiction with the maxim that 'time does not pass for the king' was precisely first developed there, where the public interest and the crown were directly present. As seen, first for several political offences including treason, and then in summary jurisdiction where a public organ had assumed most prosecutions, it would seem ironic for the justification to be so closely tied to the infalibility of the monarch.

Another path, related to, but different from what Kenny suggests, would be to understand that the non-existence of time bars is connected to the immunity of the King in the sense that the crown's power is expressed in the judiciary or in the criminal justice system as a whole. This speaks to an understanding of the limitation periods related to the structure and functions of the judiciary, as limitations to the jurisdiction and, that in this sense, the king would not lose the power of his justice despite a long passage of time. At some point, the legislators found good reasons to introduce the exceptions that we have studied.[158]

To the extent that criminal prosecution was seen as a public enterprise for the most part of the last two centuries, i.e. through the growth of the police forces and only of late through the creation of the Crown Prosecution Service, there is some ground to believe that there was a notion of restraint in the use of that power. However, this was not the dominant view of what the criminal law as a whole is. Movements in that direction are recent. And so indeed is the concept of the state in the law in general[159] and its intervention in the criminal law, where for a long time 'the king simply assumed the power to supervise the enforcement of his laws by

157 Langbein (n 154) 319.

158 Besides the two explanations discussed here, a third possible but not at all developed alternative for explaining this principle of the common law is introduced by John Johnes, who attributes this feature to a protestant rejection of the catholic notion of the earthly remission of sins. 'English Law' in: Antonio Cassese and Mireille Delmas-Marty (eds), *Jurisdictions Nationales et Crimes Internationaux* (Presses Universitaires de France 2002) 62. This thought opens up an interesting line of inquiry, possibly to be addressed in the future.

159 Martin Loughlin, 'The State, the Crown and the Law' in Maurice Sunkin and Sebastian Payne, The Nature of the Crown: A Legal and Political Analysis (Oxford University Press 1999).

local authorities. It was not until the nineteenth century that the state in the common law world attempted to control crime directly through public policing'.[160]

5.7. 'Nullum tempus' and 'imprescriptibility'?

An apposite question at this stage is whether 'imprescriptibility', as is known in countries where the general rule is a categorical limitation of crimes, shares any of these conceptual origins with the English tradition. Does it have anything to do with a notion that 'the king can do no wrong'? Is it related to the notion of jurisdiction?

The first modern introduction of imprescriptibility in Germany was that of war crimes in the Leipzig war crime trials.[161] These trials, the extension of limitation periods with the aim of prosecuting crimes committed by nazi officials, and the suspension of limitation periods after the reunification of Germany to allow for the prosecution of offences committed in the last years of the German Democratic Republic all shared a desire to process war crimes and 'system-conditioned injustice' (*Aufarbeitung von Kriegs- und Systemunrecht*). There is, thus, not an idea that the sovereign can do no wrong, but on the contrary, that sometimes criminal law is required to deal with past state-led injustice.

Aspirations at the international level took a long time to materialise. Both at the United Nations[162] and within Europe[163] there was a post-war push towards the declaration of non-

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160 Malcolm Thorburn, 'Punishment and Public Authority' in Antje du Bois-Pedain, Magnus Ulväng and Peter Asp (eds), Criminal Law and the Authority of the State (Hart 2017) n 23. See Frederick Pollock, 'The King's Peace in the Middle Ages'' (1899) 13 Harvard Law Review 177.

161 Although in the end only ten sentences were imposed, it is said that these processes laid the foundation for the understanding of individual criminal responsibility in the context of international law. Asholt (n 2) 348.

162 Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity 1968.

163 European Convention on the Non-Applicability of Statutory Limitation to Crimes against Humanity and War Crimes 1974.

limitation for war crimes and crimes against humanity. However, the adoption of imprescriptibility was not immediate. Germany never became a party to those treaties, nor did the United Kingdom. Only the institution of the International Criminal Court gave the non-limitation of crimes in international criminal law generalised recognition,[164] although it was not without debate, with many countries with limitation periods wanting to have merely an extended version of them.[165]

Some have argued that the final structure dealing with the passage of time in Rome Statute:

> … shows a clear similarity between the law of the International Criminal Court and the common law, which does not take time into account into 'rigid' limitation periods, but in 'flexible' procedural regulations. This results in a change of perspective for the influence of time on criminal law, which is primarily accompanied by greater flexibility.[166]

This results in a Court and a prosecutor with the power in her hands to take or leave crimes, as far as the time of their commission is concerned. Such an understanding does resonate with the idea that there is something in this particular type of jurisdiction that justifies superior powers, which are not usually admitted for dometic courts.

Justifications for imprescriptibility are offered in a language that is unfamiliar to the debates on 'nullum tempus occurrit regi'. The reasons usually given for the non-applicability of limitation for crimes against humanity and war crimes is the extraordinary seriousness of

164 Kok (n 40) 43.

165 Asholt (n 2) 455 ff.

166 ibid 455.

these activities, and the fact that to some extent they are not only an affront against the direct victims but against humanity itself.[167] This was expressed by the Supreme Court of Israel:

> 'Most crimes in the world have forgiveness […, but] the Holocaust, crimes against the Jewish people, crimes against humanity and war crimes. These -- they have no global forgiveness. No forgiveness of the law and no forgiveness in the heart.
>
> The law eliminates the statute of limitations for such crimes. There is no time, and the Minister of oblivion has no control over them. Abolishing the statute of limitations on these crimes, means that the crimes should be seen as if they were above the time, as if there was still Treblinka, and Jews suffocate in 'one' and cry out from torn lungs and the blood pits are still boiling.[168]

There is something in common and something quite different between the notion and significance of imprescriptibility in international criminal law and in English law. The common feature is an expression of entrusting courts with a significant role in advancing justice, especially in areas of concern. Very different is the unease about the atrocious and eternal nature of the crimes in international law, which has no equivalent in English law. There, 'very serious' crimes, or 'crimes that would attract long or intense punishments', or 'outrageous crimes' are considered reasons for seeing the prosecution being brought forward in line with the Code for Crown Prosecutors. There is, thus, a distinct choice regarding where prosecution is correctly more selective and policy-driven.

5.8. Conclusions

This account of how and why categorical time limits have developed sheds light on their current form as well as other institutional consequences of the passage of time for the prosecution of crimes. It has shown that the notion of limitation periods has existed for a long time in English

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167 ibid 459—467.

168 First decision on the case Demjanjuk, Criminal case (district-Jerusalem) 373/86 State of Israel v John Ivan Demjanjuk (25.4.1988), Justice Zvi Tal. With thanks to Netanel Dagan for the reference and translation.

criminal law, but that it has never been conceived as a generally applicable substantive institution, either through common law or through statute. This summary has also shown that there has been little reflection about how the existing exceptional norms fit into the whole system or what their role in the system is. Finally, it has been possible to see that the changes in the pace of production of such rules have been encompassed with other phenomena in the criminal justice system: the introduction of the summary jurisdiction and the changes in the prosecutorial agencies.

For Germany, it is possible to conclude that even if the Roman rules were determinative in retaining the idea of limitation as an available legal tool, the modern concept of limitation cannot be explained by appealing to them. Much more significant is a reference to the concept of legality that emerges in association with the French Revolution, and with the procedural reforms of the time. This interpretation is ratified by the shifts that occurred during the twentieth century, where changes relaxing time limits were coincident with a more general aim of enlarging prosecutorial powers in specific areas for reasons of penal policy, either in severe cases of regime re-stabilisation or for more mundane situations but in line with the perceived need to grant the prosecutors more control over certain decisions.

This chapter has continued the comparative exercise, contextualising the changes with some historical facts and with some of the conceptual history about the criminal law and its role in the governance of the state. Once again it has been possible to discern similarities in the two jurisdictions, as well as to highlight how the different balances have been reached in what is seen as their preferred way to deal with the passage of time for the prosecution of crimes.

The next stage of this research will lead to an assessment of the justifications and the performance of the different ways of understanding time limits from several perspectives. This

more theoretical part will still necessarily refer to the descriptions and analysis offered in the first part. The historical account given in the present chapter might be helpful to see that despite any possible theoretical assessment, reality shows that the law changes, adapts and receives influences in a way that sometimes defies the expected aims or values that it is ideally thought to encompass.

PART II. EVALUATIVE PERSPECTIVES OF TEMPORAL LIMITS

This second part of the thesis evaluates forms of time limits for the prosecution of crimes. This enquiry relates primarily to the second research question of the thesis, by assessing which form of time limits performs better. Answering this question will require making explicit which parameters are used for such an evaluation. Drawing on the first part, two models will be compared: discretionary and categorical limitation models. First, an assessment from the point of view of the general aims of the criminal law, procedure and punishment will be provided. Second, three perspectives will be adopted in order to account for the different interests at play in the criminal law: the victims, the accused and the state.

Two models for temporal limitation, based on the real-world regulation of the English and Welsh and the German mechanisms to limit prosecutions due to the passage of time, can be delineated:

α) The *discretionary mode* authorises certain legal actors not to prosecute an offence based on a *prima facie* assumption that time negatively affects the justification of the prosecution of such individual case.

β) The *categorical mode* is structured on an explicit binary rule, mandatory for all legal actors, that establishes a point in time for each crime where prosecution becomes barred, covering all offences.

The two modes encapsulate the conclusion reached so far in this thesis, that is, that both countries studied place time-based limits on the deployment of the criminal law. Through different mechanisms, they both control the exercise of state power by mostly prosecuting only crimes that occurred recently. Each may contain a series of norms and a distribution of powers. However, these two models do not refer to the adjacent mechanisms in place (e.g., abuse of process, reporting mechanisms, controls over discretion, and rules on over-lengthy proceedings), or to the nuances introduced by exceptions and modifications (e.g., suspensions, discovery rules, exemptions, and specific guidance for categories of crimes), which reflect the complexity of real-life regulations. This is the sense in which they are simplified models.

This part will be devoted to assessing the performance of both categorical and discretionary limits, noting their virtues and their prerequisites. Chapters 6 and 7 will address this from the perspective of the aims of the criminal law, in their forward- and backward-looking dimensions. Chapter 8 will assess the two types of limits from the point of view of the aims of criminal procedure. Chapters 9, 10 and 11 will adopt three interest-based perspectives: that of the victims, the accused and the state. These six chapters will be followed by some concluding reflections (in Chapter 12) as to how they could operate in an 'ideal' criminal law.

CHAPTER 6. TIME LIMITS AND THE FORWARD-LOOKING AIMS OF CRIMINAL LAW

Based on the first part of this thesis, I have identified two divergent ways of thinking about the best mode for regulating how to deal with the passage of time for criminal prosecutions. One mode places a categorical limit, while the other allows in-principle unlimited prosecution but permits certain officials (usually the prosecutor, sometimes the police, and exceptionally the judge) to limit a prosecution. This second path does not declare the system indifferent to the passage of time.

In order to better understand why in neither jurisdiction there seems to be a systematic use of the criminal law after a lengthy passage of time it is worth examining the purposes of the criminal law. This chapter will look at the forward-looking aims usually attached to the criminal law, while the next chapter will address the backward-looking purposes.

Among the consequentialist aims, prevention is 'the most obvious […] good' and so it is the one that is most discussed in the literature.[1] However, forward-looking aims for using the criminal law need not be restricted exclusively to crime prevention or reduction,[2] and indeed many are generally utilitarian, thus integrating alternative costs and benefits and ulterior social goals.[3] Under this heading, such forward-looking aims and some of the mechanisms

1 Antony Duff, *Punishment, Communication, and Community* (Oxford University Press 2000) 4.

2 Neil Walker, 'Reductivism and Deterrence' in Antony Duff and David Garland, *A Reader on Punishment* (Oxford University Press 1994).

3 Nicola Lacey, *State Punishment* (Routledge 1988) 27 f.

allegedly contributing to them will be considered: rehabilitation, deterrence, incapacitation and the concept of 'positive general prevention' (*positive Generalprävention*).[4]

As will be observed, forward-looking mechanisms often show different faces when they are considered in their pure theoretical formulation and when they are considered in practice, interacting with the complex realities of the criminal justice system. This contrast is even more extreme when deployed at a greater time-distance from the commission of a criminal offence.

6.1. Rehabilitation[5]

Rehabilitation involves giving offenders the means and opportunities to desist and is often associated with changing the motivations and disposition of an offender towards the law.[6] Rehabilitation through punishment seems to some to be an aim that can only be achieved in the short term after the commission of an offence. The arguments behind this reasoning are either that the offender might have rehabilitated herself or that interventions might be futile and the cause of the offending 'incurable'.

The measure of rehabilitation, desistance, might be seen as one that does not necessarily need state intervention in order to take place. 'Most of the research suggests that desistance "occurs" away from the criminal justice system. That is to say that very few people actually desist as a result of intervention on the part of the criminal justice system or its

4 For a discussion in English about this aim see John Gardner, 'The Functions and Justifications of Criminal Law and Punishment', *Offences and Defences: Selected Essays in the Philosophy of Criminal Law* (Oxford University Press 2007). More Germany, Markus Dubber, 'Theories of Crime and Punishment in German Criminal Law' (2005) 53 American journal of comparative law.

5 In the German world, the concept of *Resozialisierung* is preferred. Also 'reformation', 'social reintegration' and 'positive special prevention' could be used as labels here. The German literature leans towards the use of resocialisation, as a constitutionally anchored principle derived from articles 1 I and 2 of the German Federal Constitution. Axel Montenbruck, *Deutsche Straftheorie: ein Lehrbuch* (3rd edn, Freie Universität Berlin 2018) 204 ff. I have abstained from using the concept of reintegration or re-entry, as it is often associated only with post-carceral experiences.

6 Distinguishing between rehabilitation and reform, Duff (n 1) 5.

representatives'.[7] For the purpose of this argument, we will call such forms of rehabilitation that are outside of the criminal justice system 'self-rehabilitation'. If self-rehabilitation and desistance are a more or less natural process that will develop in time, this ought to be considered.[8] The problem for assessing if it would be warranted to have the criminal law operate in these circumstances, however, faces an epistemological barrier: how to know if the offender has indeed self-rehabilitated.

One criterion for self-rehabilitation could be if over a longer period of time an offender has desisted from offending (or at least has committed no offence that has come to the knowledge of the authorities).[9] This is why, some systems containing a categorical limitation have implemented a rule reinstating the counting since the last offence committed.[10] However, such a norm differs significantly from the theoretical model of categorical limitation under scrutiny here.

Some authors believe that 'there will often be an indirect correlation between the passage of time and the relevance of […] rehabilitation of the offender' because the offender might be more difficult to change through the infliction of punishment. 'It is questionable

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7 Stephen Farrall, 'Why Do People Stop Offending' (1995) 1 Scottish Journal of Criminal Justice Studies 51, 56.

8 Traditional age-crime curves show a diminished probability of committing crimes in later stages of life and this would be an argument against the preventive efficacy of late punishment. This model is widely accepted on aggregate terms, but it is always highlighted that on an individual level there is great variance. For a state of the art see Chester Britt, 'Age and Crime' in David P Farrington, Lila Kazemian and Alex R Piquero, *The Oxford Handbook of Developmental and Life-Course Criminology* (Oxford University Press 2019).

9 Wolfgang Mitsch in Volker Erb und Jürgen Schäfer (eds.), *Münchener Kommentar zum Strafgesetzbuch* (C H Beck 2019) §78 n 3.

10 Austria (§ 58 ÖStGB), Chile (Art. 96 CP), historically also several jurisdictions in Germany.

whether punishment is going to make an aged offender into a more useful citizen or a better person'. [11]

Could a categorical mode of limitation promote the aim of resocialisation? For those who believe that punishment and the criminal law are themselves degrading and disintegrative practices,[12] less punishment could indeed achieve better rehabilitation. A bar to prosecution and punishment could help citizens who have once committed an offence —but were never prosecuted — to continue with their more-or-less law-abiding lives without the threat of being subject to the interruption of those life-paths by the criminal justice.[13] Beccaria thought that having a fixed period of time after which there will be no criminal prosecution 'allows the criminal to amend, and become a better member of society'.[14] However, there is no universal effect of the passage of time on rehabilitation. Some offenders will self-rehabilitate, others may recidivate.[15]

To summarise, if rehabilitation has been achieved by other means, or if it can no longer be achieved through prosecution, there are reasons to exclude the prosecution of crimes categorically. The prevalence of these circumstances in order to decide whether this should be introduced as a general rule is practically impossible to evaluate. A discretionary mode of limitation would allow an analysis in the specific case of whether self-rehabilitation has

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11 Daniel Shuman and Alexander McCall Smith, *Justice and the Prosecution of Old Crimes* (American Psychological Association 2000) 29—30.

12 Braithwaite and Mugford, for example, recognise that '[m]ost criminal trials are a good example of status degradation ceremonies', before criticising some of these views as over-simplistic. John Braithwaite and Stephen Mugford, 'Conditions of Successful Reintegration Ceremonies: Dealing with Juvenile Offenders' (1994) 34 British Journal of Criminology 139, 140.

13 As a collateral benefit of limitation periods, but not as a sufficient justification for them René Bloy, *Die dogmatische Bedeutung der Strafausschließungs- und Strafaufhebungsgründe* (Duncker und Humblot 1976) 190; Ramón Ragués i Vallès, *Prescripción Penal* (Atelier 2004) 36.

14 Cesare Beccaria, 'Crimes and Punishments' in James Anson Farrer (tr), *Crimes and punishments: including a new translation of Beccaria's 'Dei delitti e delle pene'* (Chatto & Windus 1880) ch XXX.

15 Ragués i Vallès (n 13) 35.

occurred and for making a prognosis about whether rehabilitation could be effective in the individual case, but it does not give assurances that more resocialisation will occur thanks to the intervention of the criminal law. The pursuit of rehabilitation and resocialisation seems to not give general answers to our question.

6.2. Special deterrence and incapacitation[16]

Reducing or eliminating reoffending through coercive methods is incapacitation.[17] Special deterrence or special negative prevention is the expected effect of criminal law on an offender to dissuade her to offend, through the threat of punishment.[18] They may be in a means-to-ends relationship. Both can be considered together to understand how, through the imposition of a punishment, the aim of prevention or reduction of crime is sought using the criminal law in the context of a widening temporal gap between the offence and the prosecution and determination of criminal liability.

Some arguments noted earlier are also applicable here: in terms of prevention, the prosecution of an offender who has led a law-abiding life since the crime is unjustified. Thus, as one German commentator has argued:

> As soon as the mental and spiritual development of the offence committed has come to an end, i.e. the offence is no longer perceived as belonging to the offender in its current identity structure, there is no longer any legitimation for state punishment from the point of view of special prevention. The perpetrator does not need any bettering influences with regard to the act he is internally processing, nor does the breach of criminal law, which has already been dealt

16 In Germany, often both are considered under the headline *negative Spezialprävention*, but they are more specifically termed *Abschreckung* and *Unschädlichmagung*.

17 ibid 5. As Duff stresses, incapacitation 'is implausible as a general aim for our existing penal systems', but nevertheless it can be considered for some specific forms of punishment.

18 Duff (n 1) 4.

> with, indicate the current dangerousness of the perpetrator and thus the need for protection by the general public.[19]

However, what about cases where it can be shown that this is not the case? Would this justify building the whole system in discretionary terms, so that those cases could still be prosecuted? At this point, we clash with the traditional doubts about the real potential of criminal sanctions to indeed prevent crime, which are not within the scope of this research.[20] Discretion regarding whether to prosecute would allow for this judgement. Categorical limits would not. The mere passage of time would not prevent offending and thus an additional requirement of a change in the personality of the author would be necessary.[21]

The epistemological problem is also just as present here: how do we know if the offender is more or less dangerous, or prone to offending, after the passage of time? When is this mental and spiritual development completed? When no other crimes have been committed or at least none have been reported and then processed through the criminal justice, our system assumes that this person is not dangerous or little inclined to offending. If additional offences have been committed, does that allow the state to examine that person's past in order to uncover (either to prosecute independently, to aggravate a sentence or to impose any other legal consequences) any prior criminal behaviour, even if it has not come to the attention of the authorities yet, or even if it has been discarded? One alternative way to answer this question is

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19 Stefan Zimmermann, *Strafrechtliche Vergangenheitsaufarbeitung und Verjährung* (Iuscrim 1997) 50. [my translation]

20 Whether the incapacitation implied in incarceration effectively prevents offending or it only incarcerates the realm of criminal action of the offender to prison itself, whether prison and other deprivations of freedom of movement are in themselves criminogenic, or whether the labelling effect of criminal convictions creates modes of life closer rather than further away from crime, these are all questions that would be essential and also may have a derivative relevance if the factor of time were introduced.

21 Max Lorenz, *Die Verjährung im Strafrechte* (Heinrich Mercy Sohn 1934) 55. For a more detailed development of the thesis on possible identity changes, see Chapter 10.

to see the preventative aim as supreme; another is to, at some point, allow for other considerations to take the lead, such as a cost-benefit analysis.

The father of German special prevention theories, von Liszt, was not as concerned with the effects of limiting the application of the criminal law in time in terms of deteriorating prevention, as with the associated costs and difficulties of late prosecutions. He claimed that the difficulties and uncertainties involved in the determination of the facts would be disproportionate to their (preventive) effects.[22] For these reasons, he supported limitation periods.

Even beyond the possibility of a now-law-abiding offender, the special deterrent potential of deferred sanctions is also questioned:

> The chance that the perpetrator will record the punishment imposed on him as a measure that should serve to make him aware, […] that the legal system cannot accept such socially unlawful behaviour without tangible disapproval, is greater when this experience is in quick succession to the offence.[23]

This is not a question about the changing dangerousness of an offender, then, but rather an effect of the passage of time *per se* in the capacity of the criminal law to speak to prior offenders about their conduct in order to achieve a change for the future. If true, this would be an argument, then, in favour of categorical time limits.

Scepticism surrounds the effectiveness of criminal punishment generally to prevent individuals from offending.[24] But even if we believe that prosecution prevents crime, it would

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22 Franz von Liszt, *Lehrbuch des Deutschen Strafrechts* (Guttentag Verlagsbuchhandlung 1900) 296.

23 Bloy (n 13) 187. [my translation]

24 Charles E Loeffler and Daniel S Nagin, 'The Impact of Incarceration on Recidivism' (2022) 5 Annual Review of Criminology 133; Daniel S Nagin, 'Deterrence in the Twenty-First Century' (2013) 42 Crime and Justice 199.

still be contradictory to use this tool when any risk of future reoffending by this offender can already be ruled out.[25] In sum, as we have seen, three types of arguments have arisen. One implies that the ineffectiveness of the criminal law is not *caused* by the passage of time, but it is a circumstance that is *verified* in time, when the risk of reoffending can effectively be said to be lower. A second strand is a cost-effectiveness assessment, which favours non-prosecution as a general rule for old crimes. The third considers that there is something in the passage of time that degrades the capacity of the criminal law (if any) to address the old offence in order to achieve prevention. The temporal dimension, thus, adds a complexity to the pursuit of special deterrence. This diminished deterrent efficacy can only in some circumstances speak sufficiently in favour of general and categorical rules to not prosecute. In some cases, it seems, that pre-emption of offences would still be achieved better through the use of the criminal law and would thus justify keeping a discretionary mode of time limits.

6.3. General deterrence[26]

The effectiveness of deterrence —discouraging the commission of offences, by threatening punishment, which ought to weigh negatively in a rational (cost-benefit) calculation— is susceptible to the passage of time. It is often said that deterrence is achieved through *swift, severe and certain* punishment. The rationality presupposed for deterrence to work (the weighing between the benefits and costs of criminal behaviour) is in theory affected by the timeliness of the prosecutorial response. Some theories of deterrence assert that the effectiveness of the criminal law in deterring the commission of crimes is inversely related to the time that has passed since the offence.

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25 Claus Roxin, 'Prevention, Censure and Responsibility' in Andrew Simester, Antje du Bois-Pedain and Ulfrid Neumann (eds), *Liberal Criminal Theory : Essays for Andreas von Hirsch* (Hart 2004) 31.

26 Or *negative Generalprävention*.

One classic account of deterrence is Feuerbach's psychological compulsion: as offences have their psychological origin in sensuality and pleasure, '[t]his sensual [*sinnlich*] impulse can be negated by everyone knowing that an evil, greater than displeasure that arises from the unsatisfied impulse to commit the act, will inevitably follow his deed'.[27] For this purpose, the evil threatened in the statute ought to be inflicted as soon as the contravention has occurred. If not, the connection will become loose and the psychological compulsion will be ineffective.[28] If, for any reason, the prosecution is not started immediately, perhaps the decay in effectiveness will continue until the threat becomes empty and thus setting a limit beyond that point would not do any harm. But this was not Feuerbach's position. He believed that categorically limiting prosecution would encourage criminality and he considered it not to be defensible in view of this aim of the criminal law, but reluctantly allowed limitation periods as an act of mercy.[29]

Beccaria, on the other hand, believed that for most criminality the preventive power of the criminal law declines over time. He claimed that applying a categorical limit would not be problematic in terms of showing impunity anymore, and a time should be fixed, after which the offender should no longer be uncertain of her fate.[30] However, according to the way Beccaria's text has been interpreted, this logic does not apply to all offences. Those 'atrocious crimes, whose memory tarries long in men's minds, deserve when once proved, no prescription in favour of a criminal who has fled from his country'.[31] This reasoning has been followed to

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27 Paul Johann Anselm Feuerbach, 'Appendix A: Textbook of the Common Penal Law in Force in Germany' in Markus Dubber, *Foundational Texts in Modern Criminal Law* (Oxford University Press 2014) para 13.

28 ibid.

29 Paul Johann Anselm Feuerbach, *Kritik des Kleinschrodischen Entwurfs zu einem peinlichen Gesetzbuche für die Chur-Pfalz-Bayrischen Staaten* (Tasché & Müller 1804) 242—243.

30 Beccaria (n 14) ch XXX. Elsewhere, Beccaria also insisted on the unfairness of the suffering that the uncertainty could cause the offender, ibid ch XIX.

31 ibid ch XXX. Although this paragraph has often been interpreted as allowing for the limitation of the prosecution of lesser offences and not supporting it for more serious offences, I submit that a different interpretation would be more faithful to the text. The author says that for all crimes the statute should fix

this day by several authors. In the context of mass atrocities and organised crime,[32] it is still claimed that the deterrent effect of prosecution and punishment will continue to be significant after a long time. Organised and economic criminality involve much planning, which gives the offender an advantage over the victim and the prosecution: she can manage the aftermath of the offence in a way that allows her to retain great control before the existence of the offence comes to light.[33] Probably it is this increased assumed rationality and the capacity of these types of agents that would justify doubting whether they can operate under the same time-constrained deterrent effect of the criminal law.

Bentham also makes a strong case for swift punishment. Because punishments should remain at the minimum necessary level, the certainty of their imposition should be maximised and they 'should follow offence as closely as possible; for its impression upon the minds of men is weakened by distance, and, besides, distance adds to the uncertainty of punishment, by affording new chances of escape'.[34] The deterrent effect therefore decays. But what should be done when time has passed, and a punishment has not been imposed? Bentham considers that excluding punishment for negligent offences and attempts 'is a good; and in such cases it is an evil to nobody'. He argues that a rule of categorical limitation is desirable. But it would be damaging in the aggregate to fail to prosecute individuals who are guilty of serious offences. 'Let the avenging sword remain always hanging above their heads. The sight of a criminal in the peaceful enjoyment of the fruit of his crime, protected by the laws he has violated, is a

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the period of investigation/prosecution. By *prescription* he means the so-called limitation for the execution, *prescriptione de la poena*, once an offence *has been proven*. There, he justifies such a prescription only for lesser and not for heinous offences.

32 Gómez de la Escalera at Ragués i Vallès (n 13) n 49.

33 Volker Gallandi, 'Verjährung bei langfristig geplanter Wirtschaftskriminalität' (1993) 7 wistra 255. Among the possible institutional designs of limitation periods, one ought to consider the models that begin the counting of the period from the discovery of the offence

34 Jeremy Bentham, *Theory of Legislation* (Tübner & Co 1864) 326.

consolation to evil doers, an object of grief to men of virtue, a public insult to justice and to morals'.[35] So, it appears that there is an effect of the passage of time, but it does not suffice to exclude the benefits of prosecuting the most serious offences. This would speak in favour of a categorical limitation of relatively minor offences, allowing for the discretionary mode to take over for more serious ones. Where such a line is to be drawn, however, is not any clearer based on this analysis.

From the historical literature we can contrast these opinions with that of Abegg, who countered that the arguments of Beccaria and Feuerbach could be used to reject just as well as to support the use of limitation periods. For example, as well as undermining the deterrent effect of the criminal norms, categorical time limits could cause an enhanced fear of proximate prosecution.[36] Abegg also asserted that there was no empirical basis to sustain the alleged effects on increasing criminality rates, based on his personal experience of travelling to states within Germany with different regulations regarding time limits.[37]

Contemporary authors have followed a similar line based on their understanding of the rational calculations of potential offenders. They believe that limitations are not a factor, only the probability of prosecution as such (which would be much more dependent on the distinction between mandatory and selective prosecution than on the passage of time).[38] Theories of rationality state that future punishment is discounted in time, so even if no limits were imposed or if a discretionary mode of limitation were in operation, the deterrent effect of late punishment

35 ibid 327—328.

36 Even today, this argument is replicated Helmut Satzger, 'Die Verjährung im Strafrecht' (2012) 34 JURA — Juristische Ausbildung 435.

37 Julius Friedrich Heinrich Abegg, *Verjährung rechtskräftig erkannter Strafen* (Maruschke & Berendt 1862) 94 ff; Martin Asholt, *Verjährung im Strafrecht* (Mohr Siebeck 2016) 21.

38 Tatjana Hörnle, 'Verfolgungsverjährung: Keine Selbstverständlichkeit', *Festschrift für Werner Beulke zum 70. Geburtstag* (C F Müller 2015) 120; Tatjana Hörnle, 'Sollen Verjährungsfristen für den sexuellen Missbrauch von Minderjährigen verlängert werden?' 2010 Goltdammer's Archiv 388, 391.

would be minimised or annulled *per se*.[39] More generally, other authors argue that specific configurations of the criminal law have no influence on deterring crime.[40]

Van den Haag argues that deterrence theory favours only minimal discretion. Although he does not discuss the issue of time, he proposes a system of determinate and flat sentences, eliminating as much judicial and prosecutorial discretion as possible[41] in order to achieve the maximum possible deterrence, based on swiftly imposed predictable sentences.[42] Crucially, for him, individualisation ought to be reduced, and a fair and coherent set of punishments for different *crimes* (both in terms of desert and deterrence) should be established. 'But to decide what is justly deserved by different *criminals* seems quite impossible for anyone but God. Our charitable attempts to do justice to individuals must end in arbitrariness and injustice (as well as in reduced deterrence)'.[43] He believes, then, that defining the size of punishments should be done by establishing categories of crimes by seriousness. All in all, his proposal replicates the same structure of reasoning as categorical limitation, albeit for a different purpose, and he justifies it with deterrent aims.

In short, deterrence seems to be greatly affected by the passage of time. There are reasons to think that punishment can lose its threat over time, and other reasons to believe that the threat of it is still —or perhaps even more— relevant. Also, if any deterrent power persists at all after a long lapse of time, the symbolic effect of placing categorical limits on prosecution

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39 Yair Listokin, 'Crime and (with a Lag) Punishment: The Implications of Discounting for Equitable Sentencing' (2007) 44 American Criminal Law Review 115; Yair Listokin, 'Efficient Time Bars: A New Rationale for the Existence of Statutes of Limitations in Criminal Law' (2002) 31 The Journal of Legal Studies 99.

40 Paul H Robinson and John M Darley, 'Does Criminal Law Deter? A Behavioural Science Investigation' (2004) 24 Oxford Journal of Legal Studies 173.

41 Ernest van den Haag, 'The Criminal Law as a Threat System' (1982) 73 The Journal of Criminal Law and Criminology 769, 781.

42 ibid 772.

43 ibid 776. [emphasis in the original]

might annul it. Deterrence might be better served with a system of non-discretionary rules, categorising events by types of crime instead of looking at the individual circumstances of each instance of them.

6.4. 'Positive Generalprävention'[44]

Positive Generalprävention seeks to prevent crime by reaffirming the validity of criminal norms through the punishment of violations.[45] Individual violations and the motivations leading to offending are not central to this theory,[46] but rather the confirmation of the validity of the norm and the bond of social norms.[47] Such a reaffirmation of the norm would also appear in an expressive theory of punishment such as Durkheim's, where society's collective feelings are paramount to punishment's function.[48] Instead of focusing only on the subjects of the criminal law as potential offenders, positive general prevention sees them as potential law-observers and their reactions to the normative content of the law. The relevant criteria to

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44 Probably nowadays the dominating theory of punishment in the German context, it might be assimilated with the theories of denunciation in the common-law context. For references, see Ronald J Rychlak, 'Society's Moral Right to Punish: A Further Exploration of the Denunciation Theory of Punishment' (1990) 65 Tulane Law Review 299. Others assimilate this theory with Bottom's 'normative compliance', and more specifically with normative compliance based on legitimacy, see Anthony E Bottoms, 'Compliance and Community Penalties' in Anthony E Bottoms, Loraine Gelsthorpe and Sue Rex (eds), *Community penalties: change and challenges* (Willan 2001) 91—92. The difference here is the individual focus that denunciation and normative compliance have, *vis a vis* the general social character of *positive Generalprävention.* For this German-born theory, it is not about what any single individual does or thinks, it is about the aggregate normative effect of the criminal law and the imposition of punishment. Because of this difference and in view of the prominence and lengthy development in Germany, I will keep their denomination.

45 Tatjana Hörnle, 'Straftheorien', *Enzyklopädie zur Rechtsphilosophie* (2011) available at http://www.enzyklopaedie-rechtsphilosophie.net/inhaltsverzeichnis/19-beitraege/80-straftheorien#II.

46 Similar theories developed in England do not have this same emphasis. In particular, those using a notion of normative compliance focused on legitimacy explicitly understand the concept as an empirical matter of how the public perceives the criminal justice system, together with the effectiveness of its capacity to achieve compliance. A legitimate system 'is economically more viable and is more stable over time' than one based only on instrumental compliance. M Hough and others, 'Procedural Justice, Trust, and Institutional Legitimacy' (2010) 4 Policing 203.

47 Especially in Gunther Jakobs, *Staatliche Strafe: Bedeutung und Zweck* (Ferdinand Schöningh 2004); see Hörnle, 'Straftheorien' (n 45) para 31.

48 Émile Durkheim, *The Division of Labor in Society* (Martino 2012). On the relationship with *positive Generalprävention* see Dubber (n 4) 703.

understand the possible effects of the passage of time here are whether the commission of an offence will still imply a threat to the validity and efficacy of the criminal behaviour rules.

In typical circumstances, as long as the norm has continued to be obeyed by the large majority of citizens, it would seem fair to say that the legal efficacy has not been damaged and that prosecution is not necessary to reinforce the binding power of the norm.[49] It does not seem problematic to acknowledge that offences endanger the overall respect for the law more just after they are committed than a long time afterwards.

Three explanations for this phenomenon can be found in the literature:[50] some are focused on 'knowledge' (the disappearance of the crime from the general consciousness),[51] others on a change in the assessment of that knowledge (when the crime becomes an event of the past, the judgement becomes less rigorous and the need to address it through an attribution of criminal liability loses strength),[52] and some others on an objective change of circumstances (not necessarily a lesser reproach, but a change in the sense that the fact becomes part of the history of criminality for society and for the offender a part of her biography).[53] All of these theories share the notion that invocation of the criminal law is unjustified if the grounds for its operation have disappeared.

Different types of offences have different lifespans. The public and victims may not care about minor offences after a relatively brief period of time after the offence, but the more

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49 Helmut Satzger, 'Die Verjährung im Strafrecht' (2012) 34 JURA — Juristische Ausbildung 433, 434.

50 Asholt (n 37) 134—156.

51 Already Pufendorf in *De iure naturae et gentium*, cited by ibid 135. To this argument it can be replied that it would be strange to think of a general forgetfulness, when indeed almost no crime is generally ever known. ibid 144., citing Loening.

52 Jakobs (n 47) II.1.10.22.

53 Bloy (n 13) 187. In a similar way, Zimmermann (n 19); Marc Radke, *Bestrafungshindernisse aufgrund des Zeitablaufs* (Shaker 2001).

serious an offence is, the greater the need for it to be punished to achieve social peace and reinforcement of the law.[54] This justifies progressively longer periods within categorical limitation; increasingly longer limits for increasingly serious offences. However, one could also convey that the communicative effect of punishment stays the same after a long time as through imposing it shortly after an offence has been committed.[55] If that is really the case, there might be good reason to retain control through a discretionary mechanism to evaluate whether time has had any effect on the justifiability of a prosecution.

In either case, these arguments depend very much on empirical results, a strategy that faces serious difficulties in being proven (as, again, does the notion that there is any general preventive effect of any particular instance of the application of the law through a criminal prosecution). Is there any concrete evidence of such a change? There are no known attempts to demonstrate this. On the converse side, there are some attempts to argue that rather than a descriptive forgetfulness, there *ought to be* a social agreement on letting go of the past, as the unending memory (especially in times of digitally preserved data) would be a threat to freedom.[56]

It is worth noting that categorical limitation might support general prevention as well, especially under a normativistic conception of *positive Generalprävention*.[57] Faced with the fact that the criminal law does not respond to every offence (many offences go unpunished), putting a clear limitation in the law would give a normative (and not a mere factual) reason for

54 Hörnle, 'Verfolgungsverjährung: Keine Selbstverständlichkeit' (n 38) 120.

55 Pastor at Ragués i Vallès (n 13) 38.

56 Asholt (n 37) 138. Similarly, but outside the scope of the criminal law, see Jeremy Waldron, 'Superseding Historic Injustice' (1992) 103 Ethics 4.

57 An example of such preventative theories would be Jakobs, who is more concerned with the ratification of the authority of the state, rather than with the specific avoidance of the commission of offences directly. Günther Jakobs, *Staatliche Strafe: Bedeutung und Zweck* (Ferdinand Schöningh 2004).

excluding prosecution and clarifying the realm in which the criminal law is effectively expected to operate in full force. This would avoid generating a permanent performative contradiction, as it would avoid revealing the inefficacy of the criminal justice system.[58] A discretionary norm would be counterproductive for this aim: using prosecution only sometimes might not contribute to the stability of the norm and would also raise doubts about the instances when the contrary decision has been taken. The use of the criminal law could seem disruptive and destabilising.[59] A decision in this direction could breach the re-gained social balance.[60]

Whether the relevance of a serious offence *factually* ever completely fades is doubtful. There might be fear of repetition, or the victim or the community might still remember. Yet, the counterfactual validity of norms is in the essence of modern law, and thus systems that declare the *legal* irrelevance of a fact (in this case, due to the passage of time) can still aspire to achieve general prevention.

6.5. Conclusion

One might think that rehabilitation would not be time-correlated but conduct-determined (and thus in need of individual assessment). Special deterrence might be seen as against limiting the power to prosecute. General deterrence would always advise allowing for prosecution after a long time, under any mode of limitation. *Positive Generalprävention* would be the only one of these specific aims to admit a positive effect of categorical limitation.

Two main problems seem to repeat themselves when looking at the various forward-looking aims. On the one hand, we do not seem to know the real effect of any mechanism we

58 Ma Isabel González Tapia, *La prescripción en el derecho penal* (Dykinson 2003) 79.

59 ibid.

60 For this type of arguments see Asholt (n 37) 134—135., especially referring to Loening.

could choose, and whether they would, in fact, prevent crime, reduce it or rehabilitate offenders. On the other, a conflict of legitimacy may arise if, in general, the forward-looking effects of the criminal law do seem to decrease over time, but the criminal law is nevertheless used.

Once practical considerations and empirical arguments are introduced, along with a maxim of parsimony or of only legitimating the use of the criminal law to the extent that it is actually and not only theoretically advancing these aims, the result is much more ambiguous. Rehabilitation might have been achieved in the interim and prosecution could be de-socialising. Special deterrence would be confronted with the difficulty of identity changes in terms of life-course delinquency and decreasing dangerousness, as evidenced in criminological literature. General deterrence, when considering empirical research about rational calculation, would not be achievable through tardy prosecution and punishment. Also, deterrence is discouraged by exercises of discretion. Finally, *positive Generalpräevention* cannot assume that time will always reduce the social relevance of a crime and some ad hoc prosecution might be required after a long time.

A summary of these conclusions can be seen in table 6.1.:

Table 6.1. Forward-looking aims in theory and practice

	Purely theoretical assessment	**Empirically grounded assessment**
Rehabilitation	Categorical time limits inadmissible. Discretionary time limits admissible, allowing for conduct-based assessment.	Both types of limits admissible, as they can avoid de-socialising use of the criminal law.
Special deterrence	Categorical time limits inadmissible. Discretionary time limits admissible, allowing for dangerousness assessment.	Late prosecutions ineffective, more convenient to have categorical limits. Discretionary time limits admissible.
General deterrence	Categorical time limits inadmissible. Discretionary time limits inadmissible.	Categorical time limits admissible, as 'bad example' has faded. Discretionary time limits inadmissible, as discretion itself reduces deterrence.
Positive Generalpräevention	Categorical times admissible. Discretionary time limits admissible.	Categorical times admissible. Discretionary time limits admissible, although they could bring back attention to normative disruption caused by offending.

Table 6.1. shows how arguments need to be adjusted when we move from the purely theoretical consideration of an aim to an empirically grounded assessment. In some cases, the evaluation is even reversed. The use of discretionary limits becomes more complex. Sometimes, simplicity and the pursuit of forward-looking aims may speak in favour of categorical limitation. Nevertheless, neither mode of limitation seems bullet-proof.

Perhaps the passage of time only reinforces our more general view that the criminal law has a small role to play controlling crime and that it does not increase general wellbeing or utility. And that probably is why so many classical and modern preventionist authors are in favour of abandoning the criminal law as a tool after a long passage of time.[61] Authors arguing in terms of the general normative compliance with the law are also mostly supportive of categorical time limits.[62] Collateral events that happen between the commission of an offence and a long-delayed prosecution are part of the justification for categorically excluding the

61 Zimmermann (n 19) 56. [my translation]

62 See, for example, Ragués i Vallès (n 13) 41-46. A lengthy analysis of the German literature in Asholt (n 37) 134-156.

criminal law, such as self-rehabilitation, loss of interest in offending and social forgetfulness about the offence.

We can imagine cases where limiting prosecution would not help the aim of prevention. Equally, there are cases where we can imagine that late prosecutions would not achieve prevention or rehabilitation. Given these arguments, limitation periods cannot be justified for preventive reasons, but they also cannot be rejected altogether. The relative inefficacy of the criminal law in such contexts only casts a shadow of doubt about the most appropriate regulation, which the pursuit of prevention does not solve.

The next chapter will deal with the backward-looking aims of the criminal law and the effects of the passage of time thereon. In the final section of that chapter, an overall assessment of the aims of punishment will be offered.[63]

[63] See Chapter 7.6. below.

CHAPTER 7. TIME LIMITS AND THE BACKWARD-LOOKING AIMS OF CRIMINAL LAW

The backward-looking aims of punishment are usually portrayed as non-consequentialist approaches to the criminal law.[1] Sometimes, they are all combined under the term 'retribution'. Generally, this view asserts 'that the doing of a wrong generates a moral obligation to visit suffering on the wrongdoer, or that the wrongdoer should be "paid back" for his wrong'.[2] Whether to give the guilty what they deserve, to express emotions, or to communicate censure for the wrongs committed,[3] the various backward-looking sub-aims might also be affected by the passage of time.

7.1. Emotional reactions to wrongdoing

Although '[c]riminal justice has no feelings; it has no memory and no emotions […] [w]e use it as a vehicle to express human emotions such as anger'.[4] One of the best-known retrospective theories accounting for this relationship is Mackie's. He claims that a sentimentalist or subjectivist view explains the perceived need to react to harm or threats thereof. At first this is a non-moral emotional reaction, but in society, practices and

1 Some would contend that backward-looking aims and in particular retributivism do not consequently need to be blind, see for instance Mark Tunick, Punishment: Theory and Practice (California University Press 1992) 94. For an influential and restrictive version of 'limiting retributivism' and the kind of consequentialist considerations to be introduced, see Andrew von Hirsch, *Censure and Sanctions* (Oxford University Press 1996) ch 6.

2 Andrew von Hirsch and Andrew Ashworth, 'The Justification for Punishment's Existence: Censure and Prevention', *Proportionate Sentencing* (Oxford University Press 2005) 13.

3 This is the systematic approach adopted by Antony Duff, *Punishment, Communication, and Community* (Oxford University Press 2000) ch 1. Certainly many others are possible ways to deal with the theories of retribution.

4 Alexander McCall Smith, 'Time, Guilt and Forgiveness' in Emilios A Christodoulidis and Scott Veitch (eds), *Lethe's Law Justice Law and Ethics in Reconciliation* (Hart 2001) 54.

conventions develop. Because reaction is more beneficial than non-reaction, reciprocal sanctioning generates and maintains cooperative conventions.

> From cooperation in resentment to moral disapproval or indignation is a further step, but not an enormous one. It requires that certain kinds of behaviour should be cooperatively resented and opposed and seen as generally harmful.[5]

Under such a conception, the state can and should take those desires and canalise them, according to the reactions of victims and the rest of society.

The usual corollary, when placed in the context of the passage of time, is the idea that most reactive emotions fade and thus limitations and non-prosecution would indeed entail a better expression of this aim, by reflecting the real social situation.

> Lapse of time has the effect of reducing anger. I can be very upset today because a seller sold me defective merchandise or spoke to me rudely, but in a few days, I will probably forget the event. Violations of the social order that occurred many years ago no longer seem relevant. The body has already healed itself, and the social order was restored.[6]

If the criminal law is justified as an institutionalised recognition of our moral sentiments, and the healing process and the overcoming of feelings of anger are the expected natural result of the passage of time, it would be justified to recognise such a change in reactive emotions in the law. This would speak generally in favour of some sort of time limits.

This can be challenged, especially for certain types of offences, such as violent and particularly egregious crimes. To capture this variability, some might think that a

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5 John Leslie Mackie, 'Morality and the Retributive Emotions' (1982) 1 Criminal Justice Ethics 3, 8.

6 Rinat Kitai-Sangero, 'Between Due Process and Forgiveness: Revisiting Criminal Statutes of Limitations' (2013) 61 Drake Law Review 423, 435.

discretionary limit best promotes retribution in terms of expressing the reproach. This could allow for the criminal law to be in line with, but not exceed, what an individual would demand. Because if used in excess, the criminal law would be failing to understand the 'ordinary human institution of forgiveness'.[7] Less binarily, this reasoning could also allow for differentiated tiers, some with categorical limits and others with discretionary limits.

Lourié argues that such an emotional approach is indeed compatible with the use of categorical time limits if they are restricted in the positive law through specific devices and exceptions that capture the need for punishment in some cases. Some specific offences are excluded from limitation periods, and interruptions or extensions keep the prospect of prosecution open.[8] The institutional setting is not immune to the remaining feelings of anger and creates its own devices to cope with them. However, Lourié explains that the existence of limitation periods is equally grounded in a form of emotive justice. Limitation periods 'bring justice to a certain indefinite feeling in people's hearts'.[9] This is also an emotional reaction to unresolved conflicts. That is why he concludes that if emotion stands against emotion, only reason will be an appropriate umpire between them.[10]

Whether such rules can capture the individual emotions generated by a crime is doubtful. Thus, not even the more comprehensive and complex system of categorical limitation will be able to fully express them. However, it does not seem that the proponents of this aim of punishment require each and every case to be expressive of emotions, but rather that the system as a whole channels reactive emotions through a social practice. A

7 McCall Smith (n 16) 60—61.

8 Samuel Lourié, *Die Kriminalverjährung* (Schlettersche Buchhandlung 1914) 6.

9 ibid 5—6, citing the Prussian Committee for the proposal of a Criminal Code.

10 ibid 7.

discretionary model may or may not be in touch with such emotions. And prosecution despite reactive emotions having faded will not be conducive to satisfying these aims either. It is unclear whether or not the emotional theory itself could provide rational criteria, as requested by Lourié, in terms of how to design a fair institutional setting for the expression of the contradictory emotional appeals that we have described.

7.2. Communicative censure

Communication is an aim of punishment and an aim of the criminal laws stricto sensu; its mandates and prohibitions are communicative acts, expressing the public values of a community and acting as reasons to behave in certain ways.[11] The threat of punishment functions as a conventional device to express disapproval and condemnation.[12] In these terms, if a crime is not prosecuted and punished, the message conveyed is that this society does not care about the wrong committed.[13] In such cases, the criminal law assumes a stance towards all of the persons involved, and invites them to consider the fact legally insignificant. This is the effect of any non-prosecution, and if the reason for not prosecuting is the passage of time for an offence that would in principle have been subject to the action of the criminal justice system, a change in censure needs to be justified. This applies to both categorical limits and discretionary decisions not to prosecute in consideration of the time passed.

If censure is the most important function of the criminal law, we need to clarify if it is static or fluid. Some authors have proposed that under a traditional desert theory of

11 Tatjana Hörnle, 'Straftheorien', *Enzyklopädie zur Rechtsphilosophie* (2011); Duff (n 3).

12 Joel Feinberg, *Doing and Deserving: Essays in the Theory of Responsibility* (Princeton University Press 1970) 98.

13 Shuman and McCall Smith (n 4) 25.

punishment '[h]arm and culpability are generally invariant, fixed at the time the crime is committed' but that under a more dynamic censure-based model, there can be an assessment of the continuing deservedness of punishment.[14] These authors claim that 'the static approach to censure is clearly at odds with judicial practice and also responses to wrongdoing in everyday life'.[15] Authors calling for a dynamic understanding of penal censure (even if not of culpability itself) claim that treating 'the criminally recalcitrant and the morally reformed' alike 'disrespects the offender's agency and moral standing which should be of central concern to a retributive sanction'.[16] However, it seems unlikely that this line of thought would lead to a complete extinction of censure and of the relationship between the offender and the offence,[17] even if the time that had elapsed were significant. Neither form of time limit, whether discretionary or categorical, would be justified by this understanding.

> If the communicative role is one of pure denunciation, it might have boundaries.
>
> 'It would seem absurd, though, for a person in our own times to denounce solemnly the depredations of the Roman Empire or the cruelties of Attila the Hun […]. The real issue is moral impact; events of the very distant past generally have a diminished moral impact in our lives. By contrast, events of the more recent past have a greater impact because they bear on the texture of our own moral lives'.[18]

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14 Julian V Roberts and Netanel Dagan, 'The Evolution of Retributive Punishment: From Static Desert to Responsive Penal Censure' in Antje du Bois-Pedain and Anthony Bottoms, *Penal Censure: Engagements Within and Beyond Desert Theory* (Hart 2019) 142. These authors explore the possibility of post-conviction changes in censure, and the adequacy of late sentence reviews.

15 ibid 145.

16 ibid.

17 In fact, Roberts and Dagan claim that their model should not entail such a significant modification of the original sentence that would weaken the original message of censure. ibid 158.

18 Shuman and McCall Smith (n 4) 27.

Where is the limit for the criminal law? For the purpose of the criminal law, is the death of the offender the sensible endpoint of denunciation? The theoretical ground for setting a temporal limit is usually considered to be the point when an event has ceased to have significance for the current social life; when it has become history.[19] This does not mean that the effects of the offence are removed, which would be impossible for homicides, for example.[20] Denunciation through the criminal law would be pointless if the offence has been overcome and — even if it is not forgotten — it is not part of the present concerns of society. So, if censure might be dynamic but not necessarily decreasing, and denunciation has limits posed by historization, communication of the blame of the offender could sometimes be successfully achieved through the criminal law. In other circumstances, the criminal law would be used extemporaneously, and it would communicate something that has become out of date. If the criminal law ought not to be used outside of its justified scope, time limits are acceptable. Whether any categorical rule is capable of foreseeing the actual historicization of offences is doubtful. Whether all instances of application of a discretionary limit would indeed be able to include such a complex social fact is also doubtful. Thus, neither mode is clearly superior to the other from this perspective; both could lead to mostly accurate results, and some unjustified applications or non-applications of the criminal law.

19 Martin Asholt, *Verjährung im Strafrecht* (Mohr Siebeck 2016) 226—228.

20 René Bloy, *Die dogmatische Bedeutung der Strafausschließungs- und Strafaufhebungsgründe* (Duncker und Humblot 1976) 189.

7.3. Narrow retribution

If retribution is a purely moral exercise, and the aim of the criminal law is to implement the moral imperative to punish, time might in principle not seem relevant. Moral judgements are often presented as a-temporal and universal forms of reasoning.

Some retributivists explicitly disregard the passage of time.[21] From this point of view, any form of non-punishment would constitute impunity and no limits would be justified. The culpable infringement of rights is not erased and needs to be addressed despite external circumstances. The traditional approach attributed to Kant would allow no reasons other than culpability for having committed an offence as a ground for forsaking punishment.[22] However, Kant himself seems to have had doubts about the morality of punishing people after time has passed, and people have changed their behaviour. In a side note on a popular ethics book of his time, he writes: 'Whether one can morally punish someone so late, if he already adopted another moral attitude?'.[23] Later in his own work, he seems to have decided that a possible change in identity was not sufficient to abandon the need for moral punishment. However, this would not be caused by guilt being petrified in time, but because of our inability to know whether the offender has in fact rehabilitated himself:

> It seems to be inherent in the idea of penal law, that it be persistent in its demand for punishment. *We can never presuppose reformation among men, and are too weak to discern the inner motivations of crime*. A merchant of

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21 References to traditional positions in Germany can be found in Zimmermann (n 12) 55.

22 Immanuel Kant, *Political Writings* (Cambridge University Press 1991) 155. Originally from The Metaphysics of Morals.

23 *'Ob man jemand so spät moralisch strafen kan, wenn er schon eine andere moralische Gesinnung angenommen?*' [sic]. Immanuel Kant, 'Erläuterungen zu A. G. Baumgartens Metaphysik', *Handschriftlicher Nachlaß Moralphilosophie, Rechtsphilosophie und Religionsphilosophie* (1757) 58, next to §120. [my translation]. Kant does not mention how much time he was thinking about. Baumgarten's text is distinguishing arbitrary from natural punishment but does not mention the passage of time in the surrounding paragraphs.

> morally upright conduct and blameless principles was beheaded at Marseilles, because 20 years previously he had for a time been a camp-follower in the Cartouche gang, and only later came under criminal investigation on that account. It seems, then, that crimes can never lapse from the record, and even after the longest time-span, when a complete reform of life has been effected, would still contain no claim on that account to remission of punishment.[24]

This nevertheless suggests that Kant would accept waiving the punishment if it could have been demonstrated that the reform had taken place. The problem is epistemic.[25] Is this in agreement with his position, which is usually seen as hard-line 'positive' retributivism?[26] It has long been debated whether a Kantian position implies the need to reproduce the ideal moral punishment into the positive law or if the insufficiencies of our human institutions require a different type of rules. Indeed, Kant himself says that state punishment is either preventative or retributive.[27] He also points out that there can be punishments which are just but not prudent, and which could thus restrict or not promote morality.[28] This allows for a prudential maximization of the aim of prevention (or other aims), even if that would imply leaving some offences unpunished. Although this is not the most established interpretation of Kant, it is certainly in line with the texts accompanying his reflections on the passage of time.[29]

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24 Immanuel Kant, *Lectures on Ethics* (Cambridge University Press 2001) 309-310 (27:554). [emphasis added]

25 One way to avoid this problem is through adhering to a theory of identity that declares that no person is the same after a long time has passed. The 'identity thesis' will be explored in Chapter 10.

26 The concept is used as in Duff (n 3) 19.

27 'All punishments by authority are deterrent, either to deter the transgressor himself, or to warn others by his example. But the punishments of a being who chastises actions in accordance with morality are retributive'. Kant, *Lectures on Ethics* (n 36) 79 (27:286).

28 ibid 308 (27:552).

29 It is, however, in line with a historical interpretation of Kant and his influence on German law. For instance, 'Kant's thinking was equally reflected in the Prussian Criminal Code of 1851 [as well as the Bavarian Code of 1813], and-eventually-in the 1871 criminal code of the newly founded German Empire (Schmidt 1983, 344). All three codes aimed at a reduction of judicial discretion, that is, strict determination of decisions by the law. The rules of punishment were aimed at general deterrence and retribution. Positive criminology's ideas about the biological or social causes of crime were

However, retributive theories can also make distinctions based on the fact that the exercise of the criminal law is an institutional, situated enterprise, which looks at attributing those just deserts. A danger of forgetting about the 'just' part of it is thinking that desert can be attributed in a non-mediated way. Feinberg warns us about what he calls an inflated desert theory:

> one of the aims of the various institutional practices we have considered is to guarantee that persons get what they deserve with a minimum of injustice. But to make this the paramount consideration in each single case and so try to give prizes, grades, rewards, and the like to those who deserve them instead of those who qualify for them (when these are different) would be to abrogate the controlling rules, overload officials with dangerous discretion to be used as they see fit, and this, in the long run, given human fallibility, generate more injustice than is avoided.[30]

Feinberg considers that 'legal guilt' is the qualifying condition, and that desert is a moral concept, independent of, and prior to public institutions. A desert-based criminal law is one that bases its pursuit of justice on desert claims but necessarily introduces other factors in order to make such an institution possible. Categorical time limits to the prosecution of offences may be one of those institutional devices that define the characteristics required to qualify or not for legal guilt, even if they sometimes depart from strict desert. They make legal retribution possible.[31]

7.4. Conclusions about backward-looking theories

disregarded. Control of outer behaviour was the only aim, not the inner correction of offenders […]. it sought to protect the private sphere from paternalistic and authoritarian state intervention'. Joachim J Savelsberg, 'Religion, Historical Contingencies, and Institutional Conditions of Criminal Punishment: The German Case and Beyond' (2004) 29 Law & Social Inquiry 373, 388.

30 Feinberg (n 24) 83—84.

31 The discussion here, thus, is among retributive theories, and whether one thinks that penal retribution is the same as moral one. This is not a debate that ought to be addressed in this thesis, it can merely be flagged, and the conclusions of both alternatives offered.

Backward-looking and, more specifically, retributive theories seem to have a harder time recognising any effect of the passage of time on the application or invocation of the criminal law. On the other hand, against the idea that time is irrelevant to the criminal law is the contention that censure or moral feelings of blame decrease. Still, these forms of decay would not seem relevant for a so-called absolute theory.[32] But some forms of backward-looking theories may be infused with practical considerations, about how they perform in the real world. The result can be summarised in the following table:

Table 7.1. Backward-looking aims in theory and practice

	Purely theoretical assessment	**Empirically grounded assessment**
Emotional reactions to offending	Categorical time limits inadmissible for hideous crimes, may be admissible for lesser ones. Discretionary time limits admissible.	Late prosecutions ineffective to reflect social reactions, more convenient to have categorical limits. Discretionary time limits admissible, allowing for facts-based assessment.
Communicative theories	Categorical time limits inadmissible. Discretionary time limits inadmissible.	Categorical time limits admissible, as 'bad example' has faded. Discretionary time limits admissible, to be used sometimes.
Narrow Retribution	Categorical times inadmissible for pure moral retribution. Discretionary time limits inadmissible.	Categorical times admissible if part of the institutional system to make desert attributions possible. Discretionary time limits admissible but risk unequal treatment.

This diversity makes it hard to reconcile all of the backward-looking positions. Some affirm that what an offender deserves is conviction and punishment regardless of the time that has lapsed and any changes in circumstances. Others claim that the judgement is flawed if it considers no context. Finally, there are those who consider that law itself and

[32] This nomenclature is commonly used in the German discussion. However, it is also debated whether there is any necessary association between absolute and retributive theories, and some have proposed relative retributive theories, notably Ernst Beling, *Die Vergeltungsidee und ihre Bedeutung für das Strafrecht* (Nabu Press 2014).

identity have a temporal property and that the law is thus ill-suited for a desert judgement that escapes its realm of action, which is an argument that will be explored in Chapter 10.

7.5. Joint analysis of backward- and forward-looking aims of the criminal law and punishment

The passage of time is thus far from being perceived as having an undeniable effect on the criminal law when looked at from the perspective of its aims and purposes. This complicates any evaluation of the two modes of limitation. If we were to build a criminal justice system oriented towards achieving all or even any of those aims, it seems doubtful that we could confidently state an answer to the question about the appropriateness of prosecutions after significant time has passed. Conversely, it is unlikely that we would be able to obtain a formula that would lead to the most adequate design of a system of limitation, if the illegitimate use of the criminal law (i.e., its use where there is no specific justification in terms of its aims) is to be avoided.

Prosecuting after a long period would institutionalise an unconditioned criminal justice, '*fiat iustitia et pereat mundus'*,[33] which does not seem supported by any of the aims of punishment. The legitimacy of a system of unlimited prosecution is undermined by the imposition of unnecessary punishment for the preservation of the social order, allowing the criminal law to operate in contexts where it is not justified.[34] This same reasoning can be applied to whether rules should exist in order to have a general bar on, or a general decision against prosecution. If categorical time limits as a whole promoted preventive effectiveness and retribution, even if some individual cases escaped the norm, this would be judged as

[33] 'Let justice be done, though the world perish', Frank Saliger, in Kindhäuser U, Neumann U and Paeffgen H-U, *Strafgesetzbuch* (Nomos 2017) Vorbemerkungen zu §§ 78ff n 19. [my translation]

[34] Ramón Ragués i Vallès, *Prescripción Penal* (Atelier 2004) 29.

an adequate institutional structure. But here disagreement reigns internally, among the proponents of the two aims of the criminal law. Between factual accuracy and theoretical soundness, there seems to be no majority position that can lead us out of this conundrum.[35] If discretionary limits would allow for separating the wheat from the chaff (the cases where the aim is in fact being achieved or not), they might seem well suited, but in too many cases the effect of the passage of time seems to frustrate that exercise and lead to disappointment.

No aim is proposed as absolute, and all of them are at least limited by some notion of proportionality (be it means-end or relative to the perceived relevance of the offence or its consequences). Other constraints and societal goals might also come into play[36] but these would be difficult to analyse in an abstract exercise.

The resulting picture from the previous two chapters does not yet solve the question of deciding among the modes for limitation. For this reason, the next chapter will attempt to find whether there are any distinct aims of criminal prosecution, as a stage of criminal procedures.

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35 Asholt finds his own path in looking at the historization of the criminal law itself, giving place to a decay in the legitimate possibility of addressing those facts through the criminal justice system. In his terms, this would be no direct consequence of a theory of punishment but an ontological position about normativity. Asholt (n 31). This is in line with approaching 'the law in time', not analysing the effects of time in the law, see Karl Engisch, Vom Weltbild des Juristen (Carl Winter Universitätsverlag 1949).

36 Even the strictest of retributivists consider that there are valid non-desert-based reasons for not punishing the guilty. Moore is not worried by what he calls 'public policy defences', following Paul H Robinson, 'Criminal Law Defenses: A Systematic Analysis' (1982) 82 Columbia Law Review 229 ff. This category explicitly contains limitation periods, for the innocent and the guilty. Once conceded for the guilty, the more reason there is for not prosecuting the innocent. Fletcher, too, considers limitation periods as non-problematic procedural devices, George P Fletcher, *Basic Concepts of Criminal Law* (Oxford University Press 1998) 13—14. In the German context, so does Karl Binding, *Handbuch des Strafrechts*, vol 1 (Duncker & Humblot 1885) 821 ff.

CHAPTER 8. TIME LIMITS AND THE AIMS OF CRIMINAL PROCEDURE

This chapter will establish some of the aims of criminal prosecution as distinct from the criminal norms and punishment. Then, it will consider how time interacts with these aims, revealing how these objectives can still be promoted despite the difficulties faced when prosecuting after lengthy periods. When assessing whether categorical or discretionary time limits best uphold the aims of criminal prosecutions, it becomes apparent that a different and sometimes incompatible set of premises will justify one or the other. The adhesion to such premises represent different understandings of justice.

Criminal procedures, from investigation to trial, are both in England and Wales and Germany, said to reflect partly the aims of the criminal law as a whole. For the English legal system, the criminal procedure is instrumental to the *expression of the substantive criminal law*, by acquitting the innocent and convicting the guilty.[1] Criminal procedure law is there to prepare a legitimate and reliable trial.[2] Pre-trial decisions, however, are considered to work under a different logic and are justified under '*dispositive values'*, such as the prevention of crime, consent and fairness, victim compensation and proportionality.[3]

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1 This is the first element of 'dealing with a criminal case justly', which is the overriding objective of the Criminal Procedure Rules.

2 The criminal process is '*part* of the mechanisms by which the state applies substantive criminal law', Andrew Ashworth, Mike Redmayne and Liz Campbell, *The Criminal Process* (5th ed., Oxford University Press 2019) 1. [emphasis added] 'The function of the criminal procedure is to regulate and facilitate the preparation of cases for trial', at 24. 'A primary function of criminal procedure is to provide rules to ensure that reliable evidence is produced which can form the basis of an effective and legitimate trial', at 26.

3 ibid 53—55. Sanders, Young and Burton consider that prosecution policy is, in our times, mostly 'about balancing expediency with police working rules', rather than about 'fairness and keeping criminalisation as well as crime within bounds'. Andrew Sanders, Richard Young and Mandy Burton, *Criminal Justice* (Oxford University Press 2010) 435.

Criminal procedure thus serves different purposes and ought to be flexible in order to reflect them all.

In German law, the aim of criminal procedure law is also to serve as the institutional conduit for the application of substantive criminal law. However, this purpose is complemented by the need to place boundaries on the intervention of the criminal justice officials, thereby *protecting individual liberties* and making the *'re-establishment of peace under the law'* (*Rechtsfrieden)* possible.[4]

I will consider the aims and principles named above, with reference to the decisions made at these early stages of the procedure (police and prosecutorial decision-making) and how they relate to the passage of time. This should make the normative commitments and the values protected by each system explicit, allowing for a choice about which one is more conducive to a better criminal procedure.

8.1. Objectivity and the pursuit of truth

The truth-seeking function of the prosecutor is present in both legal systems. The difference lies in what the relevant type of truth is, for the criminal proceeding. The systems also show a self-declared duty of prosecutorial objectivity, although, different meanings are ascribed to that duty.

The two legal systems have different concepts of objectivity. The Code for Crown Prosecutors demands that prosecutions are conducted objectively,[5] and is followed by a

[4] Thomas Weigend, 'Unverzichtbares im Strafverfahrensrecht' (2001) 113 Zeitschrift für die gesamte Strafrechtswissenschaft 277; Claus Roxin and Bernd Schünemann, *Strafverfahrensrecht: ein Studienbuch* (29th edn, Beck 2017) 1—5.

[5] Number 2.7 states: 'When making decisions, prosecutors must be fair and objective. They must not let any personal views about the ethnic or national origin, gender, disability, age, religion or belief,

statement of non-discrimination with a list of protected characteristics. I will call this 'non-discrimination objectivity'. Some authors have observed that this focus on individual discrimination allows for the differential treatment of whole classes.[6] Even so, there is a concern that the target of prosecutorial action needs to be controllable.[7] The CPS is still very much understood as a party to the process[8] that is subject to certain duties, mainly not to be motivated to act by political considerations and to uphold the interest of justice.

The duty of the German public prosecutor, the *Staatsanwaltschaft* ('StA'), by contrast, is related to its role in gathering both inculpatory and exculpatory evidence.[9] I will call this 'impartiality objectivity'. The defence has a right to request the gathering of evidence by the police and prosecutor.[10] All of the evidence gathered must be disclosed to the defence;[11] thus, even if the StA does not present it at the trial (as it can), the defence might use the StA's investigative power to strengthen her position. Because of this duty of objectivity, the StA is not considered a party to the proceeding, and (despite the literal

sexual orientation or gender identity of the suspect, defendant, victim or any witness influence their decisions. Neither must they be motivated by political considerations. Prosecutors must always act in the interests of justice and not solely for the purpose of obtaining a conviction'. Code for Crown Prosecutors 2018.

6 Sanders, Young and Burton (n 3) 199.

7 One of those controls, relying on the capacity of the defence to be effective, is the duty of the prosecutor to disclose material which could undermine the case for the prosecution, Criminal Procedure and Investigations Act 1996 ss. 3, 7A.

8 For several examples, see Sebastian Buss, *Staatsanwaltschaft und Crown Prosecution Service* (Nomos 2010).

9 §§ 160II, 296 II, 365, 301 StPO.

10 *Beweisantragsrecht*. §§ 163a II, 166 StPO.

11 §147 StPO, this includes the so-called *Spurenakten*, i.e. files on other suspects considered by the prosecution. The English prosecutor is also under a duty to disclose evidence and unused material 'which might reasonably be considered capable of undermining the case for the prosecution against the accused or of assisting the case for the accused', s 3(1) Criminal Procedure and Investigations Act 1996. This means that it is still within the discretion of the prosecutor to decide what materials she considers fall under that category, applying a filtering test for disclosure. Such a procedure restrict controls to abuse of process or by overturning convictions, 'often after the defendant has spent many years in jail', Lord Justice Auld, 'Review of the Criminal Courts of England and Wales' (2001) ch 10. See also Andrew LT Choo, *Evidence* (Oxford University Press 2021) 52—57.

meaning of its name) is not an attorney for the state.[12] The role of the prosecutor is to serve as a 'guardian of the law', which allows them to 'spearhead a truth-finding process' by leading the objective investigation and later 'continue through to main proceeding where the chief judge oversees the presentation of the evidence'.[13] She is the single controller and monopolist of the prosecutorial impulse, and has a duty to act *ex officio.*

Both legal systems now have an accusatorial model, i.e., the accusation is entrusted to one authority that is independent of the adjudicator. England has retained a more adversarial, and Germany an inquisitorial, approach to the role of that accuser in the context of the trial. It is worth highlighting that the *Akkusationsprinzip* as understood in German criminal law presupposes that the state has the monopoly over prosecutions. The English system, nevertheless, preserves the right for individuals, private and public corporations, the police and other specialised organs to conduct criminal prosecutions,[14] even if in practice the vast majority of the activity is performed by the CPS. Still, the difference in the conception of objectivity remains.

If the understanding of objectivity is one of non-discrimination — following the English model — the prosecutor will be allowed to select cases, mainly constrained not to discriminate, and particularly not in respect of the protected characteristics mentioned above. Prosecutions can thus be legitimately pursued *ratione materiae* and even *ratione*

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12 Brigitte Kelker, 'Die Rolle der Staatsanwaltschaft im Strafverfahren: Objektives Organ der Rechtspflege oder doch „parteiischer" Anwalt des Staates?' (2006) 118 Zeitschrift für die gesamte Strafrechtswissenschaft 395.

13 Shawn Marie Boyne, *The German Prosecution Service* (Springer 2014) 6.

14 Prosecution of Offences Act 1985, s 6(1). Although usually referred to as private prosecution, Roxin has rather termed this 'popular prosecution'. Maitland sustained that 'To speak of the English system as one of *private* prosecutions is misleading. It is we who have *public* prosecutions, for any one of the public may prosecute; abroad they have *state* prosecutions or *official* prosecutions'; Delvin prefers to speak about official and unofficial prosecution, in Douglas Hay, 'Controlling the English Prosecutor' (1983) 21 Osgoode Hall Law Journal 165, n 35.

personae.[15] This means that prosecutorial policy can target some classes of offences over others. So can an individual be picked out among a pool of offenders and be selectively prosecuted (as long as this is not discriminatory in the sense described above).[16]

Considering time, selectivity *ratione materiae* explains the flexibility with which certain types of offences do not seem to interest the English prosecutor when time has passed, while others do. This would probably be the result of any discretion-based limitation system. Priorities and social concern for whole groups of offences can change over time. One example of this is reflected in what has happened with sexual offences and in particular with sexual offences against children. Despite there being no major changes in the law, offences that very recently were not prosecuted after a certain amount of time had passed are now being particularly focused on.[17] In relation to selectivity *ratione personae*, English criminal lawyers not only recognise that their law has many (and, arguably, increasing)[18] features of offender-centred elements but also that there is an

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15 Here I am borrowing the vocabulary developed in the context of the prosecutorial activity in international criminal law, Andre Vartan Armenian, 'Selectivity in International Criminal Law: An Assessment of the "Progress Narrative"' (2016) 16 International Criminal Law Review 642.

16 Selectivity *ratione personae* is not problematic in English law. A text-book example of this is *Arrowsmith v Jenkins* [1963] 2 QB 561, where the defendant had claimed that many similar actions had occurred in the same place previously and the police had not prosecuted anyone before. She asked: 'Why pick on me?'. The court's answer was: 'That, of course, has nothing to do with this court. The sole question here is whether the defendant had contravened s 121(1) of the Highways Act 1959' (per Lord Parker CJ)". Similarly, the CPS prosecuted only some of the people involved in an offence in *R (on the application of Chaudhry) v DPP* [2016] EWHC 2447 (Admin).

17 Even more extreme is the case of Ireland: 'the DPP's approach to the time period that would be regarded as undue delay changed considerably over the period. In the 1980s, a delay of as little as a year might be considered to be a bar to prosecution whereas, in the 2000s, delays of up to 40 years are not considered a bar to prosecutions'. The Department of Justice, 'Report by Commission of Investigation into Catholic Archdiocese of Dublin' (The Department of Justice 2009) para 5.46 available at https://www.justice.ie/en/JELR/Pages/PB09000504. Such changes have been critiqued by some as producing injustice, Ingrid Karmark, 'The Fair Trial of Those Accused of Historic Child Sexual Abuse' (University of Kent 2017).

18 Nicola Lacey, *In Search of Criminal Responsibility: Ideas, Interests, and Institutions* (Oxford University Press 2016), 136 ff.

explicit endorsement of the need for 'individualised' justice.[19] Each case can and should be analysed on its own merit, and there are cases that warrant prosecution even though, in terms of the offence definition, they resemble the others. It is not a class of offences; it is, most visibly, specific offenders that have committed heinous crimes in the distant past that the criminal justice system seeks to address.

In contrast, the German version of the objectivity duty as related to a parallel inquiry into exculpatory evidence can be damaged by the haphazard loss of evidence over time. Because evidence favourable to the accused is less likely to be gathered if no prosecution has been launched, it is often said that it is more affected by the passage of time.[20] If that is so, the impartiality-objectivity role of the prosecutor is factually jeopardised, even if individually she makes her best effort to remain objective, to 'spearhead a truth-finding process'. This feature was taken from the inquisitorial procedure and was assigned to the prosecutor, not the judge.[21] But no elements of discretion were introduced, which would allow for a generalised use of selection using any criteria other than this objectively constructed belief about the truth of criminal guilt. The only way to exclude old offences is if the legislator has made that decision for the prosecutor. These features are intended to protect individual rights against potential abuses of state authority, which are seen as

19 Ashworth shows concern about considerations such as 'disproportionate damage to the offender's reputation' and the 'effect of employment' in decisions regarding whether to prosecute, which are available to a non-discriminatory but discretion-based system of prosecution Andrew Ashworth, 'Prosecution, Police and Public — A Guide to Good Gatekeeping?' (1984) 23 Howard Journal of Criminal Justice 24.. 'Erosions' of mechanisms of discretion are seen by some as undermining the main objective of achieving justice in the individual case, e.g. Greame Brown, 'Structuring the Sentencer's Discretion', *Criminal Sentencing as Practical Wisdom* (Hart 2017).

20 Karl Binding, *Handbuch des Strafrechts*, vol 1 (Duncker & Humblot 1885) 823.

21 Thomas Vormbaum, *A Modern History of German Criminal Law* (Michael Bohlander ed, Springer 2014) 87.

possible due to the concentration of power and the opaqueness which make individual control by interested persons, such as victims, more difficult.

A categorical model of limitation makes sense, then, if the prosecutorial activity is very centralised and if the aim of such a role is to find out the material truth. A discretionary mode is more suited to those who favour a commitment to a more partisan prosecutorial role, tied by certain duties of non-discrimination but broadly able to select cases on any non-prohibited grounds. The criteria allowed for selection despite the passage of time could be related to the individual suspect and their trajectory and a particular worry about a certain type of crime.

8.2. Convicting the guilty

As described above, the two systems of criminal law express a commitment to convicting the guilty through a criminal trial. This principle is accompanied by a shared concern about avoiding convicting the innocent. Both systems set barriers[22] in order to minimise this risk. And both systems show an asymmetric concern: wrongful acquittals are considered less serious than wrongful convictions. Does time change this aim at all from the perspective of the prosecutor? Is time acknowledged as relevant for the chances of getting the right people convicted and the right people acquitted?

Time is considered crucial in the capacity to distinguish between the innocent and the guilty. Long before the reforms of the nineteenth century that introduced limitation periods as a general rule in Germany, there were arguments about the need to deal with the

[22] Including, e.g., the introduction of a prosecutor that independently assesses evidence from the direct gatherer, namely the police; the evidentiary sufficiency element in the full code test in the Code of Crown Prosecutors, and its equivalent in the German system contained in § 152 (2) StPO; disclosure duties; the burdens of proof, the standards for conviction.

reality of the disappearance of exculpatory evidence.[23] But positively, too, it was thought that proving anyone guilty in a trial would be impossible if only some evidence were available but not all of it. No piece of evidence is forever seen as sufficient to prove that a person has engaged in criminal conduct. Sooner or later, pieces of evidence decay, even if seemingly they exist as objects; their traces change, and the remains lose their connection with the facts that originated them.[24]

A prosecutor concerned with finding out the material truth cannot rely on incomplete information. It is problematic for her if 'one has some evidence, but without certainty, that there is no counter-evidence, or one has the deed in the rough outline; the finer details [and] the excuses are missing'.[25] We do not know what it is that we do not know,[26] and this lack of knowledge increases in time. This is the security that a categorical time limit provides: it takes the decision out of the sphere of that prosecutor, and does not allow her to engage in guessing what the actual facts of the case were.

A discretionary approach to time limits could be supplemented with additional consideration of particular unfairness when there is a risk of convicting the innocent. In principle, this model would only assess the sufficiency of evidence in order to beget a procedural truth, not a factual one. Therefore, sufficiency is better expressed as an evaluation of its strength compared to the alternative version to be presented by the defence. To protect the defendant in the face of a total absence of evidence the last resource would be to introduce a judicial challenge, thus making another participant in the criminal process

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23 Christianus Thomasius, *De Crimine Bigamiae et de Bigamiae Prescriptione* (1733) 52—53.

24 Evidence needs to be able to 'put the crime and the punishment in historical certainty'. Binding (n 20) 823.

25 Martin Asholt, *Verjährung im Strafrecht* (Mohr Siebeck 2016) 94 [my translation]

26 Binding (n 20) 826.

—the judge— intervene.[27] The question here, however, is how the discretionary decision-maker will weigh the uncertainty about evidence against other factors, for instance, the severity of the crime for the individual case. In a discretionary system like that in England and Wales, it is openly recognised that the standard for finding abuse by reasons of the passage of time is judged differently depending on the seriousness of the offences charged: the likelihood of finding an abuse of process diminishes with the seriousness of the offence.[28]

All procedural systems let go of some suspects without an assertion about their culpability or, even after having established guilt, without punishment. These mechanisms are often legitimised as recognition of the lack of a *need* for punishment. There is, thus, a fluid relationship between procedural and substantive mechanisms to avoid convictions and punishments, which only sometimes lead to a declaration of guilt or criminal liability. The legal mechanisms used by the German law to determine such a lack of a need for punishment for a certain action are diverse, but they are always legislatively established. Weigend shows several examples of substantive as well as procedural norms excluding the requirement for punishment that are similar to the criteria granted to the English prosecutor in order to assess the public interest.[29] He contends that taking the decision away from the prosecution and locating it in the substantive criminal law presses the legislator to express the circumstances in which the state forsakes to punish. This is a form of introducing some consideration for individual cases in the hands of the judge, reducing the temptation to use

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27 See *supra*, Chapter 2, for the operation of the abuse of process doctrine in England in this context.

28 John Dyson, 'Time to Call It a Day: Some Reflections on Finality and the Law', Justice: Continuity and Change (Hart 2018) 135.

29 E.g. Reparation §46a StGB, considerable harm to the perpetrator §60 StGB, and cases of diminished responsibility established in the special part of the criminal law.

the general 'opportunity escape valve' and leaving it for exceptional cases.[30] However, a restrictive opportunity principle, such as the one allowed for petty offences is, in his view, justifiable.

The passage of time *per se* is not mentioned by Weigend. But the flexibility he highlights helps us explain why categorical limits have been considered a feature both of substantive and procedural law. Their systematic position is debatable, within German criminal law, because it is not clear that there is one criterion to decide what should be accomplished by the process and what has to be left to the decision on the merits. It also helps us explain the plasticity of the law more generally, both in substantive and procedural areas, sharing aims and tools. Despite having the aim of convicting the guilty, criminal procedures are also concerned with not trying or not declaring guilt in several circumstances, which they sometimes leave to the prosecutor and sometimes expect the judge to decide.

8.3. Promoting peace under the law

Historical accounts of the origins of the criminal law in Germanic and Anglo-Saxon cultures show that they both link criminal law and conceptions of peace under the law. The connection between the two is clearly temporal because it assumes that there is a status quo ante — the state of peace — that needs to be re-established. In its origins, the role of the

[30] Thomas Weigend, 'Das „Opportunitätsprinzip" zwischen Einzelfallgerechtigkeit und Systemeffizienz' (1997) 109 Zeitschrift für die gesamte Strafrechtswissenschaft 120. Weigend is mostly referring to newly introduced abstentions to prosecute for the sake of police investigation (e.g. *Kronzeugen*) or efficiency concerns.

law would mainly have been to avoid feuds, which would otherwise have been a reaction to disturbances in public order but also in the personal sphere.[31]

Nowadays, pursuing peace under the law under the German conception goes beyond the conviction of the guilty or the realisation of the substantive criminal law.[32] It is about establishing or re-establishing an order, which has been disturbed by the offence. However, the settling of conflicts through the law need not only be done through finishing a full criminal trial (which would overlap significantly with the *positive Generalprävention* aim scrutinised in Chapter 6). It can also be done by other forms of termination, nevertheless requiring the intervention of the judge (e.g. a conditional stay of the proceeding, without conviction).[33]

But, it is not only the law that can achieve such a result. Indeed, the legal process can be counterproductive to maintaining a state of peace:

> If […] peace under the law returns by itself through the healing process of time and the legal system is restored, the intervention of the punitive power has no longer any benefits. It only leads to new unrest. Therefore, the *law forbids* it.[34]

Forbidding criminal trials through categorical time limits is the institutional recognition of this reverse way of realising the aim of peace under the law. Even if not the trial, it is the legal process that re-establishes the peace. The comprehensive idea of a

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31 Graham McBain, 'Modernising the Law: Breaches of the Peace & Justices of the Peace' (2015) 8 Journal of Politics and Law 162, 171.

32 Peter Riess, *Die Strafprozessordnung und das Gerichtsverfassungsgesetz: Grosskommentar* (de Gruyter 1999) 14.

33 Through the application of § 153a StPO, see Werner Beulke, 'Siegeszug der Vernunft oder der Willkür - Opportunitätseinstellungen im Strafverfahren' in Uwe Murmann (ed), *Recht ohne Regeln? die Entformalisierung des Strafrechts* (Universitätsverlag Göttingen 2011) 50.

34 BGHSt 18, 274 [my translation, emphasis added].

process that is respectful of the rights of the individual, which brings an end to disputes and instability cannot require the establishment of the truth at any cost.[35] For this reason, the passage of time is the substantive cause of the termination of proceedings in itself, not a contextual element that can or even ought to be weighed in with other factors. Termination of the proceeding ought to be decided within the criminal process, if the status quo has been unsettled by the commencement of a prosecution. The logic of termination due to the passage of time either creates or recognises an existing status of peace.

A categorical mode does not need to assert that in absolutely all cases, peace returns by itself. But neither the prosecutor nor the judge is the one to assess it as a criterion for the appropriateness of prosecution. It needs to be decided as one such case by the legislator, as it entails a matter of public debate, not only of a case-specific feature. This has been the justification for extending the limitation period for sexual offences against children:

> The institution of limitation periods is based on the assumption that peace under the law has returned after a certain time even without conviction. On the basis of the currently discussed cases of child sexual abuse, this assumption is refuted by means of the ongoing and intensely conducted public debate: there can be no question of an already achieved peace under the law that would be endangered by judicial intervention.[36]

The same applies for excluding time limits for crimes against humanity and war crimes, and other possible exceptions within a system of categorical limitation.

Turning to the origins of the concept of peace under the law in England and Wales, a different perspective emerges. The king's peace in the English context gradually came to

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35 BGHSt. 14, 358, 365

36 BT-Drucks. 17/6261, 23.

mean an ambit of jurisdiction.[37] From the middle ages onwards, this jurisdiction was extended until it covered the whole substantive realm of the criminal law, but it was not until the twentieth century that local courts ceased to exist and the crown assumed all criminal jurisdiction.[38] The monarch could appoint justices of the peace, to conserve it and to prevent offending. The maintenance of the peace was tied more to these officials in their personal capacities and their good fame rather than their institutional position within the criminal law, and much of their role relied on their capacity to find amicable solutions between the accused and the person that had accused them of an offence.[39]

This is where the adage that 'time does not pass for the king' is most convincing. It means that criminal courts of the crown have jurisdiction regardless of the time that has elapsed since the crime. There is no factual reference to a state of peace, which needs or needs not be recovered, but a reference to a realm of power. Any assessment of the barrenness of a criminal prosecution is to be inside such a realm, by the appropriate delegate of the king. In particular, this official might consider that the office itself and the king's peace in this sense is being threatened, if the lack of intervention would give the wrong signal that the system is not effective.

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37 For example, Glanvill in 1189 reported: 'Pleas are either criminal or civil. Some criminal pleas belong to the crown of the lord king, and some to the sheriffs of counties'. McBain (n 31) 173—174.

38 Administration of Justice Act 1977, ceasing the operation of courts leet and sheriff's county courts.

39 '[T]he job of the justice was to restore the local peace. Normally he employed one of three options to this end. If it was possible to arbitrate a dispute without formal charges, the justice sued out bonds for keeping the peace and sent both parties home. If a complaint seemed to warrant indictment, but the suspect was not dangerous, the magistrate used recognizances to ensure quiet until the next meeting of the court as well as to ensure appearances at that session. Finally, if a problem was serious enough to necessitate not only a future appearance but also some immediate constraint, the magistrate ordered the prisoner conveyed to the gaol in Horsham to await the next court', Cynthia B Herrup, *The Common Peace: Participation and the Criminal Law in Seventeenth-Century England* (Cambridge University Press 1987) 85.

In modern language, we might see the Crown Prosecution Service capturing the same concerns as follows:

> Prosecutors should consider whether a prosecution is required to uphold public confidence in the administration of justice. The more serious the offending is, the more it is likely to undermine public confidence in the justice system if the offender is able to avoid prosecution *because of the length of time* since the offence was committed.[40]

A discretionary model, then, would allow for retaining this overarching jurisdictional control over events that might threaten the public confidence in the administration of justice, especially if a long time has passed and its prosecution would be a form of reassurance of such power.

These are two very dissimilar understandings of what peace under the law means. It might take a very profound commitment to an idea of justice to opt for the one or for the other. A discretionary mode of time limits might open the contingency of the achieved peace to be unsettled, under the first view. A categorical mode might disempower the criminal justice system when it is crucially felt to be needed, under the second view. A value choice is required here in order to adjudicate what is best.

8.4. Other procedural considerations

Even if not aims of criminal prosecution in itself, there are other pragmatic considerations that may enhance the workings of the criminal justice system. Legislators and other decision-makers consider these elements when building the system.

Prosecution policy is, in our times, mostly 'about balancing expediency with police working rules', rather than about 'fairness and keeping criminalisation as well as crime

[40] Crown Prosecution Service, Non-Recent Cases and Nominal Penalties. [emphasis added]

within bounds'.[41] The criteria for expediency merit more analysis, as they are expected to be 'rationally discussable'.[42]

Categorical time limits serve as a low-cost mechanism for filtering cases. Especially in systems based on mandatory prosecution, they serve as an escape-valve for the ever-increasing number of cases that the system would have to deal with, both at the prosecutorial and the court level.[43] Discretionary limitation also serves as a filtering device, but the individualised attention needed by every case increases the costs involved in making the decisions.

A system that is based on discretion more generally will not be so pressed to filter out cases due to their perceived decreased priority, as this will probably be under a more general evaluation that is undergone under any circumstances.[44] However, setting a drastic time bar may in general put more pressure on prosecutorial and judicial organs to complete their investigations in a timely fashion, in the knowledge that they do not have unlimited time to do so.[45] Although it is debatable whether this effect will indeed take place, it will

41 Sanders, Young and Burton (n 3) 435. Even for Germany, where this claim could be perceived as too extreme, the last thirty years seem to confirm its validity, Brigitte Kelker, 'Die Rolle der Staatsanwaltschaft im Strafverfahren: Objektives Organ der Rechtspflege oder doch „parteiischer" Anwalt des Staates?' (2006) 118 Zeitschrift für die Gesamte Strafrechtswissenschaft 401 ff.

42 Mirjan Damaška, 'The Reality of Prosecutorial Discretion: Comments on a German Monograph' (1981) 29 The American Journal of Comparative Law 119, 120.

43 BGHSt 12, 335, 337; 51, 72, 78.

44 See Tatjana Hörnle, 'Verfolgungsverjährung: Keine Selbstverständlichkeit', *Festschrift für Werner Beulke zum 70. Geburtstag* (C F Müller 2015) 123; Tatjana Hörnle, 'Sollen Verjährungsfristen für den sexuellen Missbrauch von Minderjährigen verlängert werden?' 2010 Goltdammer's Archiv 392.

45 BGHSt 12, 335, 377, Satzger (n 49) 435. Critically, Hörnle, 'Verfolgungsverjährung: Keine Selbstverständlichkeit' (n 44) 122—123; Ramón Ragués i Vallès, *Prescripción Penal* (Atelier 2004) 30. A report on police practice in Germany suggests that indeed the threat of a limitation period expiring does determine the priority given to cases, Annette Marquardt, 'Cold Case-Erfahrungen aus Sicht der Staatsanwaltschaft' [2022] Polizei Aktuell, available at https://ksv-polizeipraxis.de/cold-case-erfahrungen-aus-sicht-der-staatsanwaltschaft..

mostly depend on whether the police and prosecution are subject to managerial instruments and performance assessment, and what the criteria for such evaluations are.

Lastly, achieving finality and resolution is valued by the system. 'Legal certainty' is perhaps one of the most often-repeated justifications for limitation periods.[46] This is accomplished by ideally clear and simple rules of easy application for all legal actors. Categorical limits provide —arguably they force— closure.[47] A discretionary mode cannot do this when most of the decisions are only implicitly made by allowing the *prima facie* assumption of decay operate. It thus requires other mechanisms for the system to be satisfactorily closed.[48]

8.5. Conclusions

The position of the prosecutor with regards to the aims of criminal prosecutions define the suitability of either mode of limitation. The English prosecutor is in a position to assess changes in the adequacy of prosecuting an offence after a long time has passed, because she is entitled to assess the public interest in prosecution and to incorporate into the legal assessment elements that are external to the attribution of a certain criminalised fact to a particular individual. Her role is divided between bringing some people to account and not bringing the rest to account, even if she has sufficient grounds to believe they have committed criminal offences. This is seen as necessary, among other reasons, to sustain the trust in the criminal law. Because of the understanding of objectivity that prevails in this legal system, the prosecutor needs to reflect on whether acting against an alleged offender

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46 It is debatable whether legal certainty and the more literal translation of legal *security* are exactly the same. In Germany, *Rechtssicherheit* has been one of the preferred justifications expressed by courts, see BGHSt 11, 393, 396; 12, 335, 337; 18, 274, 278; 51, 72, 78.

47 Arthur Ripstein, 'The Rule of Law and Time's Arrow' in Lisa M Austin and Dennis Klimchuk (eds), *Private Law and the Rule of Law* (Oxford University Press 2014) 324.

48 More on this will be said in Chapter 11.

would be discriminatory or personally damaging. Although she is under no duty to justify her decisions, these are expected to be in the public interest. The review mechanisms against such decisions, in theory, control that at least other individual interests can be considered (such as the victim's). What we find is a delegation of the legislative power to set the borders of the criminalised activity to one organ, and from that organ to the accountability to each individual prosecutor in charge of a case, which is consistent with the general independence granted to them.

The delegation of the power to decide what is in the public interest can be seen as a more general expression of the common-law philosophy. In general, the wider discretion granted to non-judicial public officials is said to be a feature that replicates the general law-making process of the common law.[49] The decision to not solve some particularly difficult puzzles in the legislation, but to allow for a case-by-case decision that then accumulates in the form of binding but reviewable criteria, is an understanding of discretion that is quite contrasting with the civil-law distrust for sub-legislative law creating powers.

The German prosecutor is in no position to assess the changes in the relevance of a criminal act over time, because it is not her institutional role to assess the public interest in an offence being prosecuted. Her role is crucially the pursuit of substantive truth; she is largely blind to the contingent effects of the passage of time. Evidentiary concerns infiltrate the assessment of 'sufficiency', and thus in some cases, if the evidence does not make it a clear call, prosecution (as in any other case) could be dropped. But the evidentiary test, as it is understood in Germany, does not assess whether the availability is unbalanced in favour or against the offender's version of the facts. Objectivity mandates that she stick to

[49] Kenneth Culp Davis, *Discretionary Justice: A Preliminary Inquiry* (University of Illinois Press 1976) 51.

the facts as they appear, at the same time demanding attention to the other side of the story, but it does not contain elements to assess whether the evidence has emerged as it has because of external reasons. Objectivity is a mandate, not a standard for an assessment of sufficiency or pertinence. This is in line with the original absolute duty to prosecute according to the legality principle; no assessment required or allowed. But even after this principle has to some extent been rendered more flexible and some instances and mechanisms for abandoning prosecution have been introduced, the idea of a prosecutor that ought not to assess the general conditions for punishment is still present. That is the role of the legislator.[50]

A categorical mode of time limits promotes such a view. It has the benefit of allowing the prosecutor to not get involved in any consideration that may be seen as contextual to the offence itself. It also allows for a uniform application of difficult to grasp criteria (such as peace under the law) in the whole territory.

In the more legalistic culture of the civil-law, permitted discretion is understood as a form of a mere narrowing down and specifying of primary legislative decisions; in particular in the criminal law, this can be observed in the mistrust of 'blanket provisions' (*Blankettverweisungen*) and of the blurring of the division of powers.[51] It is the (statutory) law, that can bear the burden of solving one of those puzzles, even if wrongly, because they

50 Roxin and Schünemann (n 4) 79.

51 Christian Trentmann '§ 153 a StPO und das öffentliche Interesse an der Strafverfolgung — Zum Vorwurf der Irrationalität und Paradoxie von Verfahrenseinstellungen gegen Geldauflage anlässlich des Falls Edathy' (2016) 128 Zeitschrift für die gesamte Strafrechtswissenschaft 460.

are known to be *ex ante* proxies that try to introduce certainty and uniformity and reduce dispersion. In Luhmann's terms:

> Law discriminates. It decides for someone and against someone else — and all this with regard to a future that is unknown. […] Law's relation to time lies rather in the function of norms, that is, in the attempt to anticipate, at least on the level of expectations, a still unknown, genuinely uncertain future. […] Law makes it possible to know which expectations will meet with social approval and which not. Given this certainty of expectations, one can take on the disappointments of everyday life with a higher degree of composure; at least one knows that one will not be discredited for one's expectations. One can afford a higher degree of uncertain confidence or even of mistrust as long as one has confidence in law.[52]

The trust in the English prosecution expresses a different logic. It is not about the future, but about the interests appearing in the face of the situation, which have this law-creating capacity. Using the vocabulary employed by Galligan,[53] the public interest test in England puts the prosecution somewhere between a 'modified adjudication' type of decision — one which is about deciding how to treat a particular case, based on some not very precise standard and where the main interests considered are the ones of the parties but also some others — and a policy decision — where there is an open-ended decision about how the prosecutorial organ should act, with regard to a wide array of interests, way beyond the persons directly involved in the process (the accused and the victim).[54] It is located between the extremes of adjudication and legislation.

The solution concerning the uncertainties in the capacity to comply correctly with their institutional roles posed by time are, thus, found in different places. The English approach denies the efficacy of the legislator to establish certainty. The legislative retention

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52 Niklas Luhmann, *Law as a Social System* (Oxford University Press 2004) 146—148.

53 Denis J Galligan, Discretionary Powers: A Legal Study of Official Discretion (Clarendon Press 1986).

54 See Galligan's useful table at 114.

by the Germans dictates certainty by not putting the prosecutor at risk of mistake and absorbing that risk for the legislator.

The arguments outlined above can be summarised in the following table:

Table 8.1: Arguments in favour and against prosecution of crimes after a long time has passed, according to different aims of criminal prosecution

	Elements in favour of the discretionary mode	**Elements in favour of the categorical mode**
Objectivity and the pursuit of truth	Objectivity as non-discrimination. It allows for selectivity *ratione personae* and *ratione materiae*. Procedural truth can be sought at any time, relying on adversarial principles. Better suited for systems where the prosecutor is independent of the investigation and the prosecutorial impulse is shared among many.	Objectivity as formal equal treatment of offences of the same gravity and non-partisanism. Recognition of decay in evidence indicates impossibility of seeking material truth. Better suited for systems where the prosecutor is in charge of investigation and monopolist of the prosecutorial impulse.
Convicting the guilty	Risk of wrongful conviction is avoided through allowing prosecution if the evidence meets a test. Mechanism can be complemented through judicial assessment (abuse of process). Better suited for systems where each party is in principle in charge of their own evidence.	Risk of wrongful conviction is avoided through negating prosecution. Does not require additional mechanisms. Better suited for systems where the prosecutor is responsible for inculpating and exculpating evidence, avoiding unbalanced cases.
Promoting peace under the law	'Peace under the law' as jurisdictional power. Peace requires capacity to enforce the law at any time and reassure its power after a long time.	'Peace under the law' as a social reality. Peace can return by itself in time: it can be achieved but also disturbed by the untimely intervention of the law.
Other procedural considerations	[A wider discretion-based system can cover these functions with other mechanisms]	Low-cost mechanism for filtering out cases. Puts pressure on organs of the criminal justice system to end matters swiftly. Achieving finality and certainty.

There is a wide range of alternatives to locate the assessment of the relevance of the prosecution of individual offences in general, and of old offences in particular, from the point of view of the aims of procedure. For example, one may locate restrictions in the substantive criminal law, retain a legislative assessment of public interest via predefined procedural outcomes or delegate the assessment to general standard setting or to individual unconnected decisions. The different understandings of the aims of prosecution affect the position of this decision. This is translated into the workings of the criminal justice system by the (non)delegation of the assessment of those circumstances and the powers of different

state organs. What determines which mode of limitation performs better is the adherence to certain values and one's understanding of them.

It remains to be seen how the institutional arrangements that express the two modes of limitation perform when they are considered against the diverse interests at play in the criminal justice trial, which is what will be attempted in the following three chapters. The explanations given so far have mainly shown that the different structures have attempted to avoid the most severe risks that are perceived to threaten the aims of criminal justice. Possible elements to consider are, for example, whether the policy adopted by a discretionary mode of limitation amounts to a form of prosecutorial decriminalisation and whether the literature reflecting on the topic sheds new light on the complexities faced. Another area for exploration is how a categorical mode deals with the anxieties provoked among victims of traumatic offences who find themselves with no legal recourse at all to denounce what has happened to them, as well as whether undiscovered offences that come to light too late to be prosecuted do not endanger the general confidence in the law. Do both systems protect equality before the law in a satisfactory manner? Do any of the systems have a tendency to move the object of condemnation from the offence to the offender? These are the types of questions that now lie before us.

CHAPTER 9. VICTIMS' INTEREST IN JUSTICE: THE PASSAGE OF TIME AND THEIR PARTICIPATION IN CRIMINAL PROCEEDINGS

This chapter will explore victims' legitimate interest in justice and the role they are assigned within the criminal procedure. The two modes of limitation developed so far (the discretionary and the categorical modes) will be evaluated from the perspective of the victim. Two distinct levels of analysis will allow us to present a fresher approach to the notion of limiting prosecutions than the usual general considerations about victims. One stereotype of victims might be of them unequivocally wanting prosecution to take place no matter how long after the events. But a notion of them as actors within a system, as members of a polity, and as bearers of rights and duties will achieve a more robust understanding of the issues at stake in both the discretionary and categorical models.

There is one general consideration that needs to be borne in mind when thinking about prosecutions after a long time has passed since the commission of an offence. The other side of the coin of the very much discussed changes in the identity of the accused[1] is that '[t]he victim […] may be a different person, too, and directly as a consequence of the crime'.[2] It may thus be worth considering that the interest of the victim also changes over time, and that their approach and needs regarding the offence may differ.

Similarly, the concept of 'victimisation' is, at least to a certain extent, diachronic.[3] There is a temporal dimension to being a victim. In individual terms, victimisation develops

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1 See Chapter 10.1.

2 Julian V Roberts, 'The Time of Punishment. Proportionality and the Sentencing of Historical Offences' in Michael H Tonry (ed), Of one-eyed and toothless miscreants: making the punishment fit the crime? (Oxford University Press 2020) 175.

3 Matthew Hall, *Victims of Crime: Construction, Governance and Policy* (Palgrave Macmillan 2017) 13 ff.

first through the causation of harm and later, possibly through residual trauma. Cultural shifts can determine 'victimisation processes' as well. The passage of time may allowe for the 'creation' of victims that initially were not perceived as such. A similar process is the change in perception about historic sexual abuses, where the constructivist notions of victimhood interact with the definitions of the criminal justice process. [4] In reality, victims themselves sometimes only come to recognise their own victimisation after a period of reflection.[5] Thus, a more comprehensive understanding of victimisation should consider the temporal dimension. Does the converse effect also take place, diminishing victimisation over time? Traditional theories of limitation periods assume that time heals all wounds.[6] The following sub-sections will question this intuition throughout the bundle of elements that make up the victim's interest in justice.

9.1. Two marginal notes

9.1.1. A note on terminology

In this chapter, I will mainly speak of 'victims'. This can be taken to mean any person who has (objectively) been on the receiving end of a criminal offence.[7] I will not use the concept that is more common in the legal domain, 'complainant', unless I am specifically speaking about the judicial context where indeed a person has complained about having been the victim of a crime. The reason for this is that I am not assuming that those who are factually

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4 For an argument on more general changes, some of which bear on the position of the victim see Michelle Madden Dempsey, 'Coercion, Consent, and Time' (2021) 131 Ethics 345.

5 Hall (n 3) 16 ff.

6 Or, in the German saying, there is an assumption that after some time, '*[d]arüber ist längst Gras gewachsen*' Thomas Vormbaum, 'Mord sollte wieder verjähren', *Festschrift für Günter Bemmann zum 70. Geburtstag* (Nomos 1997) 499.

7 As many legal systems do, this can also be taken to include the close family members of persons deceased by cause of a criminal offence.

victims of a crime necessarily report the event and come forward. I intend that the considerations in this chapter apply to as many victims of crime as possible. This includes an overwhelming number of persons who are not interested in prosecution, those who actively do not want a prosecution to be brought forward, persons who do not know that they have been victims of a criminal offence, etc. These would not be covered if we were to restrict our view to 'complainants'.

I will also avoid the use of loaded terms like 'survivors', as I want to use a concept that can cover both traumatic and non-traumatic experiences of criminality. Most criminality does not have severe personal consequences for victims. This does not mean that we do not want to consider them, especially as harmed members of the political community, but we also do not want to prejudge the consequences of any particular crime in advance.

9.1.2. A note on victimless offences

Although this chapter will be restricted to crimes with victims, that does not deny how critical victimless offences are in the criminal law. Any reflection about how the criminal law should be structured needs to account for the vast number of offences of varied gravity where no individual interest is affected or where, in any case, such an interest is not pre-eminently being protected. These are not only regulatory crimes but also some classical figures like treason, forgery, disorders, corruption, electoral offences, public office crimes, impediments against the exercise of certain freedoms, prostitution, exhibitionism, etc. and newer ones such as several terrorism offences. In these cases, the law may define its limitation rules without reference to a more directly harmed individual victim, and thus the considerations developed in other parts of this work apply.

9.2. Respect for the victims, two levels of analysis

This chapter addresses victims' interests at two levels. The first construes the interests of victims as objective categories that enable a comparison of justice mechanisms in terms of which one better fulfils those interests; the literature adopting this approach develops the ideal of maximising victims' objective interests (and not others), regardless of the actual empirical variation in what real-life victims actually want or believe in regard to how their cases should be dealt with. The second level is a theory of the role of victims in the criminal law. Here, the normative position of the victim is interlaced with the many other ideal functions and structures that should exist in the criminal justice. At both levels, we are offered the possibility to assess whether our two types of time limits improve the victim's position, either by promoting their interests or by realising their ideal position in the criminal procedure.

At the first level, I will claim that a discretionary model better upholds victims' justice interest as construed by the literature. By retaining the potential of prosecution and trial, this system puts victims closer to the ideal of justice, at least to the same extent that the criminal law usually does. Categorical limits, on the other hand, give up on offering the victim a solution through the criminal justice system and thus restrict the system's potential. However, it would be a mistake to think that no victim would favour the existence of time-limits. Victims are persons and members of a community, and often the categories of victims and criminal offenders overlap. Thus, an interest in justice goes beyond a self-centred interest and has at least some space for consideration of the best possible institutional arrangements.

At the second level —regarding the role of victims in the criminal law—the evaluation becomes more difficult. This is because the two models for dealing with the

passage of time represent wider perspectives about the role of the victim in their respective jurisdictions. However, there has been an apparent shift in recent decades towards giving more rights to the victim within the criminal process, which might be driving a change in dealing with the passage of time for specific offences. Still, there does not seem to be a general move in either context. We can identify a specific shift in the treatment of sexual offences (coincident with offences that Hall claims have undergone a 'cultural elevation'),[8] but this has not been accompanied by a careful reflection on other possibly traumatic experiences (such as trafficking, physical and psychological harm, kidnapping, etc.).

9.3. Victims' interest in justice

At a theoretical level —independent of particular legal arrangements— it is possible to enquire into whether there is an 'ethical basis' or a 'legitimate interest' of victims that ought to be considered when thinking about criminal justice, i.e. what is owed to victims. This is not necessarily the same as 'what victims want', an approach sometimes called 'empirical', of trying to shape the criminal justice to the individual or aggregate desires and expectations of victims.[9] Kathleen Daly has offered an empirically grounded theory of the legitimate interests in justice.[10] She uses the term *interests* 'to signal a political relationship that victims, as citizens, have in pursuing justice in the aftermath of crime'. This follows Holder, who adds that 'their justice interests were not only for themselves, but for offenders and the wider society'.[11] Even if it is possible that not every victim will 'want' these

8 Hall (n 3) 248.

9 Critical of such an approach, as 'consumerist' and static, Christopher Bennett, 'Satisfying the Needs and Interests of Victims', *Handbook of Restorative Justice* (Routledge 2013) 248.

10 Kathleen Daly, 'Sexual Violence and Victims' Justice Interests' in Estelle Zinsstag and Marie Keenan (eds), *Restorative responses to sexual violence: legal, social and therapeutic dimensions* (Routledge 2017). She is mostly thinking about comparing mechanisms of restorative justice as well as others closer to 'conventional justice' in the complex area of sexual victimisation.

11 ibid 114.

interests to materialise, they can still serve as normative standards for justice in the sense just mentioned. The passage of time is not explicitly considered a factor and the challenge will be to assess how these interests can be developed in the context of extended prosecutions or old offences.

9.3.1. Participation

Daly describes participation as 'being informed of the options and developments in a case, including the different types of justice mechanisms available […] and the ability to ask questions and receive information about crimes (e.g. the location of bodies or the motivations for an admitted offender's actions)'.[12]

To analyse this element from a temporal perspective, we can consider different factual hypotheses regarding why a long time has passed since the commission of the crime.

One possibility is that a crime has been reported and investigated, but, for whatever reason, no suspect has been individualised (**Scenario A, 'cold case'**). It seems sensible to assume that the legitimate participation of the victim is satisfied to the extent that the criminal justice can offer it for a reasonable period of time. After that, if a discretionary model is adopted, the system should have adequate information and possibly review mechanisms in order to be acceptable. The need for information will remain even if it is merely to be sure that there have been no new developments. Here it does not seem that a categorical limit would go against this interest because, to the extent possible, the victims would have all of the available information about the efforts undergone and the technical

[12] ibid 116. Similarly, and more robustly: Marie Manikis, 'A New Model of the Criminal Justice Process: Victims' Rights as Advancing Penal Parsimony and Moderation' (2019) 30 Criminal Law Forum 201, n 4.

and forensic examinations carried out in order to clarify the issue. This scenario does not seem decisive for an evaluation.

A second possibility is that there is an identifiable suspect, but this person has not been located (**Scenario B, 'hidden offender'**). Here, a discretionary model seems to better accommodate the possibility that an alleged perpetrator emerges. In that case, there need not be much investment in participation apart from keeping the victim up to date with the procedures, which will probably mean that the offence will be prosecuted if it was serious, unless there are specific factors speaking against it. A categorical limit seems to exclude participation in probably the most crucial part of the history of the case for the victim, as the law would have made the decision in advance as to the exclusion of the prosecution.

A third possibility is that there was a delay in the reporting of the offence, and thus only a long time later, an investigation was launched (**Scenario C, 'late reporting'**). In most of these cases it is, I believe, correctly assumed that there is a lack of interest of the victim in prosecution through the established legal proceedings.[13] A victim can implausibly demand participation if she has not involved herself and the criminal justice in events that occurred a long time ago. But this question is critical when the victim was in some way impeded from reporting before, both due to material and psychological circumstances. A system designed to accommodate this interest would require setting any categorical limit

[13] This may well be due to quite different causes. Empirical studies have shown that the majority of victims in general, and a significant number of victims of serious crimes in particular, are not interested in a prosecution taking place. 'The British Crime Survey (Hough and Mayhew 1983) found that only half of the victims identified (of all types of offences) felt that, if caught, the offender should be prosecuted. It also showed that four out of ten offences involving violence were not reported to the police. A major reason was that the offence was seen as too trivial', Joanna Shapland, Jon Willmore and Peter Duff, *Victims in the Criminal Justice System* (Aldershot 1985) 14—15. A different reason is found in some instances of child sexual abuse, where some victims do not perceive themselves as such or claim there have been no negative consequences for them from the experience, see Sandra Fernau, 'Sexual Abuse by Catholic Clerics: Patterns of Interpretation and Coping Strategies of Victims in the Light of a Religious Socialisation' in Dirk Baier and Christian Pfeiffer (eds), *Representative Studies on Victimisation* (Nomos 2016) 242—243.

only at the point in time when the reporting became possible. This is not the structure of the current limitation periods. The main complexity of the discretionary approach, on the other hand, is whether the assessment of the necessity to prosecute will not be tainted by doubts about the real motives for the delay when it is argued that it was caused by some impediment.[14] If that is so, there will indeed be a problem of justice among victims. For example, those with recent offences will be given privileged treatment compared to those who have postponed coming forward.

As a result, we can say that all of the scenarios strain the idea of categorical limits. In the case of a missing offender (scenario B) or the existence of an impediment to reporting a crime (scenario C), there are clear advantages to the discretionary model in terms of victim participation.

9.3.2. Voice

Voice entails 'telling the story of what happened and its impact in a significant setting, where a victim-survivor can receive public recognition and acknowledgement. Voice is also termed truth-telling'.[15] In conventional cases, this will be achieved both at the moment of reporting and at the moment of testifying in court as a witness for the prosecution.

Even for late reporting, the voice of the victim ought to be heard and, thus, categorical limits place a barrier that cannot be easily reconciled with victims' interests.

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14 There is empirical evidence that suggests that this is a real phenomenon: 'police and prosecutors, like jurors, tend to view the presence of reporting delay with scepticism', Lisa A Bunting, 'Exploring the Influence of Reporting Delay on Criminal Justice Outcomes: Comparing Child and Adult Reporters of Childhood Sexual Abuse' (2014) 23 Journal of Child Sexual Abuse 577, 580., with references to scholarly work showing this point. Also Shapland, Willmore and Duff (n 14) 19. Such mistrust is a fact that needs to be considered when designing well-functioning mechanisms.

15 Daly (n 11) 116.

Not only will the victim not have the possibility of a trial in which they can participate, but it is most likely that a full investigation will not even take place and, thus, the victim will not have a chance to tell her story in any detail, even as a witness, if only for the record.

A discretionary limit will more likely allow the victim to have her voice heard, even if the case does not come to prosecution and trial. Because there is a need for an individualised assessment of the case, it could (and should) be the case that the victim is heard in full by the investigating and prosecuting authorities before a decision is made on charging someone as the perpetrator of the offence. The case file will, thus, contain the victim's version of the events and other relevant information about the case, even assuming that the offence is not prosecuted. And those offences that pass the relevance and viability test and come to be dealt with through the criminal procedure will permit the victim's voice to be heard, regardless of the time that has lapsed.

9.3.3. Validation

Daly contends that there is a justice interest in affirming that the victim is believed and not blamed for what happened. Validation can be tested under the following question: 'was there an acknowledgement by legal authorities and/or others that the offence was serious, was there a discussion of the harms and was any victim self-blame or blame by others checked or challenged?'.[16]

In general, categorical limits impede the criminal law's validation of the position of the victim as such. Regardless of what has caused the delayed prosecution, the effect is

[16] ibid 117. Similarly, Tatjana Hörnle, Stefan Klingbeil and Katja Rothbart, 'Sexueller Missbrauch von Minderjährigen: Notwendige Reformen im Strafgesetzbuch' (Humboldt Universität zu Berlin) 49, available at https://hoernle.rewi.hu-berlin.de/Gutachten_Strafrecht-2.pdf.

always that there will be no official declaration that the person has been the victim of a crime. Even if the mode of termination of a case is not an acquittal, but a mere stay in the proceedings, the victim's version of the story will not be institutionally acknowledged as valid, and the facts will not be declared as amounting to a crime. It can be seen why this mechanism, under any hypothesis, does not promote this element of victims' interests.

Discretionary limits allow for the possibility for such an official statement to remain open and for the criminal law to be the channel for the satisfaction of this interest. However, because an informal and discretionary limit does indeed exist, and the evaluation is transposed to the decision of the competent authority (the public prosecutor, in most modern legal systems), there remains a relevant chance that validation will be denied. The reality of discretion-based systems seems to be that most 'older' crimes will not end up with an official acknowledgement of the existence and seriousness of an offence. And in this case, the denial is even more inimical to the interests of the victims than the impersonal limitation rule. There is an individual assessment that, without denying that the offence might have been committed, the possibility of the official establishment of that truth ought to be denied. The individualised deprivation of validation might be more painful and considered a greater injustice.

This effect is particularly significant for serious offences that might carry a stigma for the victim, and those that create more self-doubt about their condition as victims and feelings of guilt. Being doubted by an individual decision-maker is arguably much tougher than 'the system' or 'the rules' refusing to officially acknowledge the truth. For this reason, a discretion-based system would need to put much more effort into explaining decisions

not to prosecute in a way that does not attribute to the victim the responsibility not only for the offence but also for the failure to prosecute.

9.3.4. Vindication

The interest in vindication can be described as the affirmation of the wrongfulness (legally and morally) of the act and that this perpetrator's actions against this victim were wrong. For Daly, this complex element entails public condemnation and censure, and is tested for through this question: 'was the act said to be legally wrong or morally wrong, was the act minimised, was the alleged wrongdoer convicted, and was the imposed or agreed outcome tied to the wrongfulness of the act?'.[17]

Undeniably, with categorical limits, any possibility of vindication through the criminal justice system disappears. It is not only punishment that is excluded, but the whole possibility of invoking the criminal law. The victim will not receive a statement about having been wronged. Not only a judicial decision but any form of institutional decision-making by the criminal law is barred.

The discretionary model retains the possibility of vindication of the law and the victim. Even if there is no assurance that an act will be considered relevant after a long time has passed, at least the relevant interest is approached. Of particular importance is that — contrary to what a categorical limit model would entail — alternative mechanisms within the criminal justice might still be available for such an offence. A discretion-based mechanism might enable the relevant authority (i.e. the public prosecutor, in most cases) to exercise other powers beyond the binary choice between dropping the case and

[17] Daly (n 11) 118.

prosecution, and for example, to be satisfied with a conditional caution as a suitable outcome. Such an outcome could vindicate the victim and accomplish justice.

9.3.5. Offender accountability and taking responsibility

Victims' interest in justice requires that alleged perpetrators ought to be both called upon and held to account, and then, either through an admission of guilt or a conviction, actively take responsibility by apologising, expressing regret or remorse or completing the requirements that are imposed on them.[18] Daly's model borrows from Duff. Calling to account is, according to Duff, the prosecutor's role. Holding to account is the role of the jury and judge on conviction. According to Duff, prosecutors are indeed in the best position to decide who is to be called to account,[19] and if so, the implication of the discretionary model would be that it is correct to also leave older offences for them to decide, like any other. The prosecutor in this model not only decides under technical standards but is a political representative of the community, charged with the responsibility to determine who is to be called to account. The 'calling to account' cannot be seen as an automatic process; it requires the exercise of judgement from someone looking to satisfy the interest of the victim and the whole community. An extension of this line of thinking implies that the law should not make a cut here, as categorical limits do, impeding this exercise of judgement.[20]

The feeling of impunity consciously created by the categorical limits impedes any form of accountability and responsibility through the criminal law. This is the most

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18 ibid 119. I have slightly modified Daly's way of referring to this element.

19 Antony Duff, 'Discretion and Accountability in a Democratic Criminal Law' in Máximo Langer and David Alan Sklansky (eds), *Prosecutors and Democracy* (Cambridge University Press 2017) 16 ff.

20 I will present a criticism of this argument in a later chapter, see Chapter 11.4.

recurrent argument for those who campaign in favour of victims, and in particular for victims of sexual abuse, in order to have them abolished.[21]

All in all, then, a discretionary mechanism is more apt to attend to the interests of victims in regard to justice. Most of the aspects of this legitimate interest are better served by allowing, at least in some cases, for exploring the possibility of prosecuting, for hearing and vindicating the victim, and for being the mechanism for the accountability and assumption of responsibility for wrongful deeds.

There is a word of caution, however, regarding validation. The discretionary system risks victims being more offended when their case is rejected because of an individual assessment made by persons who had access to the information yet denied the possibility of prosecution. Maybe for this reason, Hörnle *et al.* explore the idea of a different formal and authoritative method of determination of the wrong that is better, or at least as good as, a criminal procedure.[22] Whether there could be a different form of legal procedure that could satisfy this interest without appealing to the criminal law and its specific high standard of evidence and that is more 'victim-friendly' will, however, not solve the primary difficulty of the limitations that any formalised system of adjudication of facts as the procedural truth entails, with some gatekeeping and some discretion by the decision-makers. Thus, she argues, any state procedure will be subject to this dilemma, and there is no need and no reason to invent new procedural forms to replace the vindication function of the criminal procedure.

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21 Jean-Pierre Choquet, 'La prescription de l'action publique : une atteinte aux droits des victimes ?' (2016) N° 4 Les Cahiers de la Justice 639, 643.

22 Hörnle, Klingbeil and Rothbart (n 17) 51—52.

9.4. Victims' role in the criminal procedure

Up to now, we have examined victims as if their position were autonomous of the particular shape of the criminal justice system that they inhabit and the ideas dominating such a landscape. Victims, for the criminal law, do not exist in the abstract. They exist in institutional settings that take concrete forms in specific legal communities. Victimhood is a category, a legal position conferred by the law. From this point of view, the determination of its appropriate role not only looks at the victim in itself but at the complex web of relationships that emerge out of the procedures, actors, cultures and rules in each legal system.

In a nutshell, this section will try to show that again with regards to victims it is difficult, if not impossible, to evaluate the two mechanisms against each other when put into the context of the different legal systems where they exist. However, it will also attempt to show the normative commitments that are prioritised in each system, at least to give the reader the possibility to assess by herself, which reflects their values in a better way. The common trend in both legal systems is the claim that victims have been gaining prominence within the criminal law and procedure. Nonetheless, both legal systems seem still to give little space for the victim, especially when contrasted with the high demands that the interests in justice explored in the previous section entail.

9.4.1. Limits to who can report a crime and when

Historically, the victim was under a duty to complain about a crime that had affected her. In England, a person committed an offence if she did not report a suspected crime.[23] The

[23] At least two mechanisms were available at different times and with different scopes: an amerciable offence for failing to raise the 'hue and cry' and a misdemeanour of misprision of felony. See Sykes

complaint was also required to be prompt if the victim herself wanted to prosecute, but sometimes also if others were to take her place. The most visible case was rape, for which:

> [I]n all charges of violence, the accuser must show, to sustain his charge, that he made hue and cry, alarming the neighborhood, freshly after the occurrence. The application of this principle to rape cases is seen in the following passage:
> 12- (?), H. de Bracton, f. 147: "When therefore a virgin has been so deflowered and overpowered, against the peace of the lord the king, forthwith and *while the act is fresh* she ought to repair with hue and cry to the neighboring vills and there display to honest men the injury done to her, the blood and her dress stained with blood, and the tearing of her dress; and so she ought to go to the provost of the hundred and to the serjeant of the lord the king and to the coroners and to the viscount and make her appeal at the first county court.[24]

The complaint was a formal prerequisite of prosecution for violent offences. There are no such limits in English law today, as they declined from the end of the eighteenth century. Anyone can report an offence at any time. Nowadays, the vestiges of this old rule have no relevance for the admissibility of reports or complaints but have evolved into evidentiary rules regulating the possibility of introducing the existence and content of a complaint in order to bolster the credibility of the victim's testimony.[25] However, the concern that there might be some prejudice against late complaints is present, as is shown by the CPS' guidance on non-recent offences, which expressly states that: 'A complaint made some time after the event should […] be taken just as seriously as a complaint made shortly after the alleged offence was committed'.[26]

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v Director of Public Prosecutions [1962] AC 582 and Frederick Pollock and Frederick Maitland, *History of English Law before the Time of Edward I* (Cambridge University Press 1895) 576. Both types of offences were applicable to alleged victims of crimes.

24 John Henry Wigmore, *A Treatise on the Anglo-American System of Evidence in Trials at Common Law: Including the Statutes and Judicial Decisions of All Jurisdictions of the United States and Canada*, vol III (2nd edn, Little, Brown and Company 1923) 764.

25 For a detailed description of the evolution of these rules, see Penney Lewis, *Delayed Prosecution for Childhood Sexual Abuse* (Oxford University Press 2006) ch 5.

26 Crown Prosecution Service, Non-Recent Cases and Nominal Penalties.

The old Germanic law contained similar provisions to the old English law. Complaints needed to be filed in the very act ('*auf frischer Tat*') or within a few days.[27] The justification for this was that silence expressed indifference or forgiveness before the offence or that late complaints were presumed to be based on some reprehensible intentions. There were, however, no general rules applicable to large territories or covering a significant ambit of offences, but local rules or norms covering specific crimes. These scattered rules were abolished when the unified legislation came into force, a point in history when the idea that the prosecution of crimes became a matter eminently bound to the nation-state crystallised, and when the role of the victim was almost excluded from the logic of the criminal law.[28]

Contemporary German law considers two restrictions that limit the prosecution of offences at the behest of the victim. One is the restriction of some offences (*Antragsdelikte*), where the victim must specifically demand prosecution.[29] A sub-category of these can nevertheless be prosecuted without the intervention of the victim if they are considered of particular public interest (*relative Antragsdelikte*).[30] For all *Antragsdelikte*, there is a temporal limit for the victim to come forward and report the crime to the authorities: only within three months from gaining knowledge of the crime (§ 77 b StGB) is it admissible. It is maintained that this deadline is not for the benefit of the offender[31] but

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27 Richard Loening, 'Die Verjährung' in Karl Birkmeyer, Fritz van Calker and Reinhard Frank (eds), *Vergleichende darstellung des deutschen und ausländischen Strafrechts* (Verlag von Otto Liebmann 1908) 384.

28 Kerstin Braun, *Victim Participation Rights: Variation Across Criminal Justice Systems* (Springer 2019) 39 ff.

29 Examples are unlawful entry (§ 123), defamation (§ 185, in conjunction with § 194) and violation of privacy and personal secrets (203 and 204, in conjunction with § 205).

30 Such as statutory rape, if the victim is between 14 and 16 years old and the offender older than 21 (§ 182 para. 3), exhibitionism (§ 183), battery (§ 223, in conjunction with § 230), child abduction (§ 235), stalking (§ 238 para. 1), corruption and bribery in business transactions (§ 299, in conjunction with § 301), property damage (§ 303, in conjunction with § 303c).

31 RGSt 24 427, 428; 27 366, 367.

that 'the aim of the report time limit is rather, on public law grounds, to shorten the indecision about whether the state will be under a duty to prosecute the offender'.[32]

This element certainly needs to be contrasted with the limitation periods (*Verjährung*). First, this limit is relative to each victim's acquiring knowledge of an offence and runs from different times for each of them. On the other hand, limitation periods are absolute, running from the termination of the offence (by its author or authors). Secondly, the passing of the legal period for reporting the offence will with certainty only bar the prosecution of absolute *Anklagedelikte*, i.e. those where no public interest consideration allows the *Staatsanwaltschaft* to bypass the victim. For the case of 'relative *Anklagedelikte',* they can still be prosecuted until the limitation period expires, if the public prosecution decides to bring the case forward regardless of the wishes of the victim. Limitation periods are conceptually directed at the state prosecution, rather than being concerned with the concrete position of individuals. If this were not the case, both kinds of limits would be duplicating the same function (even if for only a very small number of overlapping offences).

To summarise, time has played a role in the extent to which victims' claims have been recognised by these criminal justice systems. The habitual emphasis on adopting evidentiary and procedural rules in England and the preference for deadlines in the German context emerge once again.

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[32] Johann Schmid in Klaus Geppert and others, *Leipziger Kommentar Strafgesetzbuch.* Band 3, §§ 56-79b (De Gruyter 2008) § 77b Antragsfrist n 1 [my translation]; RGSt 71 34, 39.

9.4.2. Participation rights and the effects of time

If no prosecution occurs because the time limit has expired, all other forms of participation considered in the regular criminal process are affected.

In the German context, the capacity of the victim to force an accusation by the public prosecutor (*Klageerzwingung*) or to ask for a review of the decision not to prosecute (administratively via §172 or judicially through §173 StPO) is barred, as is the possibility to be a joint private prosecutor (*Nebenkläger*)[33] for a broad spectrum of offences or a private single prosecutor (*Privatkläger*) for the restricted number of offences where this modality is available.[34]

Some commentators have said that a natural consequence of the retreat of the legality principle would be that the victim ought *de lege ferenda* to also have some possibility of control by the discretionary stay of proceedings.[35] The contrary would mean that the growth of diversionary mechanisms 'might be seen as arbitrary from the perspective of the victim under certain conditions'.[36] Still, the victim has, until today, no possibility to influence these decisions in the German law. From the logic of the German rights of the victim, then, it would be fair to say that greater flexibility in terms of the

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33 § 395 StPO.

34 § 374 StPO. Some German authors consider this an anachronic procedure, lacking public interest, which should thus be abolished, see Joachim Renzikowski, 'Dimensionen der Straftat: Täter — Opfer — Gesellschaft' in Wolfhard Kohte and Nadine Absenger (eds), *Menschenrechte und Solidarität im internationalen Diskurs* (Nomos 2015) 217.

35 Claus Roxin and Bernd Schünemann, *Strafverfahrensrecht: ein Studienbuch* (29th edn, Beck 2017) 335.

36 Michael Kilchling, 'Opferschutz und der Strafanspruch des Staates - ein Widerspruch?' [2002] NStZ 60. [my translation]

passage of time, adopting something closer to a discretionary mode, would also push for greater control of the victim over the need to prosecute.

There are no proceedings where the public and private prosecutors sit alongside each other in English law. This might be because the traditional adversarial trial does not accommodate more than two parties with potentially disputing views of the truth. This situation relegates the victim to either act on her own, as a private prosecutor, or to be nothing more than a witness. The prosecutor does not have an obligation to seek out the victim's views.[37] Victims have the right to initiate private prosecutions at any time[38] and the right to pursue proceedings in that capacity until conviction and sentencing. The CPS may or may not take over such prosecutions.[39] One possible reason for not taking over may be related to the passage of time.[40] Outside of private prosecutions, as we have seen in previous chapters, the CPS ought to consider the victim's views when assessing the public interest in prosecution.[41]

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37 Braun (n 29) 106.

38 Section 6(1) of the Prosecution of Offences Act 1985. As happens with some public prosecutions as well, for certain offences the consent of the Attorney General or the Director of Public Prosecutions must be sought to initiate proceedings.

39 See Chapter 2.5.

40 In a private prosecution led against two police officers in the context of the Hillsborough disaster (see above Chapter 1), the CPS was asked by the defendants to take over and discontinue the prosecution started 10 years after the event. The CPS' Director of Casework expressed that among the factors tending against prosecution he had considered were '(3) The delay which had occurred between the commission of the alleged offences and the commencement of this prosecution and its likely effect on the Applicants, although I took the view that delay may be offset by the seriousness of the alleged offences (as is reflected in paragraph 6.5(d) of the Code...). (4) The effect of the delay on the evidence, for example in terms of the potential impairment of the recollections of witnesses'. In the end the CPS decided not to intervene. When this decision was challenged via judicial review, Laws LJ sustained that: 'The DPP might, in my judgment, lawfully have decided to discontinue. The tragic events at Hillsborough have been the subject of repeated, detailed, thorough enquiries. Nearly ten years have passed. But the judgment was for the DPP to make. If we acceded to Mr Harrison's submission, we would I think usurp the role of the primary decision-maker', *R (on the application of Duckenfield & Anor) v Director of Public Prosecutions* [1999] EWHC Admin 286.

41 Code for Crown Prosecutors 2018, para 4.18; Crown Prosecution Service, Non-Recent Cases and Nominal Penalties.

Some scholars are sceptical about the potential effects of the victim having more control over public prosecutions.[42] An extreme version of the rights of the victim under this paradigm could entail, for example, allowing her to launch a private prosecution at any time, even after the CPS has internally decided to drop the case. Also, if more participation in terms of dispositive decisions were granted to the victim, she would also have a say in what diversionary mechanisms should be considered by the public prosecutor and at what time. This could allow for imposing some punitive (liberty-restricting) measures without the need for a truth-seeking procedure such as a trial.

9.4.3. Protective rights

In addition to the rights already discussed, in Germany, victims have the right to be advised by a lawyer and to have a person they trust present if they are to be interrogated. Finally, and probably more originally, victims have a right to free psychosocial accompaniment during the procedures.[43] There is also the possibility of obtaining damages within the criminal trial (*Adhäsionsverfahren*)[44] or recovering assets (*Rückgewinnungshilfe*).[45] None of these rights is available to the alleged victim of a crime once the limitation period has passed.[46] There are only certain privately run schemes and charities that help probable

42 Ian Edwards, 'An Ambiguous Participant. The Crime Victim and Criminal Justice Decision-Making' (2004) 44 British Journal of Criminology 967.

43 § 406g StPO.

44 § 403 StPO.

45 § 111b StPO.

46 Civil claims for compensation in tort also have limitation periods regulated in §§ 195 and 197 I no. 1 of the civil code (Bürgerliches Gesetzbuch).

victims of some offences such as child sexual abuse even if they have not been legally declared to have been victims of a crime.

While English law does not contain such myriad protective rights that are so closely tied to the criminal process for victims, their position is at least not threatened by time. Even if prosecution is not undertaken by the CPS, the status of the complainant is not lost. The Code of Practice for Victims of Crime in England and Wales[47] applies in its totality where a crime has been reported to the police (and partially even without the need for such action). It is a description of the services and their respective service standards, which are not necessarily provided directly by the state.

Victims of violent crime may be entitled to compensation through the Criminal Injuries Compensation Scheme. However, there is a temporal element to the chances of obtaining such support. The Scheme contains a time limit of 2 years from the date of the incident, with the possibility of the Criminal Injuries Compensation Authority extending it.[48] To extend, the deciding officer must be satisfied that: '(a) due to exceptional circumstances the applicant could not have applied earlier; and (b) the evidence presented in support of the application means that it can be determined without further extensive enquiries by a claims officer'.[49] A review of the scheme explains that '[a]n example of a[n

47 Ministry of Justice, Code of Practice for Victims of Crime in England and Wales, November 2020, available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/974376/victims-code-2020.pdf.

48 Ministry of Justice, The Criminal Injuries Compensation Scheme 2012, available at https://consult.justice.gov.uk/digital-communications/criminal-injuries-compensation-scheme-review-2020/supporting_documents/cicsreview2020.pdf. pars. 87-89. This information is also explained to victims in the Code at 5.4.

49 The Criminal Injuries Compensation Scheme 2012, para. 89. Slightly more detailed guidance states that the: 'decision will be based on the "balance of probabilities". […] If you wish us to consider your application more than two years from the date of the incident you will need to provide us with evidence that shows why this application could not have been made earlier. You must also be able to provide supporting evidence for your claim that means that the claims officer can make a decision

exceptional] circumstance might be where the applicant suffered such a serious physical or mental injury that they were unable to make an application within the relevant time limit'.[50] Such exceptional circumstances have been widely used and most claims after the deadline are accepted.[51]

9.5. Human rights considerations relating to the victim

From the perspective of human rights jurisdictions, some consideration has been given to the position of victims when categorical limits exist. The European Court of Human Rights (ECtHR) has analysed some cases of limitation periods from the perspective of the protection of victims in the face of the freedom of states to shape their criminal legislation, including the temporal reach of the entitlement to punish.[52] Staffler believes that the Court is sceptical about limitation periods in general, but this scepticism is only expressed in cases where the author of human rights violations is not punished, [53] i.e. they are only considered problematic in specific cases when the action can be attributed to the state[54] or

without further extensive enquiries'. Criminal Injuries Compensation Authority, Criminal injuries compensation: a guide, 26 March 2014, available at https://www.gov.uk/guidance/criminal-injuries-compensation-a-guide#time-limits-for-applying.

50 Ministry of Justice, Criminal Injuries Compensation Scheme Review 2020, July 2020, para 93.

51 In terms of the performance of the scheme, the report states: 'From the data set, 18% of personal injury cases were submitted outside the 2-year time limit; of these 63% still went on to receive an award. There was no apparent disproportionate impact on those claiming for sexual assault […]. Of all rejected personal injury cases, only 4% were rejected for being outside the 2-year time limit'., para. 96. Also, the 'analysis suggests that the Scheme is working well for the majority of victims of child sexual abuse. Our findings show that provisions in the Scheme, such as time limit discretion, reflect an understanding of the difficulties these victims face in reporting these crimes, and changes to operational practices ensure that they are supported in applying for compensation'., para. 75.

52 See also Chapter 10.2.

53 Lukas Staffler, 'Opferschutz und Verjährung im Spiegel der EGMR-Judikatur: Überlegungen zu den opferbezogenen Schutzpflichten im staatlichen Strafrechtssystem' in Markus Abraham and others (eds), *Verletzte im Strafrecht* (Nomos 2020).

54 *Abdulsamet Yaman v Turkey* [2004] ECHR 32446/96; *Saba v Italy* [2014] ECHR 36629/10; *Turan Cakir v Belgique* [2009] ECHR 44256/06; *Paduret v Moldova* [2010] ECHR 33134/03.

as a structural problem[55] that impedes the prosecution of torture and other inhumane treatment.

Staffler contends that there are two main normative reasons why the ECtHR insists on these cases having to be dealt with through the criminal justice system as a means to protect victims. The first is the clarification of the facts as effective fundamental rights protection, and the second is 'solidarization' through sanctioning. Infringements of conventional rights demand that a state reacts through the criminal law. This, in turn, poses time limits that are in tension with the protective duties of the state. But it cannot be said that the court is generally against limitations. On the contrary, it has expressly declared them compatible with fundamental rights, especially from the perspective of the protection of the offender.[56]

Human rights jurisprudence has had an indirect effect on the current debate in the UK related to historic offences and, in particular, with regard to crimes committed in the context of The Troubles in Northern Ireland. The decisions of the ECtHR[57] have caused the creation of internal units by the police to reassess the deaths of over 3,000 persons many years after their occurrence. The insufficiencies of internal police investigations, benefitting police and army officers, led to the creation of a new body. Despite several

55 Less often found, *Cestaro v Italy* [2015] ECHR 6884/11.

56 *Coëme et al v Belgium* [2000] ECHR (2000) 2492/96;32547/96;32548/96, par 146. This thesis will discuss this point from the perspective of the accused below, Chapter 10.

57 Such as *Finucane v The United Kingdom* [2003] ECHR 29178/95; *Brecknell v The United Kingdom* [2007] ECHR 32457/04.

attempts by recent governments, the idea of introducing a limitation period seems to have weakened in favour of a case-by-case analysis.[58]

9.6. Paradigms of the victim

Based on the specific features just studied, we can now look at the current state of the debates about how victims are viewed in these legal systems, and then ask ourselves what the most suitable arrangements would be when considering the passage of time as a variable. I will argue that the ways in which victims are considered in the criminal law co-define the mode of limitation that is predominantly adopted. The public role given to the victim in England explains and justifies the discretionary limits, while the external role given to her in Germany explains and, within their logic, justifies the categorical bars. Assessing which one is a better mode depends on adhering to a broader view of their role and power in the system.

It has been posited that the victim in England represents not only a private but also a public interest. From the initial central position of the victim as the administrator of criminal justice to the retention of private prosecution as a right, the history of the victim in England shows that she is seen as contributing to the good workings of the system, by enhancing accountability and mobilising against inertia or undue failures to prosecute by the authorities.[59]

Public interest used to be under a diffuse control, and for such a system it would have been a challenge to attempt to define and assess public interest in a centralised manner.

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58 Northern Ireland Troubles (Legacy and Reconciliation) Bill 2022-2023, s 18, at the time of writing.

59 Marie Manikis, 'Conceptualising the Victim in England and Wales and the United States within a Spectrum of Public and Private Interests' (2021) 41 Oxford Journal of Legal Studies 24.

Until the creation of the CPS, then, the assessment lay overwhelmingly with the private prosecutor, controlled by the judge via abuse of process. Since the creation of the CPS,[60] this public entity has gained an additional tool of control through the possibility to take over prosecutions, at the same time as being assigned a duty to consider victims' interests in their own assessment of the relevance of a case. Still, the presumption is that any prosecution started by the victim is considered legitimate.[61] Thus, two characteristics blend together: the criminal law is an instrument that can be used for the sake of the satisfaction of private interest, and at the same time, the victim is a carrier and representative of a form of public interest even when it acts of its own accord.

These two elements can become structurally relevant for justifying a system of discretionary time limits. Because the interest of the victim is relevant to the criminal justice, and because it might be time-barred elsewhere (e.g. in tort), it makes sense to keep a legal route open for having the case decided by a court. By this means, the individual interest is satisfied. On the other hand, the victim has the power to decide whether it is appropriate to promote a judicial adjudication of the case. Here she acts as a representative of the public interest. In principle, her decision is respected and is only subject to oversight in the case that it is not in the public interest (by the CPS) or if the exercise of that right might be abusive (by the courts).

Although discretion is a concept that is usually restricted to the exercise of state power, here it makes sense to also use it when referring to the victim in her quasi-public role. The complainant's exercise of the penal action may be discretionary (as in the exercise

60 See Chapter 2.5 for a brief discussion of these powers.

61 So, for example, the CPS guidance on Private Prosecutions: 'In principle, there is nothing wrong in allowing a private prosecution to run its course through to verdict and, in appropriate cases, sentence'.

of public power) but it should never be arbitrary (or subject to private whim); it ought to be based on the fulfilment of justice and not on revenge. The excesses can be left for the courts to judge and solve through general remedies (such as the abuse of process doctrine) and require no specific instrument that considers time. The victim (like the public prosecutor) is entrusted with assessing whether the case still merits prosecution. This trust in the victim allows for the mechanism not to require a strict limit.

On the German side, the victim was historically seen very much as a bystander in the criminal law.[62] The victim is not in a position to decide whether or not to prosecute an offence. The system is based on the legality and officiality principles.[63] It is the state, through its democratically accountable legislature, that must decide about the prevailing interests and until when criminal prosecution is merited.

Recent legislative developments have led to a so-called demise of the legality principle[64] and the aims of punishment have partially integrated the interests of the victim.[65] This is why it is not surprising that some have promoted or celebrated the relaxation of the rules of temporal limitation from the victim's perspective.[66] This relaxation has been restricted to a group of offences with particular features — some types of child sexual abuse, aggravated murder and crimes against humanity — where the personal damage takes

62 Renzikowski (n 35) 214. [my translation]

63 In the words of Gärditz '*Strafrecht ist Staatsräson'*, Klaus Ferdinand Gärditz, '*Staat und Strafrechtspflege'* (Schöningh 2015) 84.

64 See above, Chapter 3.3.

65 Tatjana Hörnle, 'Die Rolle des Opfers in der Straftheorie und im materiellen Strafrecht' (2006) 19 JuristenZeitung 950; Klaus Günther, 'Criminal Law, Crime and Punishment as Communication' (2014) 2 Normative Orders Working Paper 22.

66 Anja Schmidt, 'Täter — Opfer — Staat. Zur Stellung des Opfers im Strafrecht' in Nina Nestler and Martin Asholt (eds), *Grundlagen und Grenzen des Strafens* (Nomos 2015) 200.

particular priority. It has not yet affected offences of a more varied gravity and all sorts of protected interests (patrimonial, collective, of probity, etc).

The objective interests of victims are still not a driving force in German criminal justice. Instead, they are considered at the margins in order to avoid results that are extremely denigrating or demanding. For this reason, it is internally coherent with the German view that they will retain a categorical mode of temporal limitation, with some discretion at the borders. Discretion and consideration for the victim work well together. However, to date, the change has not been systematic, creating distortions that have not been duly justified.[67]

9.7. Conclusion

A comprehensive theory of victims' objective interests would probably speak in favour of a discretionary mode of limitation rather than a categorical mode, as follows from the analysis in the first part. From the second part of the chapter, we have better understood how the current laws and legal cultures can make space for both modes, and how the values that underpin these paradigms of the victim are connected to the mode of limitation chosen by each legal system.

In the case of Germany, the categorical limits have found exceptions in cases where personal damage takes particular priority, with a certain overlap in the reasoning with areas where the law has also given more recognition to the complainant's procedural rights and an entitlement to state prosecution, namely in child sexual abuse. The tension is, thus, making changes at the margins. But the concern for the victim does not seem to be affecting

[67] Tatjana Hörnle, 'Verfolgungsverjährung: Keine Selbstverständlichkeit', *Festschrift für Werner Beulke zum 70. Geburtstag* (C F Müller 2015) 126.

the core of the workings of the time limits there, and the values behind categorical limitation seem to be upheld, nevertheless.

The English discretionary approach relies, at least in theory, on the capacity of the victim to prosecute on her own or on her ability to convince the public prosecutor of the public interest of the case. This may expand the number of victims who gain access to justice even after a long time, the other side of this being that this process makes them a sort of public official and champion of justice. Their assessment of the relevance of a specific prosecution will be determinant, especially if they can afford to prosecute themselves.

In the next chapter, I will turn to the accused. I will ask whether a more humane criminal law, focused on the dignity of the suspect, has anything to say about time limits and how the criminal law takes account of relevant changes in the offender over time.

CHAPTER 10. RESPECT FOR THE ACCUSED: TWO DEBATES

In previous chapters we have seen that one of the traditional substantive justifications for limitation periods is the assumption that there are significant changes in peoples' lives over time. Classically, it is said that the legally unresolved situation has had an effect on the offender (as natural punishment)[1] or that she is no longer dangerous to society and thus there is no need for rehabilitation,[2] or both. We have also studied some traditional procedural justifications for limitation periods, related to the disadvantage in gathering evidence for the accused after a long time has passed and the fear of judicial error,[3] as well as the individual's right to a process without undue delay.[4] All of these bear on the position of an accused[5] being prosecuted a long time after the alleged commission of a crime.

This chapter will address a different set of topics that have received less attention in the literature, and that may add to our evaluative and comparative perspective.

One is the use of time-based arguments to assess whether blaming is a diachronic form of moral reasoning, and whether these arguments have any bearing for the criminal attribution of blame. This argument revolves around the identity-change thesis proposed in moral philosophy.

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1 See Chapter 7.1.

2 See Chapter 6.1.

3 See Chapter 8.1. and 8.2.

4 See Chapter 4.4.2.

5 The concept of the 'accused' is not being used in the specific technical sense that a legal system may assign to the person suspected of having committed a crime only after certain prosecutorial acts have been directed against her (e.g. as an equivalent either to the *Beschuldigte*, *Angeschuldigte* or *Angeklagte* in terms of § 157 StPO). The term aims to encompass 'mere' suspects, defendants and actual offenders, at any time of the investigation, prosecution or trial. Even further, most of these arguments should be considered as referring to any potential accused, and thus to all members of society, and the expected protections that they deserve from the abuse of the criminal law.

The second topic is the existence of a dignitarian argument based on a 'humanitarian principle', that would call for restraint and limits to be designed for the criminal law. Three approaches will be adopted to analyse this topic: a moral, a political and a human rights-based one.

The chapter therefore asks how to make the criminal law the best possible criminal law: what its limits should be, and how it should consider the accused's interests and institutionalise them, is what concerns us.

10.1. Blaming the offender in time and the identity-change thesis

The criminal law can be seen as a triadic system: it holds people responsible, blames them and calls them to account, determining 'who is responsible for what to whom'. This section will deal with the first part of this triad, the alleged offender. A key question is whether it can be meaningfully said that the person being blamed and held responsible is 'the same' person who allegedly committed the offence a long time ago.

Theoretical concerns about changes in the identity of the accused focus on the possibility that there has been a substantial change in the person's defining psychological characteristics: it would be inappropriate to attribute to her the deeds of someone who she is no more.[6] 'Man differs over time, as if it were two different people'.[7] Two versions of this argument exist: one that requires the concrete individual under consideration to have

[6] In terms of Silva Sánchez, this would infringe the principle of personal culpability, at least as it is mostly recognised in criminal law theory of the civil law context, Jesús María Silva Sánchez, 'Identität und strafrechtliche Verantwortlichkeit' in Hans-Ullrich Paeffgen and others (eds), Strafrechtswissenschaft als Analyse und Konstruktion. Festschrift für Ingeborg Puppe zum 70. Geburtstag (Duncker & Humblot 2011) 989.

[7] Pulvermacher, cited in Martin Asholt, Verjährung im Strafrecht (Mohr Siebeck 2016) 127. It must be said that any concern of this type, if intended to be used in relation to a general system of limitation, can only apply to a system with very extended periods. This is not the reality of criminal limitation periods in the current law, as pointed out by Rinat Kitai-Sangero, 'Between Due Process and Forgiveness: Revisiting Criminal Statutes of Limitations' (2013) 61 Drake Law Review 423, 438-439.

undergone a transformation, and another that presupposes or posits that such a change is a universal phenomenon applicable to all potential suspects.

Within the criminal law, identity theses are not visibly influencing the law in England and Wales and Germany. In practice, however, they do play a role in sentencing; in both jurisdictions some criteria have been developed for considering the effects of the passage of time on the offender.[8] Assuming that these effects are well grounded, this is a reason to consider that indeed our moral, social and political arrangements work on the basis of some form of diminished capacity or willingness to fully blame someone after a long time. And there does not seem to be a reason to exclude the same reasoning from operating before the decision on guilt. This stage before the decision on guilt is what in criminal law is the stage of prosecution.

Strong versions of the identity-change theses come with different emphases. In anglophone literature, the best-known version is by Regan:

> Although the criminal was (and perhaps timelessly is) deserving of punishment, the criminal is no longer accessible to us. Inhabiting the criminal's body and social role, we find a new woman.[9]

The problem here is that it lies beyond the law as a science to determine whether this theory has the requisite empirical basis or not, if such a psychological change does indeed occur in human lives. One could call this objection the 'empirical challenge'.

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8 For an analysis of these influences on sentencing law in both legal systems, see Chapter 4.4.3.

9 Donald Regan, 'Paternalism, Freedom, Identity and Commitment', *Paternalism* (University of Minnesota Press 1983) 122, when talking about a reformed prisoner.

Alternatively, a philosophical account is needed to reveal a construction of human identity and biographies on a different basis.[10] This author does not provide such foundations.

Such an alternative would be to adopt an assumption that time changes human souls, an assumption which leads Lourié to justify a categorical mode of limitation. He underlines that the psychological relation between deed and doer is lost with time and thus criminal sanctions will not address the wrong originally committed.[11] Here there is no need for an empirical confirmation of any such change, but the assumption still requires a total displacement of the identity such that the past deed cannot be attributed to the new self. This perspective has sometimes been called 'metaphysical', as a counterpoint to the 'reductionist' or 'empiricist' approaches.[12]

Many theorists are staunch opponents of the idea that any change in identity can be relevant for the criminal law and consider that presupposing continuity in identity is necessary for any attribution of responsibility. Feinberg, for example, has argued that:

> [T]he earlier self and the later are the same self, not morally distinct persons, but rather one person at different times. [...] All of our ordinary notions of responsibility, as well as such basic moral practices as promise-making, presuppose a continuity of personal identity between earlier and later stages of the same self. […] Genuine repentance, as well as such states as contrition, remorse, the feeling of guilt, and the desire for atonement, all require some sense of continuity with the past and self-identity with an earlier wrongdoer.[13]

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10 Asholt (n 7) 128.

11 Samuel Lourié, *Die Kriminalverjährung* (Schlettersche Buchhandlung 1914) 59 f. This theory applies regardless of the direction or type of change suffered by the person (contrary to the alleged effects of the passage of time in terms of deterrence and rehabilitation).

12 Silva Sánchez (n 6).

13 Joel Feinberg, *Harm to Self* (Oxford University Press 1986) 83—84.

This counter-argument can be called the 'nature of criminal responsibility objection'.

In order to overcome the empirical challenge and the responsibility objection, it is possible to refer to yet another formulation of the identity-change thesis. Derek Parfit's proposal could first be used for this endeavour.[14] Parfit considers that identity is not a fact in itself but is constituted by the various continuities between two entities. This characterisation allows for showing a relationship between a person at one time and the same person at another time. These are a matter of degree and allow a 'discount rate' in time, but not with respect to time itself but because of the incremental weakening of the psychological connections and the bodily ground from the original entity:

> When some convict is now less closely connected to himself at the time of crime, he deserves less punishment. If the connections are very weak, he may deserve none. This claim seems plausible. It may give one of the reasons why we have Statutes of Limitations, fixing periods of time after which we cannot be punished for our crimes.[15]

This understanding does not require any concrete empirical evidence in the particular case of any such psychological change. Others, too, have expressly used similar accounts as possible arguments in favour of time limits.[16] Already at the end of the nineteenth century, Gabriel Tarde proposed a theory of identity that was capable of being accommodated within the theory of criminal responsibility.[17] Like Parfit, Tarde does not claim that there are breaks in a person's identity, but rather that there are gradual changes

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14 For a brief account see Derek Parfit, 'Personal Identity and Rationality' (1982) 53 Synthese 227.

15 Derek Parfit, *Reasons and Persons* (Clarendon Press 1987) 326.

16 Carlos Santiago Nino, *Radical Evil on Trial* (Yale University Press 1998) 182; Thomas Steenbreker, *Identität und Freiheit* (Mohr Siebeck 2020) 81—84.

17 Gabriel Tarde, *La philosophie pénale* (Storck and Masson 1890) ch III.

which may happen quicker at some points in a person's life.[18] For example, he claims that such changes are faster before adulthood. This justifies, in his view, shorter limitation periods for offences committed by youths. These regulations should not depend on any individually observable change, but should apply to the whole category of youth offenders.[19] But more generally, he relates what he considers undeniable change as the foundation of categorical limitation. Steenbrecker sees in such a construct the possibility of recognising the diachronic nature of identity, not in single cases, but as a general characteristic of the phenomenon of personal identity, which would demand some recognition by the law.[20] If these proposals succeed, they would have gained some traction against the 'empirical challenge' and the 'nature of criminal responsibility objection'.

Yet many remain sceptical about the identity-change view. Some desert-based accounts, which are still concerned with the capacity to blame an offender, recognise other influences of time in the fair attribution of criminal liability over time but abandon the issue

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18 A helpful image to understand the way this theory explains identity changes is by reference to punctuated equilibrium in evolution theory: there are periods of little change, and then others when one or several huge changes occur at a time. This is to be contrasted with graduated evolution. Many thanks to M. Dyson for proposing this comparison.

19 The law in the UK seems to be surprisingly receptive of this type of arguments, see *Dyer v Watson* [2002] UKPC D1; *HM Advocate v P* [2001] SLT 924. As analysed by Jackson *et al.*, courts have considered that, for instance, 'a child of 13 may be very different from the same child when he or she is 15 years old, both in terms of physical development and in terms of maturity and understanding with the result that the jury may have a very different impression if a 15 year old is in the dock than they would have had if they had seen the same individual when he was 13. It may be particularly difficult to assess the state of a child's understanding of sexual matters and sexual relationships when the child was 13, if he or she is not placed on trial until two years later', John Jackson, Jennifer Johnstone and Joanna Shapland, 'Delay, Human Rights and the Need for Statutory Time Limits in Youth Cases' [2003] Criminal Law Review 510, 515—516. As they see a human rights issue at stake, they thus consider that '[m]anagerial reforms and targets […] do not ensure effective legal action on a matter of human rights for each and every youth case. For this there needs either to be fast and effective remedy or, better, legislative enactment of relevant standards'. It must be noted that they are considering the benefits of intra-procedural time limits. In any case, these arguments are not exclusive to those statutory bars, and seem applicable in full to time limits for the prosecution of crimes.

20 Steenbreker (n 16) 206—207.

of identity. 'Desert-claims are multi-dimensionally time-sensitive'[21] because all parts of the criminal desert (harm, culpability and agency) can be captured at the moment of the commission of the offence. However, one could argue that the content of these elements mutates over time. This would give a place to the need for an individual assessment of blame in order to establish an adequate state reaction for the particular case. This would not ground categorical but rather discretionary limits, based on a series of criteria to be assessed for the particular case.

A view committed to the idea of identity change either in its stronger or weaker version is in line with the adoption of categorical time limits, while one that denies it but acknowledges some degree of contextual time-sensitiveness would require the adoption of the discretionary mode with its case-by-case decision-making structures.

10.2. Humanitarian principle

A criminal law committed to the Kantian notion of human dignity might incorporate what has been called a humanitarian principle. Under such a principle the content and instruments of the criminal law should be committed to not treating individuals as mere means towards other ends, and in accordance with the protection of their personal dignity. Humanity as such is not a principle in English criminal law,[22] unlike in German criminal law,[23] but it has been a flagship in movements for reform for centuries. In both legal

21 Antje du Bois-Pedain, 'Penal Desert and the Passage of Time' in Antje du Bois-Pedain and Anthony Bottoms, *Penal Censure: Engagements Within and Beyond Desert Theory* (Hart 2019) 247. For a similar view, Julian V Roberts and Netanel Dagan, 'The Evolution of Retributive Punishment: From Static Desert to Responsive Penal Censure' in Antje du Bois-Pedain and Anthony Bottoms, *Penal Censure: Engagements Within and Beyond Desert Theory* (Hart 2019).

22 The attempt led by Ashworth to use human rights as an evaluative standard for criminal law and procedure might be seen as the closest development. See, for instance, Andrew Ashworth, Mike Redmayne and Liz Campbell, The Criminal Process (5th ed., Oxford University Press 2019).

23 'Today there is widespread agreement that the principle of humanity, properly understood, should be the fundamental principle of criminal policy and criminal law: A criminal law system that aims

systems, these ideas have been discussed since the reorganization of criminal law and procedure in the nineteenth century[24] and in Germany they are still present today in the scholarship and argumentation, in particular in the context of sentencing.[25]

10.1.1. Moral ideal?

Nigel Walker, for instance, pondered humanitarian considerations as an alternative route to advocate for upper limits on punishment:

> It is a fact of history that it has been humanity, not notions of utility or desert, which has inspired opposition to the death penalty, attainder, loss of civil rights, castration and other mutilations, flogging, transportation, and solitary confinement. […] their underlying motive was humanitarian: a feeling that such things should never be done to human beings […]. As for rights, humanitarianism can prompt actions which people cannot claim as of right.[26]

The core idea in humanitarianism is that a criminal law that is respectful of the individual puts at the centre the protection of humanity and dignity. Its focus has certainly been more on the accused, in the context of a criminal law seen pre-eminently as a matter between the state and the offender. Humanity is seen to be more important in criminal law than in other areas of the law, as 'there, where the power of the supreme state triumphs most powerfully over the individual in the ambit of the legal life, the common humanity

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exclusively at protecting human interests is one that answers to the requirements of a theory of legal interests (*Rechtsgutlehre*) and a formalized control of deviance'. [my translation], Winfried Hassemer and Ulfrid Neumann, 'Vorbemerkungen zu §1', *Kindhäuser/Neumann/Paeffgen Strafgesetzbuch* (Nomos 2017).

24 Randall McGowen, 'A Powerful Sympathy: Terror, the Prison, and Humanitarian Reform in Early Nineteenth-Century Britain' (1986) 25 Journal of British Studies 312.

25 Hans-Heinrich Jescheck and Thomas Weigend, *Lehrbuch des Strafrechts. Allgemeiner Teil.* (5th edn, Duncker & Humblot 1996) 27—28.

26 Nigel Walker, *Why Punish?* (Oxford University Press 1991) 131—132.

can least be repressed'.[27] Thus, good criminal law is the law that self-limits itself with a view to underscoring the maximum value of freedom of the individual. One of the expressions of this movement was the introduction in the Declaration of the Rights of Man and of the Citizen of its Article VIII, stating that '[t]he law should establish only penalties that are *strictly and evidently necessary*'.

The necessity of punishing offences when a long time has passed since their commission is usually discarded in line with the aims of punishment, as we have seen in Chapters 6 and 7. But whether there is a necessity to punish or not may well be something that ought to be decided on a case-by-case basis. The traditional criteria regarding the diminishing necessity for punishment are not sufficient to deny the need *ex ante* for a reaction before every single potential instance of offending. Thus, the necessity criterion *per se* would not justify the establishment of a categorical mode of limitation.

Walker highlights two characteristics of humanitarian thinking on punishment,[28] which, if extended as part of a more general approach to the criminal law, might give us a clue as to how it is connected to the defence of categorical limitation. First, he says, humanitarianism would promote greater protections for more serious crimes. Protections would be less restrictive, when considering penalties for the 'commoner and less serious offences', which would also be punished less severely. Second, he claims that —by contrast to his understanding of retributivism— the humanitarian principle endorses a certain detachment from the characteristics of the offence as it was actually committed. Hence, it

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27 Thomas Würtenberger, 'Humanität als Strafrechtswert' (1948) 3 Süddeutsche Juristen-Zeitung 650. [my translation]

28 Walker (n 26) 134.

does not consider aggravating or mitigating factors, especially in regard to culpability, for establishing the right limits to punishment and protections.

These considerations have much in common with some of the elements of the shape that categorical limitation takes in legal systems where limitation is the general rule. One the one hand, this reasoning recognises the need to distinguish between more and less serious offences. But the object of such a distinction is to grant *strict* protection against abuse for those who, in principle, would be more harshly punished. Thus, a humanitarian line of thought is willing to sacrifice more actual enforcement of the criminal law for serious offences if that will protect the greater value of human dignity. At a minimum, humanitarianism would retain the same protections for those accused of more serious offences, and not subject them to a more precarious situation. Precisely in the context of excluding the most serious crimes from limitation, Guzmán argues:

> Resenting the demands of humanity before the most heinous criminal, in the name of humanity itself, is equivalent to recognizing that the guarantees do not apply equally to all and is an indicator of the weak line with which that right treats them. More than a resigned recognition, it is a capitulation.[29]

Contrary to the general intuition that graver crimes require keeping the contingency of prosecution open, this principle of humanity would require the application of at least *some* categorical limit to them, even if the more extensive period were still allowed due to other considerations such as the longer memory of them, or some preventive rationale.

On Walker's second characteristic of the humanitarian commitment, he contends that one cannot and ought not see inside people's consciousnesses or specific paths in life.

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[29] José Luis Guzmán Dalbora, 'Crímenes internacionales y prescripción' in Kai Ambos, Ezequiel Malarino and Jan Woischnik (eds), *Temas actuales del derecho penal internacional: contribuciones de América Latina, Alemania y España* (Konrad-Adenauer Stiftung 2005) 78. It could be argued, thus, that the German regime falls short of this expectation.

The humanitarian needs to respond to all human beings equally, even if that means disregarding the specifics of their culpability.[30] This might be seen as one of the reasons why there is no alteration of the time-limits according to the seriousness of the offence as-it-happened in real life. Aggravation and mitigation play no role, and harm and culpability also play no role. Limitation periods are attached to the relative intensity of the punishment threatened for the whole category of crimes under the same definition, detaching them as much as possible from the specific characteristics of the events as they are occurred.

In the quandary between discretionary and categorical modes of limiting the criminal law, some proponents of categorical limits associate their claim with a dignitarian principle. Eberhardt, for instance, considers that any form of imprescriptibility (which, as we have seen, is a form of keeping the contingency of punishment open just like a discretionary limit) means ignoring the passage of time. This, in turn, shows an attempt at totality that is incompatible with respecting the common humanity of the other, an attempt at domination of the other without limits.[31] The lack of limits to subject an individual to the control of the criminal law is to turn her into a slave of an all-mighty judge for eternity.[32] If the criminal is othered, such a distinction leads to the dissolution of the boundaries that

30 The fact that crimes against humanity were the first ones to be excluded from limitation speaks, to put it in this vocabulary, about the assessment of those criminals as inhumane. The extension to aggravated murder, e.g. in Germany, could be seen as a dehumanisation of the offender. Probably the latest developments in child sexual offences are related to a further step in the dehumanisation of sex offenders, who are seen as depraved enemies of the public and society. This 'social defence aim' resonates with the aims of the criminal law and the scepticism about time limits expressed by certain schools of criminological thinking mentioned in Chapter 11.1.

31 Marcos Eduardo Faes Eberhardt, '(Im)prescriptibilidade Penal: Uma leitura ética para além du esquecimento' (Pontifícia Universidade Católica do Rio Grande do Sul 2008). See also Fabiola Girao Monteconrado, 'La imprescriptibilidad de los delitos internacionales: un signo autoritario del derecho penal internacional' (Pontificia Universidad Católica de Valparaíso 2016).

32 Eberhardt (n 31) 72.

we would impose to respect common humanity. Under this view prosecutions become intolerable:

> [A]n imprescriptible punishment would leave the offender who awaits expiation in a condition 'contrary to the sense of humanity': a state of perpetual precariousness, of semi-life with all the more alienating effects, the higher the punitive debt to be extinguished.[33]

The logic of limitation entails negating an exercise of punishment for its own sake and instead promotes recognising that time has acted upon it.[34]

10.1.2. Political ideal?

In general, limits to the *ius puniendi* must be respected because the criminal law's 'temporal limits are a guarantee that the State will not use its power beyond its social need: a *Rechtsstaat* ought to shrink the possibility of affecting human dignity to the barest minimum'.[35] The individual should not remain at the mercy of the state:

> in order not to put the individual at the mercy or remain eternally available to the power of the State; in a situation of this type, where the criminal threat has not yet taken place *but could take place* indefinitely, it is difficult to affirm that the subject can, even abstractly, develop his existence in full form, especially if, as happens in the case of limitation periods, these

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33 Fausto Giunta and Dario Micheletti, Tempori cedere: prescrizione del reato e funzioni della pena nello scenario della ragionevole durata del processo (G Giappichelli 2003) 47. [my translation]

34 Eberhardt (n 31) 76.

35 Alberto Binder, 'Prescripción de la acción penal: el indescifrable enigma de la secuela del juicio' (1990) 4952 Revista Doctrina Penal 280. [my translation]. The authors speak of the *Rechtsstaat, Stato di diritto* or *Estado de Derecho*, which I will take to be synonymous with each other, but different from the concept of 'rule of law'. For a brief clarification see Lucia Zedner and Carl-Friedrich Stuckenberg, 'Due Process' in Kai Ambos and others (eds), *Core Concepts in Criminal Law and Criminal Justice* (Cambridge University Press 2019). In brief, I understand these concepts to mean a characteristic of the state and its legal boundedness and respect for a number of core modern principles. Being in accordance with the *Rechtstaat* cannot be predicated of non-state legal orders (if such a concept makes sense). Some reflections on the relationship between modes of temporal limitation and the rule of law will be addressed in Chapter 11.

> mechanisms also benefit persons who are formally and substantively innocent.[36]

Despite these forceful statements, it is difficult to understand why such a difference would arise between allowing prosecution only up until a lengthy period such as 20 or 30 years and allowing it indefinitely. Allowing an extremely wide-reaching operation of the criminal law might be problematic for liberal principles in general, and for all potentially accused individuals. This is significant and might be reason enough to adopt categorical limits. But it does not seem to be strong from the perspective of designing an adequate limitation system.

Two alternative understandings of the protective function of time limits remain. A moderate position may consider categorical time limits as a 'judgement of prudence by the state about the conditions of the exercise of its own punitive claim'.[37] The legislator ought to err on the side of caution and put an end to the possibility of using the criminal law.[38] It is a sign of the commitment to the *Rechtsstaat*, 'not keeping the contingency of punishment open indefinitely, setting a deadline to make it (eventually) effective'.[39] The notion of *Rechtsstaat* behind this idea is that the state, bound by the law, is subject to constrictions of diverse types, to the benefit of the individual. In this case, the constriction is a temporal one.

A stronger claim against allowing prosecutions a long time after the alleged commission of an offence from the perspective of individuals is that of instrumentalization.

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36 Carlos Cabezas, 'Prescrizione del reato: tra antica eredità e moderne sfide politico-criminali' (Università degli Studi di Trento 2014) 111. [my translation; emphasis in the original]

37 Juan Pablo Mañalich, *Terror, Pena y Amnistía* (Flandes Indiano 2010) 213.

38 Karl Binding, *Handbuch des Strafrechts*, vol 1 (Verlag von Duncker & Humboldt 1885) 822.

39 Mañalich (n 37) 213.

This might be the narrowest sense in which the principle of humanity, as an expression of Kantian dignity, is to be understood: the value of human life implies that no person should be treated as a means to something else. Allowing an eternal threat of punishment would 'break the natural limits of human existence, transforming the individual in a means to the ends of others'.[40] The fight against crime and the protection of victims are alien ends, for which the person should not be instrumentalised.

One way in which the passage of time and late prosecutions express the danger of instrumentalization is well known in history. Critical prosecutions after several decades have been those that address past horrors. The classic example of the prosecution of participants of Nazi concentration camps once again comes to mind, where some say that the reason for prosecuting participants low in the power ladder after more than half a century is due more to 'bad consciousness' than to their personal guilt.

> The bad consciousness of criminal justice before impunity which darkens certain nations' pasts, is the decisive factor in an evolution —in my opinion of dubious benefit— which might well be catalogued as an involution [the introduction of imprescriptibility]. In such cases, what is in discussion is not the criminal offence or punishment in themselves, but actually the seriousness of the underlying phenomenon, the one which demands unreserved punishment.[41]

Acting on a guilty conscience is not doing justice. It is a form of more or less arbitrarily compensating with something that is not what was due, for our past misdeeds.

Maybe it is little surprising that the area where the introduction of categorical limitations is being discussed in England and Wales is precisely that of war crimes and the

40 Monteconrado (n 31) 52.

41 Guzmán Dalbora (n 29) 76.

deployment of military power against civilians, both on UK territory and overseas.[42] These terrible circumstances entail great social repentance in regard to the way that these horrors have been handled, but at the same time conflicting views about the best way to deal with the past. Addressing specific individuals and making them responsible for the collective attitude adopted when the offence was committed and in its aftermath might be seen as a form of instrumentalization.[43]

Much of the potential of a humanitarian principle to help us in our inquiry depends on what it really entails and where it becomes applicable. Its most common use merely as a sentencing principle. This is often not clearly justified and restricts the potential of the principle in grounding better consideration for all members of a community. However, if we were to consider the whole of the criminal law and procedure as potentially an affront to humanity, its general existence would be difficult to sustain. Any non-abolitionist would have to concede that at least in the generality of cases, criminal law and humanity are compatible. As for the potential excesses, it seems that scholarship outside of the scope of temporal limits addresses the principle of humanity in cases of physical or psychological incapacity of the accused to be subject to criminal investigation, prosecution and trial. And incapacity does not necessarily have to do with the passage of time since the commission of an offence. Therefore, either one must adhere to a radical critique of the criminal law as significantly inhuman or one must concede that the use of the humanity principle is relatively narrow and related to specific circumstances of an offender.

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42 John Jackson and Jenny Johnstone, 'Statutes of Limitation in the United Kingdom' (2022) 49 DPCE Online 3898 ff.

43 One could think that the dictum 'justice delayed is justice denied' applies both ways. There is suffering and problematic consequences, not only for the victims, who have seen their interests not protected by the legal system (see Chapter 9), but also for the offender who has not had her day in court soon enough.

10.1.3. Human rights entitlement?

A final way to approach this debate, with a similar root but different implications, is to analyse the possible existence of a human right to categorical limitations, which is above the contingent legislative decisions of a determined jurisdiction. Such a proposal has recently been explored by Esser at the European level.[44] In order to achieve such a general requirement he relies on the (mostly minority) opinions on this topic by judge Pinto de Albuquerque, sometimes with the support of other judges. Despite being in the minority, his reasoning may have found some resonance in the Court. In recent decisions, it has considered that the non-application of existing limitations is a violation of Art. 7 ECHR, in that it infringes the requirement of 'punishability' contained in the requirement of the act or omission 'constitut[ing] a criminal offence under national […] law'. Therefore, Art. 7 is not only demanding the specification of the elements of the offence and the assigned punishment, but also other requirements of 'punishability'. This in turn is consistent with a substantive understanding of limitation periods.[45]

This shift has allowed Esser to argue for a requirement under international law to regulate the point in time from which prosecution is no longer at stake.[46] The whole of the national regulation would be guided by the principle of proportionality as well as the conventional rights of victims. Under such an approach most offences would be covered by categorical limitation, but it might be possible to exclude some criminal offences from

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44 Robert Esser, 'Verjährung der Strafverfolgung — ein Menschenrecht?' in Gudrun Hochmayr and Walter Gropp (eds), Die Verjährung als Herausforderung für die grenzüberschreitende Zusammenarbeit in Strafsachen (Nomos 2021).

45 See Chapter 3.2.2.

46 Esser (n 44) 70.

limitation and allow for their 'eternal prosecution', when it is sufficiently clear to all potential defendants that their gravity merits such a different treatment.

Such a right has not been found to exist until today. Part of the explanation, as this thesis has shown, is that having categorical limits is not a *condictio sine qua non* for a criminal law that is respectful of human rights and other humanitarian concerns. However, if Esser is right and there is sufficient basis to ground such a right under European human rights law, categorical limits should be considered in particular for systems of mandatory prosecution and where it is felt that there are no sufficient controls of possible violations of the fundamental rights under the Convention. It seems, by the traditional logic of human rights jurisprudence,[47] that the solution would end up relying on some judgements of proportionality between the intrusive effects of use of the criminal law and the wider social goods that are purportedly associated with its application a long time after the commission of an offence. This is not a form of reasoning internal to the criminal law. Criminal law is traditionally seen as distinct from other forms of regulation, characterised among other things by a binary decision on liability and a closed catalogue of sentencing options. A proportionality judgment is necessarily context-dependent, as it requires an evaluation of means and an adjustment of the norm to the circumstances of the accused. Even a discretionary mode of decision-making would struggle to accommodate such disparate criteria.

[47] Alec Stone Sweet and Jud Mathews, 'Proportionality Balancing and Global Constitutionalism' (2008) 47 Columbia Journal of Transnational Law 72.

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This section has addressed three possible paths based on the principle of humanity, to compare the virtues of categorical and discretionary time limits. One, which is a moral evaluation, criticises othering the accused eternally, and subjecting her to the power of the state forever. The second, which we may call a political one, criticises the excesses of state power that can arise when there are unclear limits regarding its action through the criminal law. The third, the legal route, considers that categorical limitation is a human right. As such, even if not an absolute argument, at least a pro tanto argument sufficient to establish a right is promoted.

All of these routes to sustaining categorical limitation have some appeal, and also significant limitations. One would have to be an unfaltering sceptic (or abolitionist) of the criminal law to believe that any late application of it is akin to a dehumanising act. Avoiding instrumentalization is closer to an institutional argument, for which there could be potential alternatives. Finally, the human rights argument is tentative and does seem to require finding an infringement of other particular rights in the individual case to make a plausible claim.

Discretionary limits do not in themselves solve these problems either. They rely on the consequent and fair application of prudential criteria precisely in ethically complex contexts. If there is indeed the possibility of dehumanising persons accused of a crime, this type of limit is powerless against it. If there were sufficient ground even to found in principle a right to limitation, then the burden would be on the proponent of discretion to show that in all imaginable cases there would be other protections in a given legal system that would avoid a human rights breach.

10.3. Conclusion

Efforts to assess categorical and discretionary modes of limitation focusing on the offender yet again show a complex landscape. While assuming that the identity-change thesis can justify categorical limits, a more moderate notion that recognises some level of dynamism of all elements of the offence could rather speak in favour of a discretionary approach. The identity-change thesis requires an important ontological commitment, which many are not willing to accept. Such a view is also not one that is dominant in criminal law attributions of responsibility and will be at odds with those who see protection in a more static understanding of criminally relevant elements. But a view that finds dynamism in different elements of the offence and in more than one specific direction is compatible with adopting a discretionary mode of limitation.

Humanitarian commitments serve as a way of generally restricting the use of state power. The application of this notion to temporal limits is used to justify the need for a categorical rule that no representative of the state can discretionarily disapply, and which defines the reach of the criminal law into the future. Humanitarian concerns are laudable and central to a criminal law committed to the respect of dignity. However, it is difficult to see how they can reach beyond a concern for the instrumentalization of individual cases. If there is a humanitarian problem with the criminal law as a whole, a mere temporal limit is certainly insufficient to make it right.

One could think that what is in the interest of the accused is always that there are the briefest categorical limits possible. However, it is difficult to sustain such a notion directly when looking at other pillars of the criminal law, especially considering the ontological commitment to continuity of individual identity. But a normative position that aims to be as protective as possible might indeed prefer them over discretionary methods,

especially in view of the possible instrumentalization of cases when there are contextual changes of circumstances that lead to use the criminal law for something other than the ideal and pure attribution of individual criminal liability. Against such prosecutions would be, to borrow Packer's words, 'the moral embarrassment inherent in the instrumental use of one person's suffering to affect the conduct of others […] heightened by the perception that the punishment is not merely instrumental but also disproportionate'.[48]

[48] Herbert Packer, The Limits of the Criminal Sanction (Stanford University Press 1968) 288.

CHAPTER 11. THE STATE: UPHOLDING VALUES AND AVOIDING PERILS AFTER A LONG TIME

The aim of this chapter is to assess how the two institutional mechanisms for limiting prosecutions studied in this second part of this work (categorical and discretionary modes) perform in relation to four debates typically addressed in regard to criminal law as an eminently state-controlled activity. To be sure, these are not the only possible approaches to evaluating the categorical and discretionary modes' performance. But they enshrine a range of topics in the current discussion about the justifications for, and effects of, state action and inaction with respect to criminal offences. Therefore, they constitute good angles from which to evaluate arguments that might be put forward to introduce (or, conversely, to reject the introduction) of specific forms of time limits. The same two generalised models developed for the rest of Part II will be used as a shortcut to refer to the main structural differences between England and Wales and Germany.[1]

The first debate will confront the fear of authoritarian or abusive uses of the criminal law, and whether time limits can be understood as mechanisms that constrain such tendencies. The constellation of categorical and discretionary powers will prove relevant although not exclusively necessary to achieve such controls.

The second is the issue of standing, or the potential loss of the moral entitlement to legitimately exercise that state power. The key question is whether the state loses the (moral) standing to hold a person to account through the criminal law due to the passage of time. The conclusion will be that even if some analogy can be drawn with possible causes of loss of standing, particularly with the idea of 'meddling' and the lack of territorial jurisdiction, this form of reasoning does not help in assessing time limits definitively. Thus,

[1] See *supra* 4.3.

this section will be dedicated to exploring the lack, or loss of normative justifications for prosecution, if there is any.

The third discussion will compare categorical and discretionary limits in terms of the type of legal standard that they are from a jurisprudential perspective. To assess whether there are benefits in using one or the other form of legal regulation when it comes to controlling prosecutions, certain constitutive elements of the rule of law theory will be examined. This section will show that even if it is not always the case that categorical rules help better attend to the demands of the rule of law, there are certainly difficulties with the discretionary mode that are often underestimated.

The fourth and final section will deal with the notions of impunity and non-punishment, and whether justice can be achieved when an in-principle criminalisation is exceptionally avoided. In order to assess the discretionary non-prosecution due to the passage of time, the idea of prosecutorial decriminalisation will be explored, and the potential benefits and perils of this technique will be examined. Conversely, categorical time limits will be assessed in terms of legislated impunity. Distributions of competences and delegation will, therefore, be the main concern of this section.

11.1. Fear of authoritarianism and abuse

The criminal law can be —and indeed has been— misused. Different sets of norms are intended at taming state power, in particular when criminal law is understood as a preeminent state function. Some legal systems have found one such tool in time limits and have reflected on the relationship between the temporal limit to the criminal law and the structure of the constraints to the exercise of state power.

One could be inclined to say that only categorical modes of limitation can actually serve to constrain abuses of the criminal justice. Otherwise —if left to a case-by-case

decision— the criminal law entails the risk of targeting and selecting who will be prosecuted on an arbitrary basis.[2] In the extreme, this arbitrariness can turn into instrumentalization and abuse. This is a fear shared not only in Germany but also in other countries that have deposited their faith in categorical time bars.[3]

When it comes to sources of abuse, a particular risk has been seen in late prosecutions. The criminal tool is not uncommonly used to suppress political dissidence. And often this involves retaining the power to prosecute.[4] More generally, the fears of a criminal justice system used to extort, pressure, and coerce for reasons other than the aims of the criminal law, or of a drive of those aims beyond the respect for individual freedoms, is behind the calls for restraint. Beyond individual cases, an opportunity has been seen in old crimes by certain authoritarian regimes to impose their order. One such example of the relation between the two is the removal of the limitation for counter-revolutionary offences in the Soviet Code of 1926, and its replacement with a discretionary mechanism: being able to prosecute in exchange for substituting a lesser sanction in place of the death penalty.[5]

The idea that liberal political commitments need to be protected, among them freedom of speech, is one of the reasons why several legal systems have had exceptionally brief limitation periods for offences committed by the press. France is a good example. As Danet has argued, this subject touches the heart of politics. He shows how the regulation of such time limits varied regularly during the nineteenth century according to the more or

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2 See Chapter 8 of this thesis.

3 See Félix Mª Pedreira, 'Breve referencia a la historia de la prescripción de las infracciones penales: especial consideración de la problemática surgida en el Derecho Romano a través de dos aportaciones fundamentales' [2007] Revista de Derecho de la UNED 444.

4 One example was the creation of the offence of contumacy and the extension of its limitation period by the Fujimori government in Peru, in order to target his predecessor, Alan Garcia. The Inter-American Commission on Human Rights recommended that the State take measures, accepting Garcia's claims that his human rights were being violated. Garcia v Peru, Case 11.006 Inter-AmCH (1995). Víctor Prado Saldarriaga, 'Causales de Extinción de la Acción Penal y de la Ejecución de la Pena' (2000) 53 Derecho PUCP 905.

5 Max Lorenz, *Die Verjährung in der deutschen Strafgesetzgebung* (C H Beck 1955) 34—35.

less authoritarian character of the regime in power.[6] In general, it was common to introduce liberal legislation with very short periods (e.g., 3 months) for prosecuting press offences. In Germany, offences committed by the press were also under special regulation until the Weimar Republic, having a privileged limitation of 6 months.[7] This was promptly extended, together with other Nazi changes to the criminal law, in 1935. Under the new rules, minor press offences could be prosecuted for up to a year, and no exception applied to more serious ones, which were returned to the general regime contained in the criminal code.[8]

Beyond press offences, in Germany there is some broader historical basis for the fear of a link between the authoritarian use of the criminal law and the lack of temporal limits becoming instrumental for that purpose. A doctoral thesis written during Nazi times explains how, for the ideals of National Socialism, categorical time limits were seen as inadequate for the new purposes and understanding of the criminal law. The state needs to keep the contingency of prosecution open if the criminal law is to protect the national community. The commitment of the thesis is clear from the opening statement: 'We want to serve the renovation of the national socialist criminal law'.[9] Consequently the author asks: 'Does this legal institution [limitation periods] serve the interests of the national community?'.[10] He describes extensively why time limits (*Verjährung)* are an expression of the dominant liberal views, with their emphasis on the individual and protection against

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6 Jean Danet, Sylvie Grunvald and Martine Herzog-Evans, 'Prescription, amnistie et grâce en France' (Université de Nantes 2006) 67—68.

7 *Gesetz über die Presse*, Deutsches Reichsgesetzblatt Band 1874, Nr. 16, 65—72, §. 22.

8 *Gesetz zur Änderung des Strafgesetzbuchs* (1935) Artikel 13, Deutsches Reichsgesetzblatt Band 1935 Teil I, Nr. 70, 839—843. According to commentators of the time, 'the previous regulation had proven to be a serious obstacle to the prosecution or [sic] distribution of treasonable pamphlets' [my translation] Gürtner/Freisler, *Das neue Strafrecht*, 153, 164, cited in Martin Asholt, *Verjährung im Strafrecht* (Mohr Siebeck 2016) 42.

9 Alfred Hasselberg, *Zur Frage der Verjährung im kommenden Strafrecht* (Gutenberg Druckerei 1935) 1. [my translation]

10 ibid 23.

the state.[11] He contrasts these views with the aim of the 'new criminal law', which is serving the national community. He states:

> 'The task of the criminal law is […] to protect the live basis of the national community, its legal order […]. To effectively shape this protection, the forces striving against society must be annihilated'.[12] … 'From this aim determination follows, that the criminal law is not a right of the state, which can be influenced by the passage of time. Criminal law is much more a constitutive part of the legal order of a community, which aims to protect it'.[13]

Concretely, he proposes a structure that he believes better reflects this conception of the criminal law and the state:

> 'In summary is therefore to be concluded: The current regulation of the *Strafverfolgunsverjährung*, which establishes without exception for all crimes limitation periods without consideration of the act and actor, cannot serve the interests of the community. […] Instead of the current law there should be a provision *that leads to a just decision in all cases*. In principle, it is in the interests of the national community that all criminal acts must succumb a prosecution. For offences not threatened with death or lifelong penalty, it should be put under the discretion of the judge after a certain timeframe, whether it corresponds with the interest of the national community to refrain from punishment or to mitigate it'.[14]… '*In order for the proposed delegation to fulfil its purpose entirely, the freedom here granted to the judge must benefit the public prosecutor to the same extent*'.[15]

This was not the only proposal at the time. A weaker alternative was to establish one period of mandatory prosecution, and later for more serious offences a period of permissible prosecution, at the discretion of the *Staatsanwaltschaft.*[16] Even this minor modification has been considered by later commentators as 'a conjunction of hysteric populism, hierarchical thought and without rule-of-law (*rechtstaatliche*) consideration'.[17]

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11 ibid 22.

12 ibid 31.

13 ibid 32.

14 ibid 46. [emphasis added]

15 ibid 49. [emphasis added]

16 ibid 59—60.

17 Thomas Vormbaum, 'Mord sollte wieder verjähren', *Festschrift für Günter Bemmann zum 70. Geburtstag* (Nomos 1997) 494—495.

The actual norms that came into force were considered based on 'authoritarian grounds' by commentators writing shortly after the war.[18] These ideas were not only promoted by Nazi jurisprudence, but had previously been disseminated also by the Italian positivistic school of criminology and others focused on the so-called 'social defence'.[19]

How intimately related to authoritarian ideologies is it to perceive that they need to extend the reach of the criminal law in terms of time until the death of the offender? It is impossible to say. Only the converse can be said: that conscious liberal efforts have been put into the idea of limiting the state power in this way. And the fear of those who have lived during episodes of authoritarianism can be considered by all of us in order to learn some lessons about how the thoughts develop and how they attempt their institutional reception.

Certainly, there are other ways of attempting to control for the potential for authoritarianism in a criminal justice system. The English have their very own form of addressing this, namely through the victim and the rest of the citizenry and their potential role as private prosecutor, in the independence of the Bar, in the role of judges and, as has already been mentioned in this thesis,[20] in the value of discretion.

Private prosecutions have historically served as a mechanism for controlling state excesses in criminal law, and that is why they were given a certain 'ideological and constitutional pre-eminence'.[21] In a previous chapter we focused on the role of the victim

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18 Johannes Nagler, Heinrich Jagusch and Edmund Mezger, *Leipziger Kommentar* (de Gruyter 1954) §66 524.

19 Raffaele Garofalo, *Criminology* (Little, Brown and Company 1914) 366.: 'Another favour which the law extends to offenders is the prescription of criminal actions […]. Notice, then, how the law extends its protection to the enemy of society'.

20 See especially Chapters 2.1., 2.5., 4.3.2. and 4.4.

21 Paul Rock, 'Victims, Prosecutors and the State in Nineteenth Century England and Wales' Criminal Justice' (2004) 4 Criminal Justice 333. In the same vein, Alec Samuels, 'Non-Crown Prosecutions: Prosecutions by Non-Police Agencies and by Private Individuals' [1986] Criminal Law Review 33: 'The right of private prosecution is a fundamental constitutional right. Monopoly power in the state is bad'.

as private prosecutor and her contribution to the public interest,[22] as individuals or through associations, which allowed for 'the origins and much of the conduct of action [to remain] outside the control of the State'.[23] They occupy a role in the legal mentality that may exceed their real power, but private prosecution is constantly present as an element of citizen control over state action. 'The right represents an ultimate safeguard for the citizen against inaction, inertia, capriciousness, incompetence, bias, or corruption on the part of the public prosecution authorities'.[24]

In addition to this element, the independence of the Bar to represent those individuals was a constitutive element of the controls: 'Prosecutors should be independent of party, interest and influence',[25] and for this reason there was reluctance for a long time to appoint state prosecutors, who may be bribed, have factional interests, or protect the powerful. Decentralisation and independence were seen as good cures for these evils.

Another more general element that protects a system from its instrumentalization is said to be the role and status of judges. Already in the nineteenth century, Mittermaier commented on how the English judges were highly esteemed and how thanks to them criminal justice was not used for political prosecution, as was often the case in Continental Europe.[26] The flexibility that judges have, to adapt to the needs of individual cases, saves the need for elaborated theories to secure judicial independence.[27] Administering the law is a practical undertaking, a pragmatic balancing of reasons, based on a long tradition of

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22 See *supra*, Chapter 9.6.

23 Rock (n 21) 333.

24 Samuels (n 21).

25 Rock (n 21) 341.

26 This must, however, be contrasted with the impression held in England about criminal judges, who are seen as less esteemed than civil judges. See Matthew Dyson, *Explaining Tort and Crime: Legal Development across Laws and Legal Systems, 1850-2020* (Cambridge University Press 2022) 244.

27 Carl Joseph Anton Mittermaier, *Das englische, schottische und nordamerikanische Strafverfahren* (Ferdinand Enke 1851) 36—37.

incremental adjustments. 'It is nowadays regarded as elementary that a general inherent power to protect the citizen from prosecutorial abuse of its processes is vested in the court'.[28]

The law under this conception cannot be based on abstract principles and rationalistic rules. Whatever way these rules are crafted, an 'infinitely greater part of [government] must depend upon the exercise of the powers that are left at large to the prudence and uprightness of ministers of state'.[29] In the case of the judiciary and regarding time limits, the retention of the instrument of abuse of process as the main control tool was seen as representing 'the practical application of the sensible rule that in the operation of criminal justice it is never wise to say "never"'.[30] The British constitution and their laws evolved through incremental adjustment, reproduced by apprenticeship, 'working not from general principle but working from precedent to precedent'.[31] With such an understanding, the idea of a rule creating boundaries as such does not make much sense, and would not be perceived as an appropriate control of authoritarian impulses within the system.

11.2. 'Moral standing' of the state: can it be lost?

The theoretical literature on criminal law has developed a concept that groups a wide array of phenomena that are considered to be the causes of the 'lack of moral standing' of the

28 *R v F (S)* [2011] 2 Cr App R 28 [14].

29 Edmund Burke, *Thoughts on the Cause of the Present Discontents* (printed for J Dodsley, in Pall-Mall 1770) 22., who considers that the converse face of the 'passive' rule of law is this 'active' capacity of the government to implement policies. It must be said, however, that others like Dicey and Hewart were much more weary of discretion, see Tom Bingham, *The Rule of Law* (Penguin 2011) 48 ff.

30 *R v F (S)* [2011] 2 Cr App R 28 [16], commenting on *R v Derby Crown Court, ex parte Brooks* (1995) 80 Cr App R 164.

31 Martin Loughlin, *The British Constitution: A Very Short Introduction* (Oxford University Press 2013) 14—15.

state to launch criminal prosecution and impose punishment.[32] Could it be that the passage of time has a similar effect, and that is the underlying reason for avoiding late prosecutions? If that is so, does this ground speak in favour of any particular form of regulation of time limits?

The notion of moral standing is not evidently applicable to the position of the state in criminal law. The state and the individual —in this case, the suspect or defendant— have a vertical relationship. The role in finding culpability and attributing liability for a criminal offence is not necessarily akin to moral, interpersonal blaming. When assessing its legitimate use of the penal tool, the position of the state is not judged by moral standards but by legal criteria (if the assessment is one of legality) or by political criteria (if the assessment is one of general practical reasoning).[33] But the frequent use of the notion of standing to ground the position of the state in criminal law demands at least an attempt to look at its borders.[34]

In formal terms, neither England and Wales nor Germany recognise something like a loss of standing due to the mere passage of time.[35] However, we can say that the

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32 For an up-to-date list of such works see Findlay Stark, 'Standing and Pre-trial Misconduct: Hypocrisy, 'Separation', Inconsistent Blame, and Frustration' (2023) Criminal Law and Philosophy, n 26.

33 Recent works in this line of thought are Malcolm Thorburn, 'Punishment and Public Authority' in Antje du Bois-Pedain, Magnus Ulväng and Peter Asp (eds), *Criminal Law and the Authority of the State* (Hart 2017); Klaus Ferdinand Gärditz, *Staat und Strafrechtspflege* (Schöningh 2015); Vincent Chiao, *Criminal Law in the Age of the Administrative State* (Oxford University Press 2018).

34 The more extended view of the separation between criminal and moral reasoning in Germany partly explains why it is not possible to find analogous literature that considers the moral standing to blame applied to the criminal justice system and the criminal law. The closest it gets is through the concept of *Verwirkung* (literally: forfeiture) *des staatliches Strafapruchs* (of the state's entitlement to punish), a term that is not expressed with reference to the type of normative judgement behind it. Strangely, one author does name the idea of *Verwirkung* in the title of his article on *Verjährung*, but then fails to mention if or how the two concepts might be related. Curt Stackelberg, 'Verjährung und Verwirkung des Rechts auf Strafverfolgung' in Arthur Kaufmann and others (eds), *Festschrift für Paul Bockelmann* (C H Beck 1979). For the purpose of this section, I will adopt the English idiom of 'moral standing' with the caveat that this will undoubtedly incline the type of arguments towards those that make more sense to a common lawyer.

35 It would be more debatable in France. Much of the literature and the parliamentary debates when discussing limitation periods appeal at least partly to the idea of '*la loi del oubli'*. Maryline Boizard,

legitimacy of the use of state coercion is put in doubt and thus more or less strictly controlled. The basic liberal tenet of the control of state power is, for sure, present in both countries and thus there is a need for close scrutiny of the conditions for the deployment of state coercion through the criminal law.

As before, this analysis assumes that the task of the criminal law is to hold people responsible, to blame them and to call them to account, within a triadic system ('who is responsible for what to whom'). This chapter addresses the last part of this triad: 'To show that [someone] is being legitimately called to account, we must show not just that there is something for which he should have to answer, but that those who call him have the standing to do so'.[36] Some facts about the blamer could make the blaming inappropriate. When applied to offences committed longer ago, we may explore if there is a degradation of the state's capacity to call to account.

This route seems to have potential for our endeavour because it means that 'judgments of culpability are conceptually prior to both blaming attitudes and expressions of blame, in the sense that the latter entail but are not entailed by the former',[37] or, otherwise said, that an action could still be culpable, but that we could be (morally) impeded from attaching consequences to it, much in the way that time limits are understood to work. This bifurcation allows us to abandon the focus on the offender, and focus instead on the activity of prosecuting and punishing.

Some of the more commonly named causes of a loss or lack of standing are acting against one's own previous attitudes (sometimes translated into the legal notion of

'Le temps, le droit à l'oubli et le droit à l'effacement' (2016) N° 4 Les Cahiers de la Justice 619. For further development of this idea see Chapter 5.

36 Antony Duff, 'Responsibility, Citizenship and Criminal Law,' in R.A. Duff and S.P. Green (eds.), *Philosophical Foundations of Criminal Law* (Oxford: Oxford University Press, 2011), p. 132.

37 Angela M Smith, 'On Being Responsible and Holding Responsible' (2007) 11 The Journal of Ethics 465, 467.

estoppel), engaging in the same conduct that one intends to blame another person for (hypocrisy) or 'failing to mind their own business' (meddling).[38] These are the ones that I will discuss in the pages to follow, in an attempt to assess at the same time which forms of potential loss of moral standing would find resonance if models of categorical or discretionary limitation were to be adopted.

11.2.1. Estoppel

The idea of estoppel or an analogous moral form of it could have some sense when used in relation to late prosecutions and the impropriety of the state to prosecute. An estoppel 'happens where a man hath done some act, or executed some deed, which estops or precludes him from averring any thing to the contrary'.[39] This analogy seems plausible because estoppel also entails a temporal dimension: previous conduct is compared to current conduct, and there must necessarily be a relevant time gap that gains moral or legal relevance. If something has not been done before, why now?

Estoppel is often formulated in terms of the idea that 'no one ought to act against their previous behaviour'.[40] Thus, the state should be impeded from acting against its previous acknowledgements and actions, if it has created a 'special relationship of trust and confidence'.

Duff[41] contemplates that the kind of circumstances giving rise to estoppel could be promises of immunity, entrapment, discriminatory or vindictive prosecution, and reliance on official advice about the law. None of these hypotheses is related to the passage of time *per se*, but some might relate to cases that are incidentally also late prosecutions. For

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38 Other candidates are complicity, moral luck and claimant injustice, discussed in Neal Tognazzini and Justin Coates, 'Blame' [2021] The Stanford Encyclopaedia of Philosophy.

39 William Blackstone, *Commentaries on the Laws of England*, Vol 3: Of Private Wrongs 308.

40 Gabriele Wolfslast, *Staatlicher Strafanspruch und Verwirkung* (Carl Heymanns Verlag 1995) 28 ff.

41 RA Duff, '"I Might Be Guilty but You Can't Try Me": Estoppel and Other Bars to Trial' (2003) 1 1 Ohio State Journal of Criminal Law 16.

instance, that could be the case with alleged breaches of promises not to prosecute[42] or cases where there has been some particularly serious executive misconduct. The most noticeable cases of this type were the 'letters of comfort' handed out to former IRA members. For instance, in the case of *R v Downey*, the defendant was arrested in 2013 for a bombing allegedly committed by him in 1982 in Hyde Park. He was prosecuted, despite having received a letter in 2007 providing assurance that he was not liable to arrest if he entered England and Wales. The Crown Court decided that the 'public interest in holding officials of the state to promises they have made in full understanding of what is involved in the bargain' allowed for declaring an abuse of process and staying the procedure. [43]

It does seem dubious that the mere passage of time, could create an imbalance such that the moral standing would be put in question. The estoppel argument, thus, does not seem adequate for understanding the possible lack of standing related to the passage of time. After all, the criminal justice system is in principle only applying its own known tools later in time, under the same parameters that it usually would. As long as no additional elements such as promises or misrepresentations have been given, there is no reason to think that the positions of the person who is blaming another and the person being blamed have changed during that period.

11.2.2. Hypocrisy

Under a strict definition, hypocrisy is said to be the attitude of doing something that one criticises someone else for doing. Under a more general version, it is associated with trying to subject others to blame while showing no commitment to the relevant values.[44] The

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42 *R v Croydon Justices, ex parte Dean* [1993] QB 769, *R v Killick* [2012] 1 Cr App R 10.

43 *R v John Anthony Downey* [2014] CCC. The decision was not appealed. Sweeney J also said that 'the very public interest in ensuring that those who are accused of serious crime should be tried is a very strong one (with the plight of the victims and their families firmly in mind). However, in the very particular circumstances of this case it seems to me that it is very significantly outweighed'.

44 Patrick Todd, 'A Unified Account of the Moral Standing to Blame' (2019) 53 Noûs 347, 362 ff.

person being blamed ought to reply that she is being held to higher standards than the person blaming her applies to herself.

A case for hypocrisy could arise as a general complaint about the state letting so much crime be committed and go unpunished, showing an insufficient commitment to really addressing law-breaking through the criminal law. Is it not hypocritical to declare a prohibition that people are not really forced to comply with? Is that not even more serious when this has continued happening for a long time, or when so many more cases have been accumulated in the state's pending list, and now it has been decided to go back to one specific case that occurred a long time ago?

One could say that there is a case of hypocrisy, also, when there is a special policy for some cases. It is probably true that murders are usually prosecuted. But this is not the case for specific constellations of cases. Not all of the murders related to the civil unrest in Northern Ireland —and sometimes committed in England— were prosecuted.[45] After an intense first period of prosecution of Nazi crimes, the numbers diminished noticeably. Only much later did the interest grow again,[46] and in the last decades prosecutions have been focused on less direct participants (e.g. the telegraphist, the baker of the concentration camp), while many others in their same positions never were in the sight of the authorities.[47]

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45 This fact led to a 'cold-case' review led by the police officers of the Historical Enquiries Team, a unit set up in 2005 to deal with 3,269 unsolved murders committed between 1968 and 1998. In 2013 a review by the UK's Her Majesty's Inspectorate of Constabulary found that cases involving police and military suspects were 'being reviewed with less rigour in some areas' than cases involving non-state officials.

46 Andreas Eichmüller, 'Die Strafverfolgung von NS-Verbrechen durch westdeutsche Justizbehörden seit 1945. Eine Zahlenbilanz' (2008) 56 Vierteljahrshefte für Zeitgeschichte 621. Particularly serious crimes (such as war crimes, illegal detentions in concentration camps and mass killings) constituted only a minor part of the offences dealt with between 1945-1949.

47 Extremely critical about how the doctrines and priorities have changed in recent decades, Heiner Alwart, 'Strafprozess im stahlharten Gehäuse der Vergangenheit' (2022) 77 JuristenZeitung 715.

Sexual abuse in some institutional contexts and many intra-familial sexual crimes have not been prosecuted, or so it is sometimes claimed.[48]

This argument seems helpful in establishing a loss of standing for groups of cases where the state's policy has changed perceptibly. Hypocritical attitudes of the state may not immediately amount to a of loss of standing but may be solved by 'compensating injustice by other means', such as sentencing mitigation.[49] Capturing these groups institutionally seems more feasible through categories of offences, determined either by protected interests or by gravity. This speaks for some form of categorical distinction, but even if there is a temporal dimension to changes in state action, it is not the passage of time *per se* that could help us draw the limits of the relevant categories.

11.2.3. Meddling

The most promising route around the concept of standing and the complexities of late prosecutions is the analogy with 'meddling'. It is not our business to address all wrong behaviours or attitudes, only some of them. People who nevertheless engage in this form of blaming 'are often judged to be moralistic, self-righteous and meddlesome'.[50]

Lacey and Pickard are among those who have seen a simile to meddling in the context of the criminal law. They have found this analogy in territorial limits, in which they see a concern akin to avoiding lack of standing in state action:

> The scope of a legal system's jurisdiction— etymologically, how far and to whom that system speaks in its civil, criminal, or other legal voice—in relation to different forms of legal standard is a key institutional condition for its effective and legitimate operation, carving out as it does just what is this branch of the law's "business". The law cannot operate outside of its

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48 Against the idea that there was no concern with these kinds of offences, see Adrian Bingham and others, 'Historical Child Sexual Abuse in England and Wales: The Role of Historians' (2016) 45 History of Education 411.

49 See Nicola Lacey and Hanna Pickard, 'Why Standing to Blame May Be Lost but Authority to Hold Accountable Retained: Criminal Law as a Regulative Public Institution' (2021) 104 The Monist 265, 274.

50 Maria Seim, 'The Standing to Blame and Meddling' (2019) 38 Teorema: Revista Internacional de Filosofía 7, 11.

> jurisdiction; this would be a form of meddling—to put the point metaphorically and by analogy with interpersonal moral blame. Without clear and effective protocols of jurisdiction, no legal order can function properly.[51]

There is a sense in which space —as in jurisdiction— and time —as in limitation— share a common spirit in determining the realm in which the relation between the state and the individual is to find its place.[52]

In spatial terms, it might well happen that crimes committed far away may be of some sort of interest to us. This happens, for example, if the victims are members of our political community, or if the offender herself is, or because the crime affects some financial interest, a peace settlement, or some heritage of mankind. But we regulate the borders of the reach of state power with rules. The criminal law is a special realm of social condemnation, but it is not the same as any moral judgement. 'We may disapprove of wrongs committed in other places, but we recognise that we simply cannot assume responsibility for righting them'.[53]

Here we find ourselves better positioned to finish our parallel with the two modes for regulating time limits. Rules on jurisdiction take many forms. Some legal systems claim wider jurisdiction than others. However, these rules are categorical, not discretionary. Rules on jurisdiction take this decision out of the hands of the prosecutor, and define it in uniform general rules, even at the cost of sometimes excluding some particularly hurtful offences, over which one might want to call an offender to answer.

Why should there be any rules and not merely the prosecutor's discretion to define the borders of state power? I believe that our notions regarding the adequate territorial

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51 Lacey and Pickard (n 48) 274.

52 See also Lindsay Farmer, 'Time and Space in Criminal Law' (2010) 13 New Criminal Law Review: An International and Interdisciplinary Journal 333, 339—340.

53 Alexander McCall Smith, 'Time, Guilt and Forgiveness' in Emilios A Christodoulidis and Scott Veitch (eds), *Lethe's Law Justice Law and Ethics in Reconciliation* (Hart 2001).

limits to the exercise of state power through the criminal law correctly imply that we need some (categorical) rules to define its borders, for clarity inside the community and in relation to other possible interested parties (e.g., other states). Analogously, the idea of having time limiting rules cannot be discarded, as they are not so far away from regulating 'meddling' of our criminal justice system into a social ambit that exceeds its competence. Even if the community might have some interests vested in events that happened in the relatively distant past, this might not be enough of an argument to always leave the door open to extending competence above it.

One argument for this position is that a discretionary rule would entail excessive transaction costs, if every time a conflict of this sort came to light we needed to wait for an authoritative decision by the appropriate entity. But if the meddling argument is true, then something more must be said. Possibly, then, the idea sustaining rules rather than discretion is that at present, the system is not in a position to assess whether addressing the event would be a form of meddling; if meddling amounts to a diminished standing, the 'new' community is also not in a position to judge the adequateness of its communication.

An objection to the analogy between geographic jurisdiction and temporal jurisdiction is that the latter seems to be founded on much more entrenched historical, political and social grounds. Temporal limitation has an arbitrary flavour to it. Two parts of this concern must be distinguished. First, the analogy is not meant to be complete, and I do not wish to say that things in the past are forgotten or become irrelevant 'as if they crossed a border', suddenly becoming out of reach. The analogy is only meant to highlight that if there is such a thing as meddling, and if there is meddling in trying to pass judgment over events that happened beyond physical borders, then the image of borders might be

helpful to think about time as well.[54] Second, the decision about 'where to draw the line' is always a difficult and potentially an arbitrary one. Any line-drawing suffers from this weakness, be it the age of criminal liability, the distance of the family relationships that may give rise to a conflict of interest, the adequate term for a government, the amount of money to be declared before authorities or where to draw country borders. Any such decision demands its own relevant reasons in order to pass a test of adequateness. The decision (and, often too, the imposition) about borders needs to be based on historical, cultural and political grounds; but still, the limit itself remains artificial, a creation of the legal system. The decision about where to draw the time limits will probably be based on the gravity or seriousness of the offence, under a more general understanding that these can be translated into a measure of time, just as we do when determining punishment.[55]

The idea behind avoiding meddlesome exercises of blaming is protecting the position of the blamer, not having her do something that is wrong. For the state, if this image has any purchase, then meddling in the past would make it commit a wrong. The systemic effect of the state wronging individuals would be to cast a shadow of doubt and it could be more damaging to the perceived legitimacy of the system than the hyper-cautious exclusion of some potentially relevant cases. Meddling is a concept that calls for a radical and categorical limit to prosecutions rather than for a discretionary boundary of the state's capacity to act.

If one really believes that criminal blaming is sufficiently analogous to moral blaming, the charge of meddling is a better fit for thinking about loss of standing in time. Like spatial ambit, it speaks about the sphere of criminal law in contrast to other forms of

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54 The analogy is not all that original, it seems. 'The past is a foreign country; they do things differently there', starts LP Hartley's novel The Go-Between. My thanks to J Roberts for the reference.

55 Hopefully this thesis will give the reader enough elements to assess whether or not these reasons are convincing.

social reproach. Being committed 'in recent time' might be analogous to an offence being perpetrated 'inside the realm', or within the personal jurisdiction boundary expressed in the phrase 'under the king's peace'. As the association of criminal law with the nation-state is so dominant, the temporal and personal dimensions are less present in our reflections. But that does not mean that they cannot or should not be made explicit in the same fashion. And for similar reasons, they seem better conducted through a categorical rule.

11.3. Rule of law values: vagueness, consistency and finality

This section will analyse some of the strengths and weaknesses of our two modes for time-limits (categorical and discretional ones) in terms of some rule of law values, namely, consistency and the avoidance of vagueness.[56] For this purpose, I will follow some of the reflections on the rule of law.[57] The debate applied to the modes of temporal limitation does not entail saying that one is closer to achieving the rule of law ideal and the other is further from it. Both are suitable candidates. But the problems and complexities of the values behind the rule of law can help us understand which mode ought to be better deployed in which context, and how.

Under some conceptions of the rule of law, the requirements of this ideal are that the rules must be open, clear, coherent, prospective and stable.[58] Legislation and executive

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56 A more typical subject of debate in regard to the rule of law and categorical time limits is the concerns about the retroactive extension of limitation periods. This debate has taken place extensively in many jurisdictions that adhere to this model and has most often redounded in reflections about the nature of the limits (denying major problems with the rule of law if they are procedural but considering such extensions impermissible if they are substantive). For an acute analysis see Ernst-Wolfgang Böckenförde, 'Zur verfassungsrechtlichen Beurteilung der Einführung der Unverjährbarkeit des Mordes' (1979) 91 Zeitschrift für die gesamte Strafrechtswissenschaft 888, 888—894.

57 As discussed in the comparative literature, the concept of rule of law is understood differently in different legal systems. See Lucia Zedner and Carl-Friedrich Stuckenberg, 'Due Process' in Kai Ambos and others (eds), *Core Concepts in Criminal Law and Criminal Justice* (Cambridge University Press 2019); Martin Loughlin, 'Rechtsstaat, Rule of Law, l'Etat de Droit', *Foundations of Public Law* (Oxford University Press 2010). Here we will use the concept as it is usually deployed in the common law context and in analytical jurisprudence.

58 Famously, Lon Fuller, *The Morality of Law* (Yale University Press 1969).

action should be guided by laws with those characteristics, otherwise they will be arbitrary. Two closely related affronts against this principle are vagueness and inconsistency. A slightly modified case originally offered by Endicott will exemplify the risks of vague rules. He pictures a line of defendants, with identical cases, except that each successive defendant is prosecuted a day later. The first one ought to be prosecuted, while the last one ought clearly to be excluded due to the long time that has passed since the commission of the offence.

> If, for every pair of adjacent defendants in the series, each of the two is in the same legal position, then there is no first defendant against whom the law requires that the charges be dismissed. If the first defendant may lawfully be prosecuted and the last defendant may not, then for some pair of adjacent defendants, the court [or the prosecution] must allow the prosecution to proceed against one, but dismiss the charges against the other. The court cannot even solve this problem by appealing to considerations of justice, or of the interests of the public or of individuals.[59]

The vagueness created by this space of discretion leads to finding a cut, without any appeal to relevant legal reasons, and secondly, allows for different applications in different instances either by the same or by a different decision-maker. Even if vagueness in the law cannot be completely eliminated, it can be restricted. A rule stating that the reasonable time for starting prosecutions against crimes is 5 years or excluding the notion of reasonability altogether and replacing it with a time-period would undoubtedly be less vague than a 'too long ago' standard.

This would seem to be a reason in favour of precise standards. But the problem is not yet solved. Endicott presents us with two concerns: that time periods could be unsuitable due to the nature of some offences because of their complexity, and that even within the same type of offences there might be variations that need attention.[60]

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59 Endicott, Timothy, 'The Impossibility of the Rule of Law' (1999) 19 Oxford Journal of Legal Studies 19, 4.

60 ibid 5.

Categorical time limits can in theory be adjusted legislatively for crimes that are known to be usually complex by their nature. The type of conduct displayed, the means required for the commission, the delayed emergence of the prohibited result or some other expression of the wrong could give rise to special categories.[61] This process is facilitated by the criminal law being based on type-descriptions of offences with specified objective and subjective elements.

The second concern highlighted, however, is something that an *ex ante* rule cannot capture. How could such a rule distinguish between two instances of fraud, one where the offender has personally identified herself before some witnesses, and another where the fraud has been committed through a series of complex digital pathways anonymising the source? Here the categorical mode is at a loss.

Clarity and lack of vagueness can be improved through the adoption of categorical limits, and thus some principles of the rule of law can be promoted within the operation of the criminal law. Yet these improvements might not be enough to cover all forms of arbitrariness deficit in the rule of law. Hyper-precise laws have problems of their own. They 'stimulate the interpretative ingenuity of lawyers and judges' and may introduce arbitrariness in a different sense: 'the sense in which a law is arbitrary, if its requirements do not reflect the reasons on which such a law ought to be based'.[62]

Two distinct elements seem to be at play. On the one hand, attempts at bypassing regulations are not negligible; they are a real problem.[63] But their chances of success

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61 This is a theoretical argument about the possibility of categorical time limits to comply with these rule of law requirements and not a defence of the current shape of limitation periods. I stress this because following this line of argument would speak in favour of structuring the relevant categories according to the difficulty in prosecuting or the complexity of the cases, and not according to the gravity, which is the shape they usually take. Maybe what this says about the existing limitation periods is that they are conceived to protect substantive more than procedural aspects.

62 Endicott, Timothy (n 58) 7—8.

63 Attempts to circumvent the limitation periods that used to exist in England and Wales. Section 6 of the Sexual Offences Act 1956, which punished sexual intercourse with underage girls (under 16 but

depend on a wider distribution of legal powers, not on the mere fact of having precise rules. For our purpose, the capacity of prosecutors to use charging decisions to bypass categorical time limits is determined mainly by whether the charges are controlled by the judge and whether it is possible to negotiate them.[64] In a system with no negotiation on charges and judicial determination of the applicable offence description, this problem is very much reduced. In the context of our comparative exercise this is a telling difference between England and Wales and Germany.

On the other hand, there is a question about the over and under-inclusiveness of rules. A time-limit would allow things that the rationale does not want to allow and would block things that it would indicate to let through. This is a problem with any rule.[65] The question should be, rather, how close or how far any specific rule brings us to achieving a desired result, all things considered. Adding another layer of complexity, there is a need to highlight that such a desired result, in this thesis' proposal, is not merely about allowing the prosecution of all crimes that one would contingently want to prosecute and excluding as many less relevant cases as possible, but correctly balancing the powers of decision.[66] This is much harder to assess, because no case-by-case evaluation will show a clear enough picture of the level of precision achieved by the rule.

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not under 13), had a time limit of one year. It was evaded by instead charging indecent assault under section 14 of the SOA 1956. This brought great criticism. Jonathan Rogers, 'Fundamentally Objectionable' (2007) 157 The New Law Journal; Jonathan Rogers, 'The Time Limit on Prosecutions for Underage Sexual Intercourse in the Sexual Offences Act 1956: A Continuing Problem' in Antony Duff and John Child (eds), *Criminal Law Reform Now: Proposals and Critique* (Hart 2019).

64 On how this configuration of powers and legal provisions plays a role in the US, see Alan L Adlestein, 'Conflict of the Criminal Statute of Limitations with Lesser Offenses at Trial' (1995) 37 William and Mary Law Review 100.

65 Cass Sunstein, 'The Problem with Rules' 83 California Law Review 992.

66 See *infra*, section 4 of this chapter, and *supra* Chapter 4.

Consistency — or the imperative that like cases are treated alike — is related to the rule of law as a 'prophylactic institutional norm'.[67] It protects the rule of law by preventing arbitrariness and discrimination. Let us slightly modify Endicott's line example again. In our series of defendants who have committed the exact same crime, two of them are to be prosecuted on the same day, and so are sharing the same position in the line. We will also add that they have behaved in exactly the same way since the offence, that the police have undertaken the same investigative steps against them, that the evidence available is the same and, as far as can be told, that all of the factors listed in the law are the same.

Under a categorical model, both of them would be either included or excluded. Under the discretionary mode, it might be the case that one is, and one is not. Rules contain in themselves the expectation of consistency. Rules, also, work on the basis of empirical triggers and determinate responses.[68] The categorical model applies the same rule for all legal actors. Discretionary decision realms might or might not be subject to a demand of treating like cases alike. It might also be open to an unrestricted range of factors. Finally, different legal actors may be under the legal requirement to prioritise different factors, which, in turn, might lead to differences in treatment depending on who makes the decision.

A discretionary model, therefore, might be more suspected of failing to achieve consistency. But this does not mean that the decision makers will act in an arbitrary or prejudiced way. Even if the two cases are not treated alike, it does not mean that they are being treated discriminatorily or based on bias and prejudice, they might be acting within the realm of discretion.[69]

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67 David A Strauss, 'Must Like Cases Be Treated Alike?' [2002] University of Chicago Public Law & Legal Theory Working Paper 22 <http://www.ssrn.com/abstract=312180> accessed 23 April 2019. In other senses, it can be seen as a moral imperative, or as a political commitment. Although crucial, those are not the perspectives addressed in this section.

68 See *supra* our brief discussion about soft and hard limits in Chapter 4.

69 Strauss (n 66) 18.

There is yet another way of analysing the potential of discretionary and categorical modes of limitation in the context of rule of law values. We can think of either form of time limits as norms offering 'resolution' or finality. Endicott argues that resolution is required in any practice needing coordination. It helps in giving a solution to difficult cases where 'the need for a solution is important in itself (independently of the importance, if any, of which solution is adopted) […]. In adjudication, the general political need for resolution in decision-making crystallises into a formal, structural demand'.[70] Time limits are not only a norm delimiting the realm of state power exercised through the criminal law. They are also a decision rule for the administrative or judicial termination of a case. They give a resolution, even if not a substantive one, on the facts of the case.[71]

In these terms, the potential of the discretionary mode to offer a resolution is modest. If the *prima facie* assumption that time negatively affects the justification for prosecution needs to be assessed in each case, weighed against any other possibly innominate circumstances that are considered relevant, then it is a weak element for resolution. If there really is value in finding a resolution for the sake of coordination, then categorical limits could be a more successful tool.

In conclusion, we can say that even if vagueness and inconsistency can be better avoided by the categorical mode, this does not ensure that the demands of the rule of law will be met. Arbitrariness can still exist. Controlling decision-making requires that, whatever norm is adopted, it is in line with the distribution of powers among the participants in the criminal process. The standards and rules applied ought to reduce the

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70 Endicott, Timothy (n 58) 15.

71 Referring mostly to civil limitation, but applicable to our context, Arthur Ripstein, 'The Rule of Law and Time's Arrow' in Lisa M Austin and Dennis Klimchuk (eds), Private Law and the Rule of Law (Oxford University Press 2014).

space for uneven and uncertain results, as well as allowing for the law to give a resolution. Marginally, maybe, categorical limits are more beneficial for this purpose. The way in which they provide a resolution enables administrative and judicial closure in a manner that is acceptable from a rule of law perspective.

11.4. Impunity and decriminalisation; delegation and separation of powers

Another perspective for studying the underlying benefits and deficits of the diverse ways in which one can structure the time limits for prosecution is with a view on the impact on justice. One of the strongest forms of opposition to limitation periods or categorical limits to the prosecution of crimes is the accusation of impunity. The radical exclusion of all offences committed before a certain retrospective deadline can be seen as a refusal to seek justice, an arbitrary decision by the state to privilege those who have managed to escape it for long enough, a failure of the state's duty towards victims. This concern makes categorical limits a good target of the doctrines against impunity, together with amnesties and pardons.

In general terms, impunity merely means a 'lack of punishment', and hence bears a neutral connotation. But some have noted how the statements made in international courts define impunity as a 'general lack of investigation, persecution, detainment, prosecution and sentencing of those who are liable for violating protected rights', reflecting also many laypeople's understanding of 'impunity' as an undoubtedly negative term.[72]

The doctrine of impunity was developed mostly in international and human rights law (and thus in the realm of state responsibility). It was later extended to a more general

[72] Jesús María Silva Sánchez, 'Doctrines Regarding the Fight Against Impunity and the Victim's Right for the Perpetrator to Be Punished' (2008) 28 Pace Law Review 21, 867.

appeal to justice in the criminal law.[73] One of the potential circumstances traced in the human rights case law refers to 'the explicit limitation of prosecution and punishment for […] facts owing to exemption laws stemming from democratic parliaments (active legal impunity)'.[74] This description certainly fits with the form of the existing categorical limits.

It must be said, however, that the discretionary model can also amount to impunity, in the sense of the definition above. To show this connection, I will borrow the concept proposed by Erik Luna in demonstrating one of the systemic powers of prosecutors in modern criminal justice systems: prosecutorial decriminalisation.[75] He claims that this is a way of overcoming the time and resource constraints that the criminal justice system is under. This kind of substantive decriminalisation (even of conduct that remains formally criminalised)[76] can take place for classes of offences (Luna is thinking of, for example, the non-prosecution of cannabis possession) or for individual instances of offending (such as the general use of prosecutorial discretion to drop or divert cases). As he puts it: 'Through

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73 George P Fletcher, 'Justice and Fairness in the Protection of Crime Victims' (2005) 9 Lewis & Clark Law Review. Critically about this expansion to permanent aspects of the criminal law, Silva Sánchez (n 71) 875—879.

74 Silva Sánchez (n 71) 867.

75 The use of the concept of prosecutorial decriminalisation might be criticised. It is, admittedly, a figurative use of the concept. However, it captures important features of the phenomenon. On a first level, it might be said that the relevant form of criminalisation is the formal one, and even if a conduct or class of conducts are not prosecuted this does not eliminate the expressive value of having them prohibited in the first place. One may also say that, as there cannot be certainty about a group of conducts being decriminalised, as this amounts to a set of practices and not to a rule, there is a confusion between the factual and the normative levels of the concept. However, they can be seen as functional equivalents (see Chapter 4.2.), when focusing on the outcomes.

On a second level, one might say that Luna is not thinking about the possibility that one same type-conduct is usually prosecuted at one point in time but not later. One way of discarding this objection is to point out that he does apply the concept to cases where young offenders are treated differently than adults; here a sub-category is being created that is not related to the conduct itself but is defined by other criteria. Time could play the same role.

76 For the use of these concepts see Nicola Lacey, 'Historicising Criminalisation: Conceptual and Empirical Issues' (2009) 72 The Modern Law Review 936.

their discretionary decision-making, prosecutors are treating some conduct as not quite as criminal as it could be—in other words, prosecutorial decriminalisation'.[77]

Luna identifies two forms of prosecutorial decriminalisation. One is what he calls 'covert' or 'the secret law of decriminalisation'. The implicit practice of covert decriminalisation works within the boundaries of the legal powers of prosecutors but is hidden from the sight of the general public. Problematically, the lack of public scrutiny allows for this practice to be visible only for repeat players, with even the defendants and victims remaining unaware of it, which amounts to a lack of transparency. Because its existence and extent are unknown, prosecutorial decriminalisation is not amenable to the traditional mechanisms of change in a representative democracy. Finally, he is concerned with what he calls 'adhocracy'. Ad-hoc decision-making can result in otherwise similarly situated individuals receiving vastly different consequences.

Prosecutorial decriminalisation can also be overt, via express policies or guidelines. This type of decriminalisation may avoid the problems just sketched. Its own problems, on the other hand, are that prosecutors might end up taking up other public powers' responsibilities in terms of the creation and execution of the laws (such as the legislature and the government), and it could still raise questions of consistency (temporal, geographical, and topical), if the structure of the prosecutorial agencies is decentralised and highly dependent on the circumstantial preferences of the heads of the agencies.

Suppose we continue drawing this analogy with discretionary time limits. In that case, we could say that an attempt at constructing overt prosecutorial decriminalisation was made in England with the introduction of the criterion in the Full Code Test during the first

[77] Erik Luna, 'Prosecutorial Decriminalization' (2012) 102 The Journal of Criminal Law and Criminology 796—797.

version of the Code for Crown Prosecutors.[78] This provision stated 'staleness' of the offence as part of the public interest limb of the Test:

> [R]egard must be had not only to when the last known offence was committed, but also the length of time which is likely to elapse before the matter can be brought to trial. The Crown Prosecutor should be slow to prosecute if the last offence was committed three or more years before the probable date of trial, unless, despite its staleness, an immediate custodial sentence of some length is likely to be imposed. […] Generally, the graver the allegation the less significance will be attached to the element of staleness.

An even more extreme version was contained in the 1994 Code, which considered the passage of time in principle as one of the factors against public interest in prosecution.[79] This text was later removed.[80] When interviewed in the context of this thesis, high-level CPS officials said that they were not aware of this provision ever having existed, nor could they tell if there was any source of information to try to understand the real meaning of its removal, as there are no minutes or consultations available on the changes made to the Code.[81] Does the deletion mean that the time should not be considered at all and thus that old offences should be treated in precisely the same way as recent ones? Was it deemed inappropriate to explicitly state this element, or was it expected that prosecutors would apply it nevertheless, as they have indeed done since? Was this a little thought through modification that slipped between the multiple drafts and inadvertently disappeared? Was it a change in the personal position of the chiefs of the institution? At this point, we can only hypothesise, which is not a good way of bringing our investigation forward, and for this reason, we will have to leave this line of enquiry open. In any case, the situation now

78 See *supra*, Chapters 2 and 4.

79 Code for Crown Prosecutors 1994, 6.5.d. This was kept in the editions of 2000, 2004 and 2010.

80 In the 2013 version of the Code for Crown Prosecutors this element was no longer contained within the public interest limb, and it has not appeared again.

81 Interview with CPS lawyer 1 (15 January 2021), Interview with CPS lawyer 2 (18 January 2021).

is that, when put in these terms, the English discretionary mode of limitation for indictable offences arguably amounts to a form of 'covert prosecutorial decriminalisation'.

In contrast to either form of prosecutorial decriminalisation stands a legislative determination of impunity. The contrast, then, more generally, is between a model where it is the prosecutor and another where it is the legislator that decides which situations to exclude from the effective practice of the criminal law.

One theoretical possibility is to opt for a strict allegiance to the wider notion of a principle of legality, in the sense in which it contains what the Germans call *Vorrang des Gesetzes* or the pre-eminence of the legislated law, together with the *Gesetzmäßigkeit der Verwaltung* or adequacy of the legislated law of the administration and the *Gesetzbindung und Rechtsbindung der Rechtssprechung* or boundedness to the legislation and the law of the judiciary.[82] One ought to distinguish that from what is usually called the procedural principle of legality (in German *Legalitätsprinzip*), which is associated with the maxim of mandatory prosecution. The legality being discussed here relates to the respect for the content of the legislated law as the primary source of the legal ordering. Even if this is not seen as a maxim in England and Wales in jurisprudential terms, the centrality of the legislated law certainly creeps in through the doctrine of constitutional law through parliamentary sovereignty. More specifically, since the prohibition of the creation of common law crimes, and with the introduction of the contents of Art. 7 of the European Convention on Human Rights into its internal law, this principle has also grown in relevance. This should allow these ideas to resonate for an English audience as well.

Adherence to this idea is underpinned by a deeper understanding of the role of the legislated law in some modern legal systems. The legalisation of power, the control of all

[82] All of these elements are derived from article 20 of the German constitution, but they are also very much understood as principles informing the law in other civil law countries as well.

power of the state through the legislated law, has its origins in the French Revolution and expanded to the rest of continental Europe, reaching common law countries to a lesser extent.[83] In terms of the place that the legislated law occupies, it seems inadequate to think about the possibility of the delegation of this decision regarding impunity to any other state power. Of all the areas of the law, it is in the criminal law in particular where there is a demand for the legislated law to contain the fundamental substantive and procedural decisions. The concrete application of this line of reasoning for limitation periods is expressed as follows:

> All in all, it is up to the criminal legislature to take into account and weight the different interests in shaping the temporal dimension of the monopoly on the use of punishments. This legislative authority in criminal matters ensures the constitutionally anchored principle of legality [legislated law], which in the power-dividing democracy grants the power to set criminal law to the people as the bearer of state power. With this allocation of competencies, the legislature is therefore given extensive freedom of design, namely which legal interests are protected to what extent and for how long by means of criminal law.[84]

It is understood that it is the legislature that needs to weigh the interests at play, even if this is at the cost of generalisation. In particular for those who see categorical limits as a substantive matter, they are intertwined with the role of the legislature in making generally applicable normative decisions about criminalisation.

> [T]he question of having — or not having — statutory limitations, is a question of criminalisation. Criminalisation is about imposing a certain kind of conduct under the threat of punishment and depends, in a continental legal tradition, on legislative action. Within a modern *Rechtsstaat* framework, the legislator has a general duty to give reasons for passing a new law and in particular to state the reason for criminalisation. […] A decision about expanding the scope of time an action can be prosecuted

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83 Eduardo García de Enterría, 'La Democracia y el Lugar de la Ley', *El Derecho, la Ley y el Juez* (Civitas 1997) 53—54. [my translation]

84 Lukas Staffler, 'Opferschutz und Verjährung im Spiegel der EGMR-Judikatur: Überlegungen zu den opferbezogenen Schutzpflichten im staatlichen Strafrechtssystem' in Markus Abraham and others (eds), *Verletzte im Strafrecht* (Nomos 2020) 54. [my translation] See also the discussion in Chapter 5.5.

> must be based on shared opinions of the permanence of the harm that an offence constitutes for society at large.[85]

The decision about whether to have categorical limits, and certainly the specification of their length and to which offences they should apply, is a policy decision. What is seen as the upside of this mechanism is that once categorical limits are statutorily determined, they become autonomous of the decision-making of those who control substantive criminalisation. If statutorily defined, limitation is a reality, which supervenes independence of political will.[86]

The opposite is true for discretionary limits, at least if there is no express legislative engagement in their configuration. In the words of Galligan, discretionary powers are a hybrid of legislative and adjudicative.[87] They cannot be understood as merely following some internal logic of the law. On the contrary, discretionary powers are eminently oriented at allowing some degree of policy implementation. The capacity to retain the power to drive prosecutorial priorities, both in individual and for classes of cases, is in the hands of the prosecutors (all of them: private, centrally and decentralised public). What is protected by discretion is the capacity to implement policy. What is protected by the categorical rules is the exclusion of criminal law from politics. What is best cannot be conclusively and universally stated, but the consequences must be kept in sight.

When English scholars say, 'limitation periods are a creation of statute law', they are agreeing with what a German lawyer would say. But the English scholar means something different. She is pointing at the fact that they are exceptional, that the law does

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85 Ragna Aarli, 'Non-Expiring Offences in Nordic Criminal Law' (2017) 3 Retfærd 20.

86 Nadja Capus, *Ewig still steht die Vergangenheit?* (Stämpfli 2006) 28-29.

87 Denis J Galligan, *Discretionary Powers: A Legal Study of Official Discretion* (Clarendon Press 1986) 63.

not necessarily contain them but that the statute might, and that the law does not need them in any structural way. The German lawyer means that limitation periods are part of the legality principle, part of the normative organisational decisions that the legislator *must* make.

In a system built up based on this understanding of legality, delegation amounts to giving either the administrative or judicial powers more power to regulate (or for our purposes, permitting the overt prosecutorial decriminalisation) or more discretionary powers in singular cases (to covertly decriminalise), 'protected only in the supposed superiority that emanates from the superior knowledge of their technocratic cadres'.[88] This shift, in turn, should not be admitted as it would mean a resignation of the value of democracy, 'reinstalling, in fact, a genuine autocracy, that of technocrats'.[89]

The contrary position —the one that would endorse a discretionary model— may rely on asserting that technical capacity of legal actors and the adequacy of other complementary mechanisms to ensure the appropriate workings of the law. And it is worth highlighting that this classical notion of legality is weakened in continental European countries and in Germany itself. Much more appreciation of the discretion of other public officials and of the capacity of the administrative state to act in the common interest has settled as a core structure of the criminal justice. The appreciation for delegation and discretion seems to be on the rise.

11.5. Conclusion

This journey through different aspects of the understandings of state power and the state's capacity to deploy the criminal law provokes some final reflections. The first is that the need to avoid authoritarian uses of the criminal law offers a justification for temporally

88 García de Enterría (n 82) 55.

89 ibid.

constraining the criminal law, making use of a legislative device. The type of anti-authoritarian controls that allow a system to work on the basis of 'never saying never' are much more complex and rely on a contingent equilibrium.

The second conclusion is that there is one form of 'loss of standing' that allows us to think of time limits as an institutionalisation of a moral intuition: meddling. From this perspective and drawing an analogy with spatial boundaries, light is shed on why categorical limits seem more satisfactory than discretionary limits for circumscribing the realm of the interaction of the criminal law with its addressees. Yet, I would argue that the structures of interpersonal moral judgment are unfitting for assessing the position of the state.

The third conclusion is that in terms of consistency and vagueness, both modes of limitation — categorical and discretionary — have the potential to sufficiently pass a 'rule of law' test. Both also have some costs. Vague norms that lead to an inconsistent application could result in arbitrariness in one sense of the term. Extremely specific standards might be unfit to capture some of the purposes of the existence of the criminal laws altogether, if they were to block the capacity of the system to comply with its duty, which would make the rules arbitrary in a different way. If a third element, resolution, comes into play, again it can be served by both, but categorical limits possibly take us further. In the end, both categorical and discretionary arrangements are sensible ways of regulating what is perceived as a necessity for the operation of the criminal justice system and for the restrictive use of the criminal law.

Finally, both modes have been shown to be equally scrutable in terms of impunity. Even if at first sight only categorical time limits fit the description, when seen through the lens of prosecutorial decriminalisation, the discretionary model also falls into that category. Thus, it becomes necessary to assess which is the most appropriate organ to make a

decision to exclude events from prosecution. I believe that because of the interests at play, delegation brings more difficulties than benefits. These difficulties are not insurmountable but depend on a much larger context and a web of powers and balances that cannot be designed without looking at the context and the whole normative landscape. The understanding of the value of legislation is crucial.

If we were designing a criminal justice system from scratch —such as the proposal contained in the next chapter—, what considerations about time would we have in mind? Having assessed this question from all of the perspectives above, my conclusion is that discharging the prosecutors from making individualised decisions about time limitation offers a better balance of powers in the criminal justice. When centralised bureaucracies take control of most of the decision-making in criminal law (as is the situation now in both of the studied countries and allegedly the tendency around the world), there are more reasons to recourse to a statutory determination of the boundaries of that power. This does not imply that there are no legitimate interests that could go against this conclusion or that there are no alternative ways to control such power. England is an example of a system that has managed to develop sophisticated controls, and which does not seem to need more extensive statutory control in this area. There is no outcry because of miscarriages of justice. Still, if put in place to assess a system *ex nihilo*, categorical limits are a safer choice.

If we assume an ideally appropriate use of public powers under liberal principles, there is little to say about the need to consider categorical bans on prosecuting when a long time has passed. But in the face of possible systemic abuse, the reiterated creation of expectations that are then not respected, and the creation of what could in the extreme be an erratic penal policy, it seems understandable to control the system from the outside-in, instead of trying to pick out those events in singular instances of judicial control.

This conclusion does not preclude the possibility of finding reasonable exceptions, where the discretionary mode ought to operate. Still, even there, the previous reflections speak for at least a structure of temporally-driven ‘overt decriminalisation’ for those kinds of cases: more explicit considerations about the general decrease in the relevance of offences over time, as well as reasons for exceptional prosecution in specific cases, could achieve a fairer treatment of all those potentially affected individuals. Policy changes could be more open to public scrutiny. This in turn would protect the criminal law from accusations of selective impunity.

CHAPTER 12. CONCLUSION

This concluding chapter offers a summary of findings, as well as a recapitulation and evaluation in light of its proposed aims and contribution to the scholarship.

12.1. Summary of the thesis

1. **Poles together:** the English and German systems are two close-to-polar opposites when it comes to how to deal with the passage of time for the prosecution of crimes. The first system relies heavily on the discretion of police, prosecutors, and judges, and the second is founded on strict general and categorical rules of limitation, gradated according to offence seriousness. The English system also contains a categorical rule of limitation for summary offences. For indictable crimes, it is to a significant degree regulated by prosecutorial guidelines, guidelines on the instructions to the jury, the capacity of the victim to act as a private prosecutor, trust in the capacity of the parties to bring high-quality evidence to trials, and the doctrine of abuse of process as the last stop for any inappropriate prosecution. The German system contains a few —but significant— rules which, for practical purposes, extend the duration of the periods while still retaining a rule of absolute limitation for all offences but aggravated murder.

2. **Functional equivalence:** there is a noteworthy level of functional equivalence between the mechanisms developed in the two legal systems, leading to a *de facto* situation that does not look very different in England and Wales and in Germany. Still, there is a difference in the dominance of discretion-based assessments of public interest to prosecute in England and

Wales that may allow for exceptional prosecution of any indictable offence. This structural difference is yet again toned down by the existence of some hard limits in England, as well as some soft limits in Germany, that become noticeable on closer inspection.

3. **Deeper differences:** the differences cannot be explained simply by labelling either legal system to a legal family (common vs civil law) or a procedural tradition (adversarial vs inquisitorial). More is gained through the study of time limits and other adjacent mechanisms regulating the relevance of the passage of time for criminal law. For instance, notions of undue delay or 'overlength' of prosecutions exist in both legal systems, with different associated mechanisms and consequences, sometimes leading to a stay in the proceedings but developing fast into other alternatives in recent decades. Also, there is a relevance for sentencing. Often it is said that the time elapsed since the commission of the offence ought to be considered to reduce the punishment to be imposed, but crucial differences exist between jurisdictions, such as the reluctance to do so for more serious offences in England, while in Germany this applies across the board. The relevance of understanding the reliance on discretion and categorical rules as ways to regulate the passage of time is present here too.

4. **Breaking with the roots through centralisation:** the history of these developments has shown the great significance of the modern break with tradition in establishing generally applicable rules of limitation for significant parts (if not for the totality) of the criminal law. The modern history of categorical time limits can and should be distinguished from its

Roman precursor. The progressive centralisation of prosecutorial and judicial powers is tied to this development; more centralisation is related to wider coverage of this type of rule. Categorial rules limiting the prosecution of politically related offences stand out. The history of non-categorical limitation is equally rich, with England showing less change at the statutory level but significant change in recent practice. In Germany, exceptions have been introduced to deal with regime changes and recently also with victim trauma in child sexual offences.

5. **Aims in context**: the aims of the criminal law and punishment offer no answers to the question of which mode of limitation is best suited to serve them. They lead to contradictory results, and there is an internal tension between these arguments in the abstract and when deployed in practical contexts. To understand this practical setting, the effects of the passage of time and the effects of the multiplicity of possible developments of the surrounding situations during that time need to be kept in mind. The aims of criminal prosecution and procedure adopted in different legal systems, on the other hand, portray different understandings of related values that may be protected by one or the other mode of limitation.

6. **Victims and their relation to the public interest**: the shifting role of the victim in different criminal justice systems defines the expectations and powers given to her. In the case of time limits, whether the victim will influence or decide on the public interest may be determined by her generally being invested with some public power akin to discretion. When the legislator is the one who makes the decision on public interest, victims

are relegated to a much more passive role, notwithstanding the possibility of gaining other procedural rights and protections. In any case, where a system is to be built without many other mechanisms to intermediate their protections, allowing for discretion-based time limits seems more agreeable with the protection of their objective interests.

7. **Protecting the accused**: a view ontologically committed to a complete continuity of the identity of the accused cannot put in doubt the suitability of blaming her for a past deed committed a long time ago. A categorical mode of limitation could only be justified in a generalisation about the significance of going through distinct life stages. Some views offer space for a dynamic understanding of identity that acknowledges a form of time-sensitivity in blaming a person, which a discretionary mode of limitation may be able to capture. A separate argument in favour of categorical limits from the perspective of the accused is the increased risk of an instrumental use of cases of low specific public interest but greater aggregate significance. Posing that a system of discretionary limitation is generally inhumane is, however, unconvincing, or at least only as convincing as a general scepticism about the good of the criminal law as a whole.

8. **Between punishment and impunity, from the perspective of the state**: two severe risks appear for a state related to prosecutions after a long time. On the one hand, categorical limits have been tied to trying to reduce the risk of authoritarian rule through the criminal law. However, it is not convincing that they will yield more than limited control to such impulses. On the other, there is the risk of impunity, which is present in any form of

time limits. The question is, instead, what form of impunity is the one that best secures an adequate use of delegation and separation of powers in order to increase democratic accountability. This favours more transparent forms of regulation of time limits and distinguishing between the different logics of adjudication, administration, and legislation. Limiting vagueness, increasing consistency, and encouraging finality are also relevant traditional rule-of-law values that speak in favour of the use of categorical rules in this ambit. This thesis has not uncovered great moral peril in allowing blame judgements after a long time has passed since the commission of an offence unless such an intervention is considered a form of 'meddling'. If that moral peril were the case, the best way to solve the problematic intrusion would be through categorical rules.

9. **Time to decide**: rather than merely contrasting interests of victims, potentially or actually accused persons and the state, which are balanced against one another, the reflections at stake imply different regulative principles that pull the system in different directions.[1] Evaluating a system demands understanding these principles and defining more general allegiances.

12.2. Contributions of the thesis

This thesis contributes to the literature on the law of limitation of England and Wales and Germany. The core purposes were to understand the foundational differences for

[1] A similar reflection on passing can be found for private law limitation in Arthur Ripstein, 'The Rule of Law and Time's Arrow' in Lisa M Austin and Dennis Klimchuk (eds), *Private Law and the Rule of Law* (Oxford University Press 2014) 327.

divergence, to analyse the conceptions underlying their regulations, and to evaluate the models they represent.

The thesis has offered an account of the relevant law in England and Wales, its historical development and other adjacent mechanisms which bear on the institutional reaction to the passage of time for prosecuting crimes. I have also reassessed the traditional portrayal of the German law of criminal limitation, revealing the connection with several other mechanisms that are often disregarded, as well as introducing more reflection on the areas where rules on limitation periods have retreated. In turn, I have provided a reinterpretation of the history of these mechanisms that highlights their relevance and complementariness to other significant processes of modern criminal law. These elements have served to analyse the conceptions underlying the institutional arrangements and to highlight previous gaps in the literature.

In terms of evaluation, I have offered an analysis that goes beyond the traditional elements assessed in the literature, namely the aims of punishment and some procedural complexities, by offering a detailed assessment of the consequences of adopting one or the other model from three perspectives, both in theory and within the actual institutional arrangements that shape their involvement in criminal law.

12.3. On the choice of legal systems

This study involved two criminal law jurisdictions, Germany and England and Wales. Several others were used to exemplify or contrast specific points, especially in Chapter 4, where the comparative analysis was developed, showing both commonalities and differences between legal systems often put within the same legal family and procedural tradition.

The contrast between England and Wales and Germany proved fruitful in generating many points of contrast but at the same time in not being radically different to the point of making the experiences developed under their respective criminal justice systems altogether incommensurable, thus making it possible to juxtapose them under the same normative framework developed in Part II. Historical differences (in terms of facts and ideas) are a crucial part of the explanation of the divergences between these two legal systems. For this reason, Chapter 5 is novel in terms of the comparative literature on the topic, preceded and inspired by Loening's[2] and Mittermaier's[3] work over a century ago.

12.4. Answers to the research questions

The following answers are drawn from the substantive chapters in this thesis to the research questions posed in the Introduction:

1. How may we explain the contrasting approaches taken to temporal limits in the two jurisdictions?

One line of explanation is historical. In terms of the long history, the Roman influence contributed to the modern adoption of time limits in Germany, while the lack of it explains the fact that no such rule was adopted in England and Wales. The situation during the Middle Ages seems to have been similar in both territories, with some isolated and non-systematic limitation rules, but in Germany the Roman 20-year limitation rule re-emerged. The presence of this antecedent may have limited the impulses by the promoters of inquisitorial criminal procedures to allow the criminal laws unrestricted use in time.

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2 Richard Loening, 'Die Verjährung' in Karl Birkmeyer, Fritz van Calker and Reinhard Frank (eds), *Vergleichende Darstellung des deutschen und ausländischen Strafrechts* (Verlag von Otto Liebmann 1908).

3 Carl Joseph Anton Mittermaier, *Das englische, schottische und nordamerikanische Strafverfahren* (Ferdinand Enke 1851).

The reform of inquisitorial criminal proceedings, together with the creation of the public prosecutor in Germany contributes to explaining the difference. One strand of thinking which developed in the Enlightenment period, when attempting to overcome the inquisitorial system, strongly advocated for the legislated law to be the only source of all the criminal law, extracting power from the operators of the system. This was in line with the modern introduction of generally applicable categorical limitation. The direct influence came from the French doctrine and legislation on the matter. The adoption of gradated categorical limitation periods was incremental until it became a rule across the criminal law. However, marginal tensions persisted, leading to the introduction of specific exceptions, especially when dealing with political dissent and protecting political rights, when dealing with regime changes and lately with the new position gained by the victim.

The English and Welsh system may be seen as having undergone less structural change, as they have retained the coexistence of a general lack of categorical time limits with the existence of a limited number of rules imposing such bars. However, changes are also perceptible. The use of limitation periods has played a part in political offences here too. Particularly significant is the limitation on treason. The process of structuration of state penal power and the criminal justice in England consisting of the creation of police services and the evolution of the prosecution service also entailed changes in terms of how prosecutions are restricted due to the passage of time. This period saw the adoption of a categorical rule that even nowadays covers the vast majority of actually prosecuted offences (those at the lower end of the gravity scale).

A second line of explanation relates to mechanisms outside the specific regulation of limitation periods. Several specific factors contribute to the perception that no generally applicable limits are required in England. Among them are the separation between the

investigation by police and the prosecution by the Crown Prosecution Service, adjudication of the facts by jury and the law by the judge, and the participation of victims and other members of the public as prosecutors. They may serve as counterbalances, promoting the adequate use and restricting potential excesses in the use of the criminal law. Also, prosecutorial discretion and selectivity, in conjunction with the norm-setting powers of the public prosecutors lend themselves to allocating the capacity to decide about the effect of the passage of time within the prosecutorial authority.

Meanwhile, one of the mechanisms that can be seen as contributing to the need for legislative constraint of the exercise of the state power to prosecute are the greater concentration of investigative powers on the German public prosecutor and its dependence of the executive power. This adds to the notion of prosecutors as [a mere applicator of the law, blind to non-legal elements], all of which does not make the prosecutor a suitable prudential evaluator of the effect of the passage of time. The judicial function in adjudicating law and facts, together with the general adherence to the principle of legality add to this perception requiring limitation periods established by statute. The two explanations share the common feature of placing weight on the differing distribution of powers and the place of statutory law in each system.

2. Which mode of limitation, under what parameters, performs better?

Two possible parameters of evaluation are the interests of the victim and of potential accused persons. These two perspectives do suggest different approaches to limitation, even if they do not necessarily represent opposites. Contrary to what might be thought, it is not the case that the interest of the victim is always in the possibility of unlimited

prosecution, while the only position compatible with the interest of the accused is the briefest possible time in which to prosecute.

Victims' interests in justice can be seen as composed of several elements. Most of these are compatible with the notion that time may be a factor in barring prosecutions, although an ideal regime might probably allow for exceptional cases to be prosecuted after a long time. This can be thought of as achievable by excluding some types of crimes from categorical limitation, but arguably the exceptions can be best captured through a case by case analysis, i.e. through the use of discretion. If this discretion is located in police and prosecutors, the discretionary mode requires the victim to have an influence or control over the decisions on the public interest of a case.

Although the identity-change thesis and the adoption of a certain understanding of the humanitarian principle could justify categorical limits from the perspective of the accused, both these interpretations are of limited plausibility: one is ontologically difficult to align with the notion of criminal responsibility, while the other would lead to a much more general scepticism about the criminal law's legitimacy. Nevertheless, the reliance on discretionary limits does open up the possibility of some more instrumentalisation of cases and the disproportionate use of prosecutions for reasons that are incompatible with the individual desert of the accused.

Neither victims nor those accused of crimes have interests disconnected from the overall functioning of the system. As individuals might find themselves in either position, and as members of the polity, it is in their interest that the criminal law serves all with equal dignity. This helps us find a possible convergence between the two positions. In drawing them together it is possible to establish a regime that recognises the dangers entailed in

granting discretion to certain officials from the point of view of the accused, while retaining a form of discretion especially in the cases that touch victims most intensely even after a long time, not for the sake of discretion but for enabling state action when it is still needed. A mixed model might provide an appropriate combination of the two structures, departing from the two models.

Another possible parameter for evaluation is the promotion of one or more justificatory aims of the criminal law. All types of time limits (discretionary and categorical) seem inconsistent with the most accepted versions of the aims of the criminal law and punishment. Discretionary time limits, navigate the demands of such aims and purposes better than categorical limits. Nevertheless, instead of directly serving these purposes, all kinds of time limits rather seem to exist to avoid the invocation of the criminal law when it could be employed beyond its legitimate purpose, causing unjustified harm. Thus, they serve this negative function of constraint. Time limits gain pre-eminence where there is fear of the use of the criminal law as an authoritarian instrument, of its potentially dehumanising nature or mere instrumentalisation. When facing these concerns, categorical time limits may perform better.

This, however, does not mean that categorical time limits are a necessary feature of a legal system. This thesis assumes as a starting point that there is a general need for boundaries to the power of the state in the ambit of criminal prosecutions. Among possible boundaries to such power, there is little questioning of the fact that the passage of time is an adequate criterion for *most* offences; in the literature and in the legal systems studied, there is general agreement that after a long time has passed, the relevance of prosecuting a crime diminishes. The amount of time required is considered contingent upon the gravity of the offence. When the mere passage of time is inappropriate, answers diverge as to what

elements should be considered. One possibility is focusing primarily on legal impediments. Another is to consider a wide array of factors, some of them conceivably distant to the characteristics of the offence itself (such as more general prosecutorial policy and sustaining trust in the system), which are best considered *in concreto* and thus advises against making the passage of time the central or unique criterion for limiting prosecution, and a 'softer' limit based on public interest more appropriate.

Yet, unless an ontological notion of time limits is adopted (where limits define the contours of criminal law in the temporal dimension and thus cannot be denied), there are other mechanisms that could also secure adequate constraints on state power, which do not need to rely on the mere passage of time as the critical defining factor. We could theoretically also have unlimited prosecution of every single known offence, even under a hard principle of mandatory prosecution, controlled by factors other than time. However, if necessity is understood in a looser sense, our two examples show that legal systems do incorporate time as a significant element in their decisions of how to structure the priorities of the criminal justice and, to that extent, time limits are seen as 'necessary' for the adequate functioning of the system as it is configured now.

12.5. Significance and implications of the findings

This research contributes to the comparative and doctrinal literature. It also offers a different way of assessing limitation periods, which changes the focus from the old theories-of-punishment approach or unprincipled pragmatic generalisations to more complex institutional designs and value judgements.

12.5.1. Implications for comparative legal scholarship

This thesis has proposed expanding the scope of comparative analysis beyond what typically had been done in analyses of time limits. Most works have simply stated the existence in Germany, and the alleged non-existence of generally applicable limitation rules in England and Wales. Some more conscientious analyses have added that they perceive a corollary of the principles of mandatory and discretionary prosecution.

If the methodology and content of this thesis are convincing, then it implies that a much broader scope than the work usually done is required to understand and explain the differences. The role of the police, the prosecutor, the judge, the victim and even the understanding of state authority and its legitimate exercise are involved when trying to understand why this significant disparity arises. Also, the thesis implies that several commonalities (*de facto* or legal ones) are to be recognised and not underestimated. From a relevant degree of functional equivalence to the shared notion of the need for discretion in some realms, comparatists ought to try to understand why these phenomena develop as well. In this thesis' proposal, these commonalities are partly explained by the collective reaction to the shared social relevance of the passage of time, the attempt to achieve particular aims, the protection of certain normative ideals through the criminal justice and through historical processes that have tested each jurisdiction's allegiance to single principles.

Filling this gap in the comparative literature allows us to better understand how and why we set limits to the criminal law. Understanding the borders is, I submit, as crucial as understanding the core.

12.5.2. Implications for criminal law scholarship

Criminal law theory often approaches discussions by appealing to the aims of punishment as the main instrument for assessing the appropriateness of any institutional design. Matters of doctrine and legislation ought to be assessed through this lens. This thesis is an example of the futility of this exercise when it comes to comparing alternative forms of regulation embedded in practices and norms that may be ambiguous as to the aims of the criminal law they serve. Several mechanisms in the law serve other purposes, the most important of which for this enquiry are balances and limits. They thus only indirectly and contingently serve some of the so-called aims of the criminal law. A general implication of this thesis for criminal law scholarship is to not assume that a mechanism can only be judged by these narrow parameters.

For criminal law doctrinal scholarship, this thesis suggests fresh consideration for the role of time limits in the respective legal systems. In England, the thesis has highlighted the weight of the existing and historical rules and the wider issues that seem to drive them. In the case of Germany, the increasing relevance of legal and *de facto* discretion realms needs to be considered for any sound understanding of the current state of the criminal law.

12.5.3. Implications for policy design and criminal justice operation

This thesis has implications for policy design and implementation. The first lesson is that neither of the two models presented here is as irrational, arbitrary, or out of touch with

modern principles as it may be thought when coming from the other side. On the other hand, this research complements some previous attempts that have shown the difficulties in harmonising limitation regulation across countries in Europe, especially in light of the difficulties that limitation sometimes causes for international cooperation.[4]

The thesis has noted some, but not all, of the points where there seem to be changes occurring worldwide in certain areas of the law of limitation. It discussed in greater detail the case of sexual offences and, in some detail, international crimes at the domestic level. In some other jurisdictions, crimes such as corruption,[5] terrorism,[6] or racism and racial slurs[7] are also being added to the catalogue of imprescriptible offences where there is no generally applicable rule of limitation. In the case of England and Wales, some changes have both been at the lower end of the gravity spectrum and the politically heated issue of crimes committed during war or civil unrest. The prosecutorial policies have developed partially out of the sight of public opinion, with the Code for Crown Prosecutors changing several times on this matter in the last few decades. Knowing more about these trends can help law-makers and enforcers to question their own realities and maybe develop relevant discussions on legal change.

12.6. Limitations and questions for further research

Most of the limitations of this work were introduced by its design, as outlined in the Introduction. There was a focus on domestic law and the comparative exercise comprised

4 Gudrun Hochmayr and Walter Gropp, *Die Verjährung als Herausforderung für die grenzüberschreitende Zusammenarbeit in Strafsachen: Entwicklung eines Harmonisierungsvorschlags* (Nomos Verlag 2021).

5 Argentina, through judicial interpretation of Art. 36 of the National Constitution.

6 Sweden, Chapter 35 s 2.6. of its Penal Code, coupled with extraterritorial jurisdiction for these crimes.

7 Brazil, through Art. 5 of the Federal Constitution as well as recent judicial interpretation.

only two legal systems (with reference to examples of how things have been done or have evolved differently elsewhere). This thesis has assumed that the question about what time is and its social role was not crucial to answer the relevant research questions. After a preliminary enquiry, I concluded that it was not useful for explaining the comparative similarities and differences and also that the evaluation would not rest on a different conceptual apparatus about time.

Academic and public debates around limitation periods continue. Some new offences are coming into the range of those 'suspect' of needing more extended possibility of prosecution in countries dominated by categorical limits. In the context of predominant discretion, there are still voices favouring the introduction of categorical time limits in the margins, and the complexities of handling discretion by the public prosecutor are sometimes criticised. However, neither of these legal systems seems to be heading directly to a radical structural change or doubting the grounding ideas that sustain those structures. Thus, research may continue to analyse these individual changes and alert about patterns and possible new developments and tensions in the law.

A future project should involve in-depth empirical research. There is a need to know in greater detail how discretion is exercised. The concept of the 'public interest' is, to use the words of the Director of Public Prosecutions of England and Wales at the time of writing, 'amorphous'; it requires further clarification. An enquiry including a few other noteworthy legal systems, such as France, the United States and perhaps Sharia law countries, would also expand the conclusions of this work.

12.7. Assessment and elements for a proposal

Some further consequences can be drawn from the reflections exposed in previous chapters that may help inform proposals on how to build an ideal regime of limitations.

This thesis has repeatedly asserted that the two models make sense in their own terms; they are explained and even justified by a series of premises and circumstances present in the two legal systems under comparison. The exercise of proposing a system of limitation void of all those characteristics is a theoretical exploration, which does not imply that it should be taken by any means as a recommendation to any actual legal system. It assumes a clean slate, an ahistorical context and does not discuss what other features would be inextricably necessary to, in my view, make this a better system than any of the existing ones.

Some of the general elements and premises of such a proposal are the following:

Temporal limitation of the criminal law is unavoidable. No system currently conceived could prosecute all offences forever and be practically and theoretically sound. Either it would have problems of overload, of low conviction rates, or it would lower its standards for convicting persons. Also, it would punish people beyond what is considered necessary or proportional; it would go against the social relevance of the events under scrutiny and could risk a drift towards an authoritarian application of the law.

The question is how to choose between the two modes of limitation constructed in Part II of the thesis, or how to combine elements belonging to them in the best possible fashion. In line with the reflections exposed in this thesis, **categorical limitation is not necessary**. A mixture of discretion and other mechanisms is a perfectly viable alternative for balancing the practical and theoretical needs of a sound criminal justice system. However, it is argued that a **categorical mode of limitation has significant advantages**

when compared with a discretionary mode of limitation when a defined set of principles is considered. Namely, categorical limitation is better aligned with the modern understanding of legality *lato sensu* (substantive and procedural), it makes a more transparent instrument, it restricts the reach of the criminal law in a clear way (similarly to the role played by rules on territorial jurisdiction), and thus constrains some potential for abuse and instrumentalisation of potentially accused persons. An open-ended power to prosecute all types of offences is a *carte blanche* that would be too risky to give as the basis of a design.

A discretionary mode of limitation has advantages that could be introduced in particular areas of the law, requiring an individualised assessment of certain cases. It better promotes the interests of victims in general and may serve for targeted use in specific areas. Thus, offences generating significant psychological trauma are the most suitable candidates, such as sexual offences, domestic violence and human trafficking. It has, however, fewer advantages from the perspective of the offender and from the perspective of the state intending to create rules for the best operation of the criminal justice system and the rule of law.

As can be seen, these reflections and justifications are only to a limited extent internal to the criminal law, they require us to integrate elements of legal philosophy. Borrowing Guzman Dalbora's words, limitation finds its foundations in one of the 'folds' of the idea of law, expressing certain ideals about the legal community that, to some extent, lie outside of the law itself.[8] Limitation implies an act of humility, recognising that the state

[8] José Luis Guzmán Dalbora, 'Crímenes internacionales y prescripción' in Kai Ambos, Ezequiel Malarino and Jan Woischnik (eds), *Temas actuales del derecho penal internacional: contribuciones de América Latina, Alemania y España* (Konrad-Adenauer Stiftung 2005).

and the law may fail, and they must let some cases go by withdrawing the punitive power, minimising its potential harm.

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A proposal for combining the best and avoiding the worst of the two modes of limitation can be attempted. Because the conclusion so far is that categorical limitation better respects the values here favoured for the criminal law, it will build the basis of our model. The specific design of what here has been termed a 'categorical mode of limitation' can vary significantly. The demands and concerns better served by a discretionary mode and the insufficiencies of the categorical mode will now be considered. To make such a model work together with these demands, some of the characteristics are:

1. **Gradation of the period according to the gravity of the offence**. Gravity is legislatively defined, assuming that there are no distorting mechanisms generating a judicial practice or sentencing provisions that widely alter this scale. To have an adequately gradated system, a two-fold distinction of 'less' and 'more' serious offences (such as the one existing in England and Wales) seems too coarse. Offences such as theft, fraud, public order offences and treason are too serious to have an extremely brief period such as 6 months but extending the realm of application of the criminal law to them after over 10 or 15 years would increase the risks already described. More extended periods for

minor and medium-gravity crimes, where a general principle of opportunity operates in general, a space for discretionary limitation appears.

2. **Serious offences ought to be subject to a limit.** In the proposals briefly mentioned in the historical chapter,[9] the gravity of the offences was taken to favour the exclusion of the upper range of prosecution from any time limit (not only a categorical limit but also no discretionary limit, promoting there a form of mandatory prosecution). The present proposal, in contrast, considers that resolution and the recognition of the law of its own fallibility requires an institutional expression in the form of a limit. For even the most serious crimes there is an individual who will be subject to criminal prosecution and the use of coercion by the state. Thus, in an ideal model, we should not use imprescriptible crimes. An extended period should suffice. However, this is not a direct reason for absolute exclusion of prosecution.

3. A specific **catalogue of offences** could be allowed to have a mechanism of individually authorised prosecution after that period. There, instead of a categorical limit, the **mechanism would adopt the shape of a presumption against prosecution**, which could be revisable by a judge. The offences subject to this exceptional mechanism could be those publicly recognised to entail personal trauma and state failure to react to victims' criminal complaints in cases of intense personal harm. Particular consideration should be given at this

9 See Chapter 5.3.

point to the late discovery of such an offence, either by the victim or the authorities, increasing the chances of the presumption being defeated.

4. **Murder** does not *per se* classify as one such exceptional offence. From the theoretical arguments here developed, based on the traumatic nature of some crimes, there seem to be no reasons that would lead the vicarious victims (those who remain alive), to not be able to seek prompt investigation and prosecution. Murders are seldom hidden crimes either. One potential argument which escapes the logic here favoured, but which could speak in favour of not limiting the prosecution of murders is it being subject to a life sentence. This would make it internally coherent to allow for unlimited prosecution. However, this is a contingent feature of a given legal system. The reasons given above for a gradated system following the gravity of the offences do not speak of a qualitative break in such structure for murder; there are other offences with death-results, there are other extremely cruel acts (and an intentional homicide does not necessarily have to be cruel), and there could well be other offences with a similar punishment assigned.

5. **Particularly unsuited for being imprescriptible are political crimes**, such as treason, crimes against the security of the state, pre-emptive terrorism offences and public order offences. These are the forms of criminality where the burden of prosecution falls even more heavily on the state and where the responsibility of misusing the adequate opportunities for prosecution needs to have clear and

uniform institutional consequences; it cannot depend on the will of changing prosecutorial policy.

6. The periods should generally **start with the commission of the offence, or the emergence of the result** contained in its description. The counting should **end with the first official action directed against a specified suspect**. **Intraprocedural delays should be dealt with through other mechanisms,** such as abuse of process and other bars to trial and compensations in terms of sentencing. Exceptionally, the beginning of the counting might be postponed, based on a closed catalogue of circumstances, such as the accused being protected by some form of immunity or being in office (for status offences requiring circumstance) until the cessation of that situation; *de facto* impossibility to prosecute due to a state of constitutional disruption; or some legal impediment.

7. The **space for discretionary limitation exists especially in lesser and mid-range offences**, in which it is in the prosecutor's hands to filter and select which offences it is in the public interest to prosecute.[10] As mentioned before, these offences would be subject to a categorical limit which is not too brief (for example, in the range of 5 to 20 years). In these areas, **explicit guidance from the prosecutorial authorities** (including any public office with charging powers) **is necessary** as to how to make this discretion operative in a consistent way across the territory and across instances of the commission of a similar

[10] This proposal assumes that a reasonable system would not be one of mandatory prosecution *tout court*, and that —in line with what has happened recently around the globe— significant discretion will be given to prosecutors in mid- to low-level offences. It would be a better fit with this proposal to have a system of mandatory prosecution for the most serious crimes.

offence. If certain offences are not a priority from the point of view of the prosecution service, overt decriminalisation policies may be undertaken by allowing the limitation period to run out, as long as it is a clear and transparent decision contained in guidelines. The boundedness of the system by publicly known factors and standards also would recommend adopting **guidance as to what out-of-court disposals are more appropriate** after a relatively long time has passed but before the expiry of the limitation period.

12.8. Conclusion

This thesis has provided a comprehensive overview of the law on time limits for prosecuting crimes in England and Wales and Germany, of their location in comparative perspective and history. It has also evaluated its main features (in the form of categorical and discretionary modes of limitation). The broader value of this thesis has been relocating the discussion from one that looks at the specific rules and doctrines usually conveyed by the literature when addressing the topic to revealing the underlying functions and the understanding of their role as a constraint to the state's power to prosecute. This strategy has uncovered different tensions from the perspective of the victim and the offender and the priorities of the legitimate exercise of the criminal law by the state. Any attempt to restrict the reach of state coercion exercised through the criminal law requires clarity regarding the effects of time limits. This thesis has contributed towards that clarification.

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