CUSTOM IN THE ENFORCEMENT OF THE LAW:
THE POWER OF THE ATTORNEY-GENERAL
TO STAY CRIMINAL PROCEEDINGS

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This article is a synopsis of a monograph which will be published shortly (in Hebrew) by the Harry Sacher Institute for Legislative Research and Comparative Law. I dedicate it to Professor Tedeschi because he was the one who triggered it ten years ago, with his suggestion that the study of law, and especially the study of contexts of discretion in the law, cannot be complete without detailed studies of the ways in which officers in practice use their powers. Custom thus has an easily overlooked importance as a source of law even in modern systems, in the many areas in which mere knowledge of the normative framework within which powers are exercised is insufficient for a knowledge and understanding of the law.

Tedeschi's suggestion seemed correct on its face, to an extent sufficient to motivate me to leave theorizing about law from the armchair and look into the practice of law enforcement. I emerged from the adventure even more convinced of his insight than when I started.

While working on the subject I realized that comparative analysis was also of relevance to such questions, and that important questions were raised about the utility of such analyses in attempts to solve one's problems. Again I have found that Tedeschi articulated the conclusion I have reached in an early article published years ago. So these insights of his were added to the many things for which I am indebted to Professor Tedeschi: the solid commitment to legal scholarship for which he has always stood; the varied, persistent and prolific interest he has in all things legal and in the life-problems which the law seeks to regulate, resulting in many essays which are to this day classic in their

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1 This suggestion was made as a part of Tedeschi's comprehensive analysis of the role of custom in the law: “Custom in Israel Law: Present and Future” (1973) 5 Mishpatim 9. It was reinforced by his sponsoring of a series of researches into the operation of custom in various areas. This study is one of this series. See also “On the Inductive Study of Law” in Studies in Israel Law (Jerusalem, 1960) 1, in which Tedeschi argues that lawyers should investigate the way legal institutions operate in social reality, drawing attention to the fact that occasionally such institutions serve functions other than those for which they were originally designed.

The larger study on which this article is based elaborates in some detail these larger jurisprudential questions of the complex relationships between solutions of legal problems (or law reform) and legal theory, empirical research and comparative analysis. Here I shall confine myself to the major findings of my research into the reality and the ideal of the power of the Attorney-General to stay criminal proceedings.

A. The Problem

Law-enforcement systems differ in the amount of explicit discretion they give law-enforcement officers regarding the initial decision whether or not to press a charge. They also differ in the amount of discretion they give administrative authorities concerning the decision to stop a criminal proceeding after it has been started.5

This appearance of difference may be nonetheless misleading, since in most systems, most of the criminal cases are conducted by the State. With this control over the handling of the case often comes discretion as to its outcome, even in systems where such discretion is explicitly denied by the law.6

3 Tedeschi's work covers the whole field of private law, including family law and the law of succession. In addition he addresses issues such as "Who Is a Jew?" In many of his articles, Tedeschi shows great sensitivity not only to the legal dimensions of the problems, but also to the human and social problems which underly them. See, e.g., his recent "Residence in Apartment Hotels and Parents' Homes" (1986) 11 Iyunei Mishpat 181.

4 See, e.g., "Medical Records and Patients' Rights" (1986) 11 Iyunei Mishpat 423, at 428.

5 For general discussions of various legal systems, see, e.g., Cole, Frankowski and Gertz (eds.), Major Criminal Justice Systems (Beverly Hills, Sage Publications, 1981). The main difference in law is between the Anglo-Saxon systems, in which prosecutorial discretion is the rule, and systems such as the German, in which at least for serious offences there is a duty to prosecute whenever there is enough evidence. For a summary discussion see Harnon and Mann, Plea Bargaining in Israel (Jerusalem, 1981, in Hebrew) 16-21.

6 Thus there is a dispute as to the extent to which discretion, even in serious crimes, is in fact limited in Germany. See, for example, the exchange between Goldstein and Marcus, on the one hand, and Langbein and Weinreb, on the other: (1977-8)87 Yale L.J. 240, 1549, 1570.
Once we acknowledge that important dimensions of the decision to prosecute and to conduct a criminal trial are a matter of discretion, our picture of that area of the law becomes incomplete if we do not know how in practice this discretion is exercised. The relevance of studying actual behaviour may be varied. First, such practices may suggest that despite the apparent equality of neutral general laws, the enforcement of the laws is *discriminatory*, in that only some groups of offenders are prosecuted, or that there are different prosecutorial policies depending on the identity or affiliation of the offender (or the victim). Secondly, such practices may suggest that some of the laws on the books are systematically *unenforced*, raising interesting theoretical and practical questions about their continuing validity and about the proper division of responsibility between legislatures and administrators. Thirdly, awareness of such practices may be indispensable for the successful achievement of one of the law's main functions – *guiding the behaviour* of people by letting them know, in advance, of the possible or probable official responses to their conduct. Fourthly, the study of such practices may suggest that there is some *corruption* in the enforcement of the law, which offends both the principle of *equality before the law* and the *integrity* of an important segment of the civil service, namely the police and the prosecutors, who are given broad powers to protect us, not to harm us.

All these possible threats to the rule of law are usually concealed by the existence of general, innocent-looking substantive norms of the criminal law, an ethos of equal and full enforcement and a normative framework within which the actual, extremely unorderly and incomplete practice of law enforcement goes on. It is the purpose of this study to examine a part of this reality, draw some of the lessons and see whether the reassuring appearance is justified.

One of the difficulties in any such attempt, in addition to the fact that traditional legal training does not aid a lawyer in such a pursuit, is that most of the decisions which together constitute the practice are of low visibility, and are not collected, reported and presented in a public way.  

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7 This point was stressed by the adherents of two American schools of jurisprudence: the Realists argued that we should investigate the law-in-fact rather than the law-in-the-books, and the Social Policy school argued that complete answers to legal questions are only given if we know both the law and the ways in which it is used and enforced.

8 In a seminal article about police decision-making, J. Goldstein points out the implications of this low visibility: “Police Discretion Not to Invoke the Criminal Process – Low-Visibility Decisions in the Administration of Justice” (1960) 69 Yale L.J. 543.
This means that the process of custom-building, as against a mere collection of *ad-hoc* decisions, if it exists at all, is slow and difficult to observe.\(^9\) It means also that if the body generating the decisions does not want, for whatever reason, to subject them to scrutiny, it may be impossible to arrive at any comprehensive non-impressionistic findings.\(^10\) Even in the absence of such reluctance, even if the body or bodies generating the decisions are willing to give the researcher full access to all relevant material, the research must be long and expensive, since the relevant material is not available in any organized form, and most of it must be collected by participating in, or at least observing, the processes of decision-making themselves. Finally, even if such research is undertaken, it is often extremely difficult to generalize in a valid way from a collection of decisions, and it is not at all clear that such generalizations should have the force of guidelines (as distinct from judicial decisions, in which part of the bindingness stems from the fact that the decisions are public, and that the law is developed by recurrent reference to previous decisions).

These are the reasons why I have chosen to research not the vast area of discretion in the enforcement of the criminal law as a whole, but only one small segment of it: the power of the Attorney-General to stay criminal proceedings after a charge is brought and before a judgment is passed. The Ministry of Justice was kind enough to give me access to the files, and to let me interview most of those involved in the decision-making process in the Ministry itself. Unfortunately, even for this little segment it is hard to establish conclusive findings, and it soon transpired that the power to stay criminal proceedings is simply the tip of the iceberg of decisions in enforcing the criminal law. The essential profile of the iceberg is suggested by the tip, but the suggestion cannot replace an actual study of the parts below. Moreover, no recommendations for the power to stay may be adequate without an analysis of the difficulties generated by the general process of decision-making in enforcing the law.

\(^9\) All legal systems which recognize custom as a source of law require that a recurrent pattern of behaviour in similar circumstances is identifiable. It strengthens the finding that such a pattern exists if people accept it as binding and follow it. Such acceptance requires the knowledge of the existence of the pattern. When decisions are of low-visibility, such knowledge may be missing.

\(^10\) In Israel, the police not only refused to give access to files, but even refused to give access to its own internal general directives. A similar difficulty was encountered by K.C. Davis when he wanted to study police discretion in Chicago: *Police Discretion* (St. Paul, Minn., West Pub., 1975) 173-174. For a similar complaint see Harnon and Mann, *supra* n. 5, at 38, n. 2.
My decision to concentrate on the power of the Attorney-General to stay criminal proceedings was also motivated by the immense practical difficulties involved in the exercise of this power. When I started the study, in 1977, the law granted power to stay only to the Attorney-General himself. The number of applications to stay rose steadily and reached an average of 2000 applications a year, imposing an unbearable load on the Attorney-General. Consequently, the law was amended in 1981 and permitted delegation of some of the power to the Deputy-Attorney-Generals. In the meantime, the number of stay applications has stabilized around 3000 a year. This arrangement, too, imposes a heavy burden on top officials in the Attorney-General's office. It is quite clear that this burden was not envisaged by the legislature when the power was granted; the power was expected to be invoked only in rare cases. This expectation was supported by the fact that in England, where a similar power is vested in the Attorney-General's hands, only 10 applications a year are processed by his office.

The situation in Israel, and the comparison to England, posed both a theoretical puzzle and a practical dilemma which made the choice of this particular subject both more interesting and of a more urgent practical importance.

B. The Normative Framework

The power of the Attorney-General to stay criminal proceedings is now regulated in section 231 of the Criminal Procedure Law (Consolidated Version) 1982 (hereinafter: CPL), which states:

231. (a) At any time after the filing of the information and before the finding, the Attorney-General may, by reasoned notice in writing to

11 Sec. 202 of the 1965 Criminal Procedure Law (19 L.S.I. 158) specified that only the Attorney-General could exercise the power. Both legislative intent and the regular canons of interpretation supported the view that the power could not be delegated.
12 See Table 1 below.
the court, stay the proceedings. Where notice as aforesaid has been
given, the court shall discontinue the proceedings.

(b) The Attorney-General may delegate to a Deputy-Attorney-
General, either generally or in respect of particular classes of matters
or a particular matter, his power to stay proceedings under subsec-
tion (a) where the charge is an offence other than a felony. 15

If the charge is for a serious offence, proceedings may be renewed for a
limited period of time. 16

The power to stay is a part of a system in which the State generally has
monopoly over the initiation of criminal proceedings, 17 and in which
there is explicit statutory discretion both in the decision to investigate
and in the decision to prosecute. 18 In addition, the State has various ways
of controlling the conduct of a trial after a charge is pressed. 19 Of clear
relevance to the question at hand is the power to dismiss a charge after
it is brought, a power that law confers upon the prosecution. 20 One impor-
tant fact which should be noted is that the consequences of the State’s de-
cision to change its mind about a charge depend on the stage of the trial.
If the discharge comes before the accused has answered the charge, the
charge is dropped and there is no bar to further proceedings. If the rever-
sal comes after that stage, the accused is acquitted, which means that he
cannot be prosecuted again for an offence stemming from the same set
of facts. 21

15 See supra n. 13. Felonies are defined in Israeli law as offences the maximum punish-
ment for which is more than three years imprisonment.

16 Sec. 232 of CPL provides that proceedings may be reopened within a year for a misde-
meanor, and 5 years for a felony. If a second stay is granted, the proceedings may not
be reopened.

17 The principle of state monopoly on criminal prosecutions is stated in sec. 11 of CPL.
Sec. 68 creates the possibility of “private complaints” for a small number of offences
listed, including mainly those offences in the prosecution of which there is small public
interest.

18 Sec. 59 of CPL provides that the police may decide not to investigate any offence which
is not a felony if there is no public interest in the investigation, and sec. 62 permits
a prosecutor not to prosecute if there is no public interest in conducting a trial.

19 Until the beginning of the trial, the prosecution may unilaterally amend the charge (sec.
91). After that stage, amendment may be requested by a party, but can only be granted
by the court (sec. 92). The prosecution has also the option of not submitting evidence,
which will usually result in an acquittal.

20 Secs. 93-94 of CPL.

21 Sec. 5 of CPL incorporates the principle that a person may not be prosecuted for an
act if he was previously either convicted or acquitted for an offence related to it.
The law does not specify the grounds for which the Attorney-General may use his power to stay criminal proceedings. This was a choice explicitly made by the legislature. There is no requirement that the accused be consulted before a stay, another choice explicitly made. The only constraint on the Attorney-General is the need to give reasons for his decision. Once the Attorney-General (or his Deputies) notify the court of their decision to stay, the court has no choice but to respect that decision. The proceedings are then suspended (rather than terminated).

The Attorney-General's decision under sections 231-232 is subject to judicial review, since it is a decision made by an official exercising his legal power, in the language of section 15 of the Basic Law: Adjudication. The power also extends to criminal proceedings started by individuals as "private complaints". Initially, the court's position was that it will only intervene in the Attorney-General's decision if it is proven to have been made without good faith, since the Attorney-General is the guardian of the public interest in this sphere. Recently, there may be a trend towards broadening this review and intervening also in decisions which are "extremely unreasonable". To date, however, the court has not reversed a single exercise by the Attorney-General of his power to prosecute, to stay or to refuse prosecution or stay.

22 See the legislative debate concerning this power, (1965) 43 Divrei HaKnesset 2441-2442, in which various limitations were suggested, and the explanation of the chairman of the committee as to why these limitations were rejected: ibid., at 2445, 2446.

23 The demand that defendants be consulted was raised in the debate: first reading, (1963) 37 Divrei HaKnesset 2034-2035, and second reading: (1965) 43 Divrei HaKnesset 2441. It was rejected by the committee: ibid., at 2446.

24 S.H. (1984) no. 1110, p. 78. The same applies to a decision by the Attorney-General to press charges or to refrain from pressing charges.

25 In fact, one of the major cases discussing this issue, Shor, supra n. 14, dealt with a private complaint.

26 Both positions are expressed in the recent decision of Noff v. Attorney-General (1983) 37 (iv) P.D. 326, in which the plurality endorsed the "classical" position of limited review, whereas Barak J. suggested that the scope of review should be more extensive. All three Justices found that in the circumstances of the case before the Court (dealing with the decision not to prosecute) there was no reason to upset the Attorney-General's decision.

27 In a number of cases the court expressed surprise at a particular decision: See e.g., Cohen v. Ministry of Justice and the Attorney-General (1964) 18 (ii) P.D. 397, in which a complaint of a crime was submitted against the petitioner. The complainant appealed the decision not to prosecute, and the appeal was dismissed. He then complained again to the Attorney-General; a new Attorney-General had been appointed in the meantime,
In 1982 Attorney-General Zamir issued new and comprehensive *directives* (replacing the existing, less comprehensive ones) concerning the practice of stays. These directives do not contain a list of grounds for accepting or rejecting applications. They concentrate on the procedural aspects of handling stays. The directives do include general instructions concerning the relationships between application of stay and delays, the relevance of the attitude of the complainant/victim and guidelines on meeting with applicants or their attorneys. The directives include special sections on two kinds of applications: applications for stays in cases initiated by private complaints, and stays sought by the prosecution for reasons of absence of the defendant or a central witness. For these categories there is an attempt at directing the discretion to grant stays by mentioning some general guidelines.

C. The Practice

Our description of the practice is based on the statistical monthly reports prepared by the Ministry of Justice, on a detailed study of a sample of 150 stay application files in 1976-1977, on a number of small samples checked in 1981, 1983 and 1984 and on conversations with individuals involved in the decision-making process in applications for stays. In addition, we use impressionistic evidence which found its way into newspapers, articles, etc. Needless to say, we have taken into account all the direct or indirect references to the practice which appear in those court decisions which were available to us.

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28 Directive 51.000, (vol. 5), most recently amended and republished May 1, 1984.
29 The directives specify, for example, types of circumstances in which a rare stay of a private complaint may be granted: an apparent abuse of the power to prosecute, e.g., when a number of complaints are made for the same set of facts; or when the complaint is brought to intimidate the defendant or his relatives from testifying against the private prosecutor or his relatives. The implication is that in regular circumstances a stay will not be granted.
30 It should be noted that a number of decisions relating to the Attorney-General's discretion in enforcing the criminal law have not been published. Some of them, which we saw, are indeed lacking of public interest. Others, however, seem significant enough. Thus, for example, the main judicial decision concerning stay of proceedings when the request comes from the prosecution itself, an extremely problematic class of cases, has
It must be stressed from the outset that the data cannot support valid and comprehensive conclusions about the practice, though they do give some sense of it. Thus, on many points the purpose of this study is to encourage further research by identifying questions on which such research may be necessary.

1. Some Numbers

Table 1:

<table>
<thead>
<tr>
<th>Year</th>
<th>applications</th>
<th>closed</th>
<th>accepted</th>
<th>% accepted</th>
</tr>
</thead>
<tbody>
<tr>
<td>1972</td>
<td>931</td>
<td>943</td>
<td>112</td>
<td>12</td>
</tr>
<tr>
<td>1973</td>
<td>943</td>
<td>817</td>
<td>150</td>
<td>18</td>
</tr>
<tr>
<td>1974</td>
<td>1228</td>
<td>1133</td>
<td>289</td>
<td>26</td>
</tr>
<tr>
<td>1975</td>
<td>1304</td>
<td>1092</td>
<td>201</td>
<td>18</td>
</tr>
<tr>
<td>1976</td>
<td>1695</td>
<td>1556</td>
<td>310</td>
<td>20</td>
</tr>
<tr>
<td>1977</td>
<td>1826</td>
<td>1535</td>
<td>369</td>
<td>24</td>
</tr>
<tr>
<td>1978</td>
<td>2162</td>
<td>1506</td>
<td>339</td>
<td>23</td>
</tr>
<tr>
<td>1979</td>
<td>2333</td>
<td>1921</td>
<td>594</td>
<td>31</td>
</tr>
<tr>
<td>1980</td>
<td>3032</td>
<td>2771</td>
<td>836</td>
<td>30</td>
</tr>
<tr>
<td>1981</td>
<td>3387</td>
<td>3030</td>
<td>760</td>
<td>25</td>
</tr>
<tr>
<td>1982</td>
<td>3033</td>
<td>3107</td>
<td>785</td>
<td>25</td>
</tr>
<tr>
<td>1983</td>
<td>2890</td>
<td>2977</td>
<td>1042</td>
<td>35</td>
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<tr>
<td>1984</td>
<td>2812</td>
<td>2880</td>
<td>992</td>
<td>34</td>
</tr>
<tr>
<td>1985</td>
<td>2684</td>
<td>2582</td>
<td>717</td>
<td>28</td>
</tr>
<tr>
<td>1986</td>
<td>2679</td>
<td>2533</td>
<td>721</td>
<td>28</td>
</tr>
</tbody>
</table>

The annual numbers given here are the compilation of monthly statistics kept by the Ministry of Justice. The statistics give the number of files of applications for stay opened each month, and the number of files which are closed. These latter files are divided into cases in which the application was accepted, those in which it was rejected, and files which were "cancelled", i.e., closed without decision on the merits (e.g., because the defendant was convicted before the decision was made, or because the application was withdrawn). \(^\text{31}\)

not been published: HC 472/76 Abu Zmil. Thus it cannot be certain that all important decisions in this field have been published.

\(^{31}\) I have not given the numbers for these categories here, since I do not draw any conclusions from them. They appear, of course, in the complete study: See Chapter 10.
Table 1 suggests that the number of applications rose consistently until 1981, then dropped and reached a stable plateau at around 2800-2900 applications a year. The ratio of applications for stay to all criminal proceedings has been oscillating between 0.34% in 1972 and a high of 0.79% in 1983, with an inconsistent pattern.\(^{32}\)

It is clear that the percentage of accepted applications is high.\(^{33}\) It has always been higher than the estimates of the people involved. In 1978, for example, there was an acceptance rate of 23-24% whereas most of the people involved estimated it at around 10% only (lower than it ever was in the period of recorded statistics).

The hypothesis that the number of applications rose because of the per-

<table>
<thead>
<tr>
<th>Year</th>
<th>Criminal Proceedings</th>
<th>Rate of Change (%)</th>
<th>Stay Appl.</th>
<th>Rate of Change (%)</th>
<th>Stay Appl/proc</th>
</tr>
</thead>
<tbody>
<tr>
<td>1972</td>
<td>274035</td>
<td>-</td>
<td>931</td>
<td>-</td>
<td>0.34</td>
</tr>
<tr>
<td>1973</td>
<td>248352</td>
<td>-9</td>
<td>943</td>
<td>+1.3</td>
<td>0.38</td>
</tr>
<tr>
<td>1974</td>
<td>235316</td>
<td>-5</td>
<td>1228</td>
<td>+30</td>
<td>0.52</td>
</tr>
<tr>
<td>1975</td>
<td>328712</td>
<td>+40</td>
<td>1304</td>
<td>+6.2</td>
<td>0.40</td>
</tr>
<tr>
<td>1976</td>
<td>379217</td>
<td>+15</td>
<td>1695</td>
<td>+30.0</td>
<td>0.45</td>
</tr>
<tr>
<td>1977</td>
<td>381040</td>
<td>+0.5</td>
<td>1826</td>
<td>+7.7</td>
<td>0.48</td>
</tr>
<tr>
<td>1978</td>
<td>431236</td>
<td>+13</td>
<td>2162</td>
<td>+18.4</td>
<td>0.50</td>
</tr>
<tr>
<td>1979</td>
<td>480876</td>
<td>+12</td>
<td>2333</td>
<td>+7.9</td>
<td>0.49</td>
</tr>
<tr>
<td>1980</td>
<td>491592</td>
<td>+2</td>
<td>3032</td>
<td>+30.0</td>
<td>0.62</td>
</tr>
<tr>
<td>1981</td>
<td>489362</td>
<td>-0.5</td>
<td>3387</td>
<td>+11.7</td>
<td>0.69</td>
</tr>
<tr>
<td>1982</td>
<td>467895</td>
<td>-4</td>
<td>3033</td>
<td>-10.5</td>
<td>0.65</td>
</tr>
<tr>
<td>1983</td>
<td>367467</td>
<td>-21.5</td>
<td>2890</td>
<td>-4.7</td>
<td>0.79</td>
</tr>
<tr>
<td>1984</td>
<td>394628</td>
<td>+7.4</td>
<td>2812</td>
<td>-2.7</td>
<td>0.71</td>
</tr>
</tbody>
</table>

The number of criminal proceedings is the result of data on criminal matters in Legal Statistics, where the number of criminal matters in the Supreme Court and criminal appeals and other proceedings in district courts were deducted from total criminal proceedings for that year. Table 2 also shows that there is no obvious relationship between the trend in the number of proceedings and the number of stay applications. It may be easy to explain some of the figures, e.g., the drop in prosecutions and the rise in stay applications in 1974, the year just after the 1973 war. For identifying and explaining other trends, more detailed analysis is required.

It is useful to compare it to the percentage of justified complaints in other contexts: see, e.g., the findings of a comparative survey of ombudsman decisions: Shetreet, “Administrative Procedure Bill” (1984) 14 Mishpatim 367, at 371, n. 10 (citing B. Danet, “Toward a Method to Evaluate the Ombudsman Role” (1978) 10 Administration and Society 348). In a similar materia of appeals on the administrative decision not to prosecute for lack of evidence or absence of public interest, only 10% of the appeals were found justified: the complete study, Chapter 5.
ception that more stays were actually granted is hard to sustain: the rise in applications stopped in 1982, despite a very high rate of acceptances, and without any indication or reason for a change in perceptions. But clearly the actual rate of acceptance is not the sole or even the main creator of perceptions, and we do not know how such perceptions are created, nor how they affect, if at all, the practices of applicants.

It is impossible to know, from these figures alone, why the rate of stays is so high and what this should tell us about the quality of the decision to prosecute or of other aspects of the handling of these cases. Nonetheless, the high rate of applications in which a stay is in fact granted should be of concern. It may suggest some problems with the primary decision-making and raise doubts as to equality in law enforcement and the importance of nagging in getting you out of regular enforcement of the law. Naturally, most of the public criticism of stays centred around the second fear. As far as I can see, the first problem is of much more serious implications to our criminal law-enforcement system as a whole.

2. Types of applications

The mere numbers do not constitute a safe basis for findings, mainly because they tell us nothing about the kinds of applications which are made, the types of reasons invoked for them and the types of cases in which stays are granted. Furthermore, despite an instruction in the new Attorney-General's directives suggesting that a more detailed statistical

34 The hypothesis was investigated in the Ministry of Justice, and was explicitly endorsed by Shamger P. in Barzilai and others v. Minister of Justice and others (1986) 40 (iii) P.D. 505, at 536-537 (the "General Security Services case").

35 One of the major reasons for a change in perception may be the change of the Attorney-General. It was popularly believed that Barak was more lenient than Shamgar, and that Zamir was more lenient than Barak. Nonetheless, in both transition periods it seems that the number of applications for stay went down when the new Attorney-General assumed office.

36 One of the reasons for this is that the actual rate of acceptances is not a known fact. If the idea behind a stay application is that there is nothing to lose by it, and all to gain, this does not seem to be affected by the chances of the application.

37 Such aspects may include answers to the questions why witnesses or defendants disappear, why it is sometimes found that the file does not contain enough evidence for even a prima facie case, etc.

account should be kept, there is no way to reconstruct such information without going back to the files themselves.

On the basis of analysing the power to grant stays, and on the basis of the samples studied, a classification of applications into five main groups suggested itself as a helpful analytical tool:

1. applications concerning private complaints;
2. applications made by prosecuting authorities;
3. applications based on new facts;
4. applications seeking a review of the initial decision; and
5. applications invoking considerations of the sort that the prosecuting authorities were not allowed to take into account.

If most of the stays are granted in groups 1, 3 or 5, this may suggest that there is nothing wrong with initial prosecution decisions. The picture may be different if most of the stays are granted in cases belonging to groups 2 or 4.

The large majority of applications (over 90%) was made by defendants or on their behalf.\(^3\) Less than 5% were made by the prosecution, and some applications were made by other authorities on behalf of defendants with intense hardships.\(^4\) In our sample we found no instance of an application for stay in a private complaint, and only one such case was related to us by Professor Zamir in the years of his tenure. Similarly, we encountered only one case in which it could have been argued that the reasons invoked for the stay were of the sort that the prosecuting authorities were unauthorized to make.\(^4\) It is thus safe to conclude that most of the applications

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39 Percentages are based solely on the systematic 150 - file sample checked in 1978. All the other kinds of data we use cannot generate any percentages data. Nonetheless, the small samples of cases we checked in later years did not suggest a change in the types of cases or considerations.

40 Three such cases are: file 62/75, in which the application was submitted by the income tax authorities when the defendant was terminally ill; file 111/75, in which the application was submitted by a social worker for the offence of instigating to prostitution, on grounds of rehabilitation; and file 126/75, in which the sitting judge suggested stay for a minor theft committed a long time before the trial and whose victim had since died.

41 This is file 2183/84, concerning the prosecution of members of the "Jewish underground". The reason for the application was that the main question in the trial was the efficiency of the security policy in Judea and Samaria, and that this was a subject not fit for judicial decision and which should be investigated by a Commission of Inquiry. By the time the Attorney-General addressed the question of whether proceedings should be stayed in that trial, the argument was rather the connection between this trial and the release of convicts in the POW's transaction. At that stage, the reason alleged
belong to requests for review, based either on new facts or on a feeling that the initial decision was not well-founded.

3. *Grounds for Decision*

One of the troubling aspects of an administrative power such as the power to stay criminal proceedings is that it has very low visibility. Thus, it is almost impossible to know what are considered good reasons for stays and what are deemed irrelevant considerations. Furthermore, the low visibility makes public surveillance and criticism less effective. Such criticism may be either too lenient, because some questionable decisions are not known, or too severe, because dramatic disclosures do not reflect the practice as a whole.

The study provided reassurance in the sense that we have not encountered, among the files we studied, clear cases of corruption or bias. Moreover, the examination revealed that in most cases the applications were indeed studied in depth, and a sincere effort was made to accommodate the needs of law enforcement with due process, humanity and equality. On the other hand, the study disclosed quite a lot of unresolved controversy concerning the relevance and the weight of various considerations in decisions of stay.

The requirement of giving reasons for the decisions, added in order to facilitate review of these decisions, is not of much assistance: the reasons given are often very general and do not always reflect the various consid-

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42 It is not always easy to understand the reasons for a particular decision from the file. A case that looked "suspect", although not corrupt, is file 21/75, in which a stay was requested in the prosecution of an old man for violence in a welfare agency. The policy in such cases is not to close files, in view of the need to deter from such conduct and stress its severity. Accordingly, a first request was rejected by the Attorney-General, and by all those who gave recommendations in the case. Nonetheless, after repeated requests from the Ministry of Foreign Affairs, a stay was granted. Insinuation of corruption or discrimination was made in a number of newspaper articles (see e.g., Ronnen, *supra* n. 38). From my experience with hundreds of such files, I do not believe that these accounts indeed justify, in themselves, allegations of favoritism.

43 Thus in many cases the recommending advocate went to lengthy efforts to verify facts, receive rehabilitation information, find out details about the complainant and the history of the conflict, etc.
erations raised by the various individuals involved in the decision-making process.\textsuperscript{44}

The new directives by the Attorney-General have helped in some of the cases, by attempting a general evaluation of the relevance and the weight of certain factors, such as the withdrawal of the complaint by the victim or the disappearance of key-witnesses. But even in such cases it is not always easy to evaluate if the guidelines have been adequately applied to a case, since the wording of the guideline is inevitably vague, and the description of the case in the file inevitably less complete than the picture an individual who looked into it and made enquiries would have.

If we had taken these methodological difficulties seriously, nothing could be learnt from the files. While it is almost impossible to identify flaws in any particular decision, it seems safe to suggest that the examination of the actual files raises some questions about the relevance and the weight of various factors in the decision to grant a stay. These questions are important because only if they can be answered in a fairly uniform way can they serve as a basis for guidelines in future cases.

a) \textit{Weakness of evidence or conflicting evidence}. There are certain cases in which it is claimed that the proper \textit{locus} of decision is the court.\textsuperscript{45} Consequently, allegations that the evidence is weak are not seen as good reasons for a stay. On the other hand, it is clear that weakness of evidence is in other cases seen as relevant, and at times even as justifying a stay (especially after the defendant has answered the charge, so that a withdrawal of the charge results in acquittal).\textsuperscript{46} This ambiguity results from an ambivalence concerning the role of the prosecutor. Under one description, he should bring all cases in which there is a \textit{prima facie} case to the decision of the court. Under another description, the prosecutor should

\textsuperscript{44} For this reason it is not always easy to know why a stay was given or refused, since it is not clear which of the reasons suggested by the applicant were persuasive to the person who ultimately made the decision. The standard form for notifying the court of a decision to stay merely states that “I reached the conclusion that, in the circumstances, there is no public interest in the continuation of the trial”...

\textsuperscript{45} See, e.g., file 98/75, a case of a charge of having intercourse with a minor. The defendant claimed that the girl told him she was of age. The application was rejected, and the two recommendations specified that the place to verify such claims is the court.

\textsuperscript{46} See, e.g., file 28/75, in which the defendants were accused of an attempt to obtain a loan on the basis of false data. The advocates in both the District Attorney office and in the State Attorney office recommended a stay due to doubt concerning the intention of the defendants. A stay was granted (with a warning).
only bring to court those cases in which he thinks there is a good chance for conviction. Clearly, the different conceptions of the role of the prosecutor yield different answers to the question of the relevance and weight of strength of evidence in the decision to prosecute. Similarly, the ambiguity concerning this factor in a decision of stay may reflect an ambivalence about the breadth of the review undertaken by the officials considering the stay. One perception may be that they should seek to make the decision which should have been made by the prosecution (the appeal standard). Another may be that they should only give a stay if the initial decision is either flawed or extremely unreasonable (the administrative review standard). Arguments can be made for both answers to the two questions, and to many variations in between. This plurality of possible approaches, which has not been addressed or resolved, clearly affects the attitude to considerations of evidence in the stay stage.

b) *Mitigating circumstances of the defendant* (past record, state of health, etc). In some cases it is claimed (and decided) that such considerations are only relevant at the stage of the argument for sentence, whereas in others such considerations seem relevant to and even sufficient for a decision for stay.\(^{47}\) Again, this kind of ambiguity may operate at the stage of primary decision-making as well. It is the kind of situation which raises fears of unequal enforcement of the law. There is something misleading about presenting the issue in this way, since clearly the decisions made should be seen against the background of the whole situation, which includes not only the mitigating circumstances but also the nature of the offence and its particular circumstances. It was stated that personal considerations were not relevant when we talked of giving bribes by a writer.\(^{48}\) They were deemed relevant in a case of insulting a civil servant by a welfare client who was a mother of six.\(^{49}\) It is reasonable to say that we

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\(^{47}\) See, e.g., file 6/75, in which it was decided that a major contribution to Israeli literature was irrelevant in an application of stay in proceedings for giving bribes; or file 21/75 (age and health situation are irrelevant in a charge for violence in a welfare agency). Contrast these with file 45/75, in which a charge for insulting a civil servant was stayed because the defendant was the mother of six.\(^{48}\) Taking bribes is a serious offence, and there seems no obvious connection between the offence and the alleged mitigating circumstance. Furthermore, the mitigation has nothing to do with the oppressiveness of a criminal prosecution for the defendant.\(^{49}\) In this case, there is probably a connection between the situation of the defendant and the circumstances under which the offence was committed. It might be a *de-minimis* case anyway, and it is almost inconceivable to punish severely in such a case. It thus may seem more sensible to refrain from prosecution altogether.
cannot really deduce from such cases any consistent position concerning the isolated factor of mitigating circumstances. On the other hand, such a conclusion may entail complete despair as to the possibility of any attempt to formulate guidelines to regulate discretion in this wide area. At least decision-makers should be more aware than they seemingly are of the complexities of their task.

c) Age of defendant. The same could be said about this factor: from the decisions we can see an apparent inconsistency concerning the perceived relevance of age to a decision to stay. At times it is seen as a consideration for mitigated sentence, at others as a reason for stay. This appearance could probably be removed if we accept that age is relevant, and its contribution to the adequate decision may depend on the particular circumstances of the case.

We should then seek to identify, and if possible to generalize, the other circumstances which may affect the decision either way. Similar indeterminacy applies to the relevance of lapse of time, the contribution of the defendant to law-enforcement, etc. While it is generally conceded that the severity of the offence and the record of the defendant are relevant, no

50 See, e.g., file 3/75, a charge of theft against a youngster with no record, who was inducted in the meantime. The complaint was withdrawn. The investigating police unit recommended a stay, but the National HQ recommended against it, so that youngsters will not think they can get away with everything before their induction. Application for stay was rejected.

51 See, e.g., file 114/75, a charge against a youngster of insulting a policeman. The reasons invoked for the application included age, remorse and the fact the youngster was going to be drafted. Both recommending instances recommended that the application be rejected. The Attorney-General decided to grant a stay.

52 In many cases it seems that lapse of time is a strong reason for a stay, especially when it is combined with additional factors. This is what justified a stay in file 126/75 (a petty theft, lapse of time, death of victim). In other cases, on the other hand, such combinations did not work. See, e.g., the first decision in file 4/84: Defendant was accused, in October 1983, of burglary and theft of a television set from a house in April 1980. An application of stay invoked the reasons of lapse of time, weakness of evidence, absence of criminal record and various personal reasons. The application was refused, with the standard reasoning.

53 Thus in file 80/75 the defendant, a resident of East Jerusalem, was accused of tax offences. The reasons for his application of stay were that he was "cooperating" with Israel to an extent that put him under physical risk. The original decision to prosecute was made by top officials who were aware of these facts. Nonetheless a stay was granted after repeated applications.
hard and fast rule can be drawn in this respect. In some cases stay is grant-
ed despite a record, in others it is denied in the absence of any previous
charge or conviction.

Suspicion of unequal treatment is often present when we hear that indi-
viduals accused of the same offence were treated differently. But the na-
ture of the offence is just one of the relevant factors. The presence or ab-


sence of others may explain or even justify the different treatment. It may
make the individuals more unlike than similar, despite the fact that the


offence is the same. Thus, it is difficult to find fault even in the fact that
while an application was rejected in one case due to the severity of the


offence, it was granted without any reference to this severity in another.


The appearance of inconsistency could be removed if the decision-
makers in both cases had been aware of the fact that their decision is gov-
erned by a multiplicity of considerations.

Decisions in stays are neither collected nor published together, so that
any generalization or comparison is made extremely difficult. Although
no deliberate effort at discrimination has been found, and although the


54 One such case is file 9/75, in which a defendant with a criminal record was granted
a stay because it was felt that a trial and punishment may harm his chances of rehabili-
tation, in view of extremely positive reviews by probation officers.

55 This, of course, is no surprise. There is always a first time in which a person suspected
of an offence is charged with it.

56 A dramatic example is the always-relevant offence of selling products for prices above
the maximum price. In file 123/75, the defendant's advocate requested a stay arguing
that the defendant did not know of the law. He suggests a monetary award instead of
a trial. The District Attorney recommended a stay for lapse of time and because the
problem was not acute. The advocate in the State Attorney office strongly recommend-
ed against a stay, due to the turpitude of this kind of behaviour. A stay was not granted.
A stay was not granted also in file 64/75, for the same offence. On the other hand, a
charge for the same offence was stayed in file 71/75, when the defendant was a mother
who had just lost a son in the war. No mention was made of the consideration of the
severity of the offence. It is impossible, of course, to assess the reasonableness and con-
sistency of such decisions without more information, but on the face of the decisions,
there is a tension between them and the principle that like cases should be treated alike.

57 The deliberations in the files reveal a conscientious and sensitive approach. Yet this
is not surprising: it is hard to expect that such deliberations will reflect anything else.
Also, discrimination is notoriously difficult to establish if one does not have a system-
atic survey of cases according to potential criteria for discrimination. This absence of
systematic material may disguise, however, not only deliberate discrimination, but
simple arbitrariness and inequality as well. Good intentions are no bar against this
vice of decision-making.
actual decision-making is not simply a rubber-stamp of the recommendations that precede it, the picture that emerges is troubling. The potential for abuse of power is immense. The inner processes of review are not always adequate. Too much depends on the integrity of a small number of extremely busy individuals.

4. Procedures

In principle, the process of handling stays should have started with the Attorney-General, since he is the one to whom the law grants the power to stay. In fact, some of the applications still arrive at the Attorney-General’s desk, but the directives ask that applications be directed to the prosecuting body, so that precious time will be saved. In this way, the prosecuting body, which has the files and the evidence, may send the material, with its files and recommendations, to the Ministry of Justice, instead of starting the process by an attempt to identify the file and the prosecuting authority. This saving of time is of special importance when the trial is pending, to prevent the eventuality of a conviction being delivered before the application for stay has been considered.

The applications arrive at the Ministry of Justice with two recommendations: that of the investigating authority (usually the police) and that of the prosecuting authority (usually either the police or the office of the respective district attorney). A third recommendation is then added by an advocate from the State Attorney office, and then the file goes to the decision-maker (the Attorney-General or one of his Deputies, according to the type of the offence involved).

Until 1980 the procedure was that after the Attorney-General decided, the letter notifying the applicant of the decision was signed by the advocate writing the recommendation in the Ministry of Justice. The purpose of this rule was to make it easy to identify the person involved if additional applications were made in the same file. Once it became clear that lawyers believed that the signatories in fact made the decision, the rule was changed so that the person making the decision now signs both stays and their rejection. The study did indicate that the decisions were in fact always made by the Attorney-General himself, often after lengthy deliberation.

58 There were a number of cases studied in which the decision-maker reached a decision that was contrary to all the recommendations he received. See, e.g., files 88/75 and 74/75 (rejection despite unanimous recommendation to stay) and file 114/75 (supra n. 51: stay despite negative recommendations from both instances).
Some criticism has been levelled against the procedure, alleging that if a defendant was represented by an important and powerful lawyer, his chances to get a stay were greater. The study disclosed that in most cases there was no meeting or correspondence with the defendant or his lawyer, and the directives specifically mention the fact that in most cases such meetings should not take place. This is an example of a rule which is important both for the efficiency of the practice and for the appearance of equality in treatment.

D. Some Comparative Notes

The power closest to that exercised by the Attorney-General and his deputies under our law is the power of the Attorney-General in England to grant *nolle prosequi*. The differences between the English Attorney-General and the Israeli institution of the same name (mainly, that the English official is clearly a political figure and a member of the government) have not affected the ethos of the job concerning law enforcement. In both systems, the understanding is that the Attorney-General should consult with political authorities on sensitive matters, but he has both independence of decision and responsibility for it as a law-officer.

Against the background of this similarity it is striking to note that the number of cases in which a *nolle prosequi* is requested in England is extremely small (about 10 a year), and about 50% are granted. Applications are processed by the Attorney-General’s aides, and are then brought to him for deliberation and decision. Some of these cases concern sensitive political issues, but some relate to extreme personal hardships.

59 See Ronnen, *supra* n. 38. See also Stella Korin-Lieber, 80 Monitin, May 1985.
60 In response to Ronnen’s article, Attorney-General Zamir specifically wrote to the Bar Bulletin, notifying lawyers that the directives explicitly specified that meetings with lawyers will only be conducted with the advocate dealing with the case in rare cases, and only exceptionally with the Attorney-General himself. He also added that he did not have a single such meeting with a lawyer between the publication of the directives (Dec. 1982) and the article (Dec. 1983). A similar denial was included in the Attorney-General’s response to the Monitin article: 81 Monitin, June 1985, p. 96.
62 See the findings of the Committee of Jurists to Investigate the Powers of the Attorney-General, S. Agranat, chairman (hereinafter the Agranat Committee), 1962.
63 See Edwards, *supra* n. 61, and the Agranat Committee Report.
64 This fact was noted by the Israel court in *Shor, supra* n. 14, based on Howard, “Criminal Prosecution in England” (1930) 30 Col. L.R. 12. Howard reported the fig-
ing is that this is indeed an extraordinary power, and that it is used in rare cases only. Most of the cases that in Israel are handled in the complex machinery of stays mentioned above are dealt with in England by regular law-enforcement authorities and procedures, such as dismissals and the decision not to proffer evidence. Thus, the main target of critiques concerning fear of abuse are the initial powers to prosecute rather than the extremely limited power to stay proceedings. A Law Reform Committee indeed recommended that guidelines for prosecutions be published, and the recommendation has recently become a law. Decisions made by the Attorney-General himself, whether stays or (more often) decisions to charge or to grant immunity are made the subject of public discussion and concern when political pressure is suspected.

In the United States there is no clear distinction between withdrawal of charges and a stay. The powers involved are vested in all attorneys, not just top officials, and are seen as part of the administrative control of criminal proceedings. The main charges against this broad discretion are the fear of discrimination and unequal justice. Here, too, the problematic power is that of deciding to prosecute. Scholars usually feel that the discretion enjoyed by prosecutors is indeed too broad and not structured enough, and the proposals are mainly suggestions for a variety of mechanisms to confine and structure that discretion. No special mention is made of the administrative power to unilaterally suspend criminal proceedings after a charge was made.

In Canada there are differences in the scope of the power to stay between the provinces of the confederation. In some, it is closer to the American model of a power vested in all attorneys, and in some – closer to the

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67 For a thorough discussion of the danger of prosecutorial discretion as it is practiced in the U.S. see K.C. Davis, Discretionary Justice (Baton Rouge, Louisiana State, U.P., 1969) esp. ch. VII.


69 For a very informative discussion see Connie Sun, “The Discretionary Power to Stay Criminal Proceedings” (1974) 1 Dalhousie L.J. 482.
English model of a power limited to the person of the Attorney-General. In the first, exercise of the power is frequent, and there are complaints that it is used to cover up for failures of the prosecution in preparing and handling cases. The recommendation is to confine stays, at least when the application is initiated by the prosecution, to top-level decisions by the Attorney-General himself.

In Germany there is no counterpart to the administrative power of stay. After a decision to bring a matter to judicial attention has been made, the decision of the case rests exclusively with the judiciary. In practice, the administration has some input to the process through recommendations, etc., but it does not even have the power to decide not to proffer evidence: in theory, at least, the task of determining the facts rests with the judge. Thus, while there is a debate concerning the general question of administrative discretion in the criminal process, especially in the initial stage before a charge is made, there is no similar discussion of discretion after the charge. Generally, review of initial decisions to prosecute is done within the administrative hierarchy.

E. Conclusions

There is neither logic nor good reason to perpetuate the present situation in which there is a massive review of prosecutorial discretion made on a sporadic basis by top officials of the law enforcement system, involving a lot of time and energy. In fact, this is what the practice of stays amounts to at this time.

The classification of applications along the lines indicated above was designed both as a tool for organizing the material and as a means to identify groups of cases in which considerations for the scope and nature of the power to grant stays should be different.

Applications for stays by the prosecuting authorities themselves, and applications for stays in private complaints, have special features which justify keeping them within the exclusive power of the Attorney-General himself.

The first group is the one most likely to create a conflict between the rights of defendants and the powers of the State. In these cases, the defendant may object to the stay since he believes that he can be acquitted instead. If we want to maintain this power at all (rather than leave decisions...

of this sort to the discretion of the courts in applications to delay the hearing of the trial or to amend the charges), it should be exercised with great care, by a person who is not a direct part of the law enforcement hierarchy, and whose ethos is a combination of law enforcement and the detachment of a judge, so that a balance can be struck between law enforcement and rights. All such cases should reach the highest echelons of administrative decision-making, and be considered with care and with a presumption against the settling of affairs in an administrative way. The Canadian experience has illustrated the kinds of dangers which may materialize if this power is conferred on the regular law-enforcement authorities, especially when misguided notions of solidarity and a belief that a certain individual should not be acquitted in the best interest of the community may affect decisions.

Private complaints should also be dealt with by the Attorney-General himself, and with special care, for different reasons. These are the cases in which the legislature empowered the victim to initiate criminal proceedings without the need to turn to law-enforcement authorities. Moreover, the court now has the power to minimize the threat of abuse of this power to harass the defendant, taking away one of the main reasons for maintaining the power to stay in such cases to begin with. The function of discretion here is to protect defendants in cases in which the protection afforded by the courts is not adequate. A wholesale willingness to grant stays in such cases may undermine the purpose of the institution of private complaint.

The Attorney-General's directives take special care to stress the unique features of such cases. Nonetheless, the directives do not specify that all decisions in such cases be given by the Attorney-General personally, as I believe they should. Without imposing a serious burden on the Attorney-General, such a procedure will guarantee that the decisions in these sensitive matters are made by the most senior and most independent law officer, in a uniform and principled way.

71 See the discussion of the rationale of the private complaint in the Knesset debate concerning the 1965 Criminal Procedure Law. The essence of the right is that an individual may initiate criminal proceedings, for certain offences, without "official" deliberation of the public interest in the litigation. Reviewing the individual's decision in terms of such public interest via the avenue of a stay may thus frustrate the purpose of granting the individual the right to initiate criminal proceedings in this way.

72 See sec. 73 of CPL which is an amendment to the original CPL of 1965, granting the court the power to require that a private complainant appoint an advocate to represent him in court so as to minimize abuse of process. If the private complainant fails to do so, the court may deem him not to have appeared.
The third group of cases – application for stays invoking reasons the regular law-enforcement agencies are not allowed to take into account – appears to be almost nonexistent due to both the broad interpretation given to "public interest" and the practice of handling such applications. Nonetheless, the extremely rare such cases which may arise clearly require all the independence and the integrity an official can exhibit, since in such cases the political stakes and pressures are likely to be extremely strong. Again, the relevant decision here may be either the initial decision to prosecute or investigate, or the later decision to stay or terminate the case in some other way. In such sensitive matters, the Attorney-General is likely to be involved from the very early stages. Clearly, if a stay is considered, the power to grant it (and the responsibility for the decision) should be exclusively his.

But all three groups together comprise no more than 5% of stay applications. The other 95% are simply requests for either review of the decision to prosecute or the drawing of attention to new facts which were established or consolidated after that decision was made. In a system such as ours, in which initial prosecutorial discretion is amply recognized, these kinds of applications should be handled routinely within the regular law-enforcement structure. This is mandatory in order to save precious manpower at the top and in order to guarantee effective review within the system of discretionary power, so that review is more systematic and more effectively used to improve the quality of decision-making at the initial level.

Efforts should be directed at structuring the discretion in the initial stage, so as to ensure more uniformity and equality, and at devising a more systematic review within the law-enforcement structure, of the type that works so effectively in Germany. Dealing with applications for stays in these groups by individuals from top levels is extremely time-consuming. More important than the time constraints, however, this procedure perpetuates the tendency of the system itself not to establish general guidelines and effective review, relying rather on the possibility of a stay to correct mistakes. This procedure thus encourages the perception of non-finality of administrative decisions, and may give an unjust bonus to those who know of the option and take the trouble to use it.

It might be argued that the stay procedure as it is now practised in Israel has some advantages – top, and presumably more competent and more independent, individuals make the decisions – and that the price to be paid is not prohibitive. This might have been true if we believed that most of the cases in which the decision to prosecute is wrong do reach
this review, and the decisions in stays would have been generalized into
general guidelines for the prosecution. Unfortunately, neither of these
happen: there is evidence that there is a systematic tendency to over-
prosecution which is not always checked by the stays mechanism, and
the decisions in stays are not communicated in an effective way to ensure
better first-stage decision-making. In addition, I believe overburdening
top officials by deciding sporadic cases is dangerous, since it distorts their
priorities and limits the time they should properly spend on deciding
policy issues and conducting systematic reviews. Thus, the costs of the
present practice do seem prohibitive.

It should be stressed that in all the countries which are concerned with
fears of corruption and inequality, the attempt to obtain more uniformity
and justice is not achieved by centralizing actual decision-making in the
hands of top officials. Such officials may have the power to demand
reports and to order reviews, but the main body of decision-making is to
be made by individuals at low levels, governed by guidelines and subject
to the review of their superiors to ensure justice and uniformity.

While we have found no proof of discrimination and unequal
enforcement, the fear of abuse is clearly there. The guarantees
incorporated into the practice are not enough to ensure integrity, but it
seems that the integrity of the law officers concerned has sufficed, until
now, to prevent corruption. On the other hand, there is ample evidence
that in many cases a charge is pressed although it should not have been
pressed. Some of these cases are reviewed in the stay stage, and the
decision is corrected. Many others, presumably, simply go through the
courts. Here we have a problem of both efficiency and equality before
the law. Efficiency, in these contexts, is also a matter of justice:
overloaded courts deliver justice more slowly, and thus limit the
effectiveness of access to justice. More thought should go into ways of
changing this situation.

73 See Friedmann, supra n. 38, and the cases cited there.
74 In one recent case, for example, the court imposed a minimal fine on a person who
was convicted upon his own confession for walking naked in his home. The judge ex-
plicitly said that no prosecution should have been brought. People in the police prose-
cution department disclose that it is much easier not to prosecute, whereas prosecution
is the rule.
75 One line of thought is to grant the court discretion to dismiss criminal prosecutions
in contexts of de-minimis or other reasons even before the hearing of evidence. Another
is to seek a system under which first-instance decisions of prosecution will be treated
more seriously, and to change the present pattern under which prosecution is the rule
and a decision not to prosecute requires special justification and discussion.
It should be noted that there is an asymmetry here: studies such as this may reveal a tendency to over-prosecution in some types of cases, but they will leave unnoticed patterns of under-prosecution, if these exist. Furthermore, rules of standing and of pleadings,\textsuperscript{76} together with the low visibility of under-prosecution, make it more difficult to challenge such practices. Stays could reflect such patterns when a “proper” decision to prosecute is reversed for the “wrong” reasons. As mentioned before, our study did not find that this danger was substantiated. Needless to say, the fact that we did not find cause for alarm does not say there is no such cause, or that we can rest assured that there never will be. The framework lends itself to abuse, and we should take great care to see to it that these fears are minimized by a combination of the appointment of good people and a wise and economical system of supervising their decisions.

\textsuperscript{76} It is usually thought that an individual does not have standing in a petition challenging the Attorney-General’s decision not to prosecute (or to stay) if the petitioner is not directly affected. Thus in such cases of under-prosecution it is unlikely that the decision will be challenged, even if it is known. The willingness of the court to deal with the merits of the challenge of the pardon and the decision not to investigate in the General Security Services episode (\textit{supra} n. 34) may signal a change in this issue. Similarly, a claim by a defendant that many others who have committed the same offence were not prosecuted and that he was singled out unfairly is of no formal relevance in the particular defendant’s own trial.