



## THE DUTCH PUBLIC PROSECUTOR



Visit of the EU delegation  
on October 16th 2007

A warm welcome to the delegation,

Mrs. Amaryllis VANDERHEYDEN  
Mrs. Elle KEEMAN  
Mrs. Gabriela CULEA  
Mr. Pavel VARGA  
Mr. Martin VAN DEN BOSSCHE  
Mrs. Ivana HRDLICKOVA  
Mr. Antti AITSEN  
Mrs. Maria JOVER CARRION  
Mr. Lorenzo BERNAL  
Mrs. Céline LE BAIL  
Mr. Juris SILINS  
Mrs. Octavia SPINEANU MATEI  
Mr. Jyrki Pauli MÄÄTTÄ  
Mrs. Francesca SAVIGNANO  
Mrs. Kristina HARMSSEN HOGENDOORN

You are hosted by

Mr. H.N. Brouwer  
Chairman of the Board  
of Procurators General

Prof. Dr. Gerard Strijards,  
International Penal Law

Mr. Floris Bouma  
Retired Chief of Police  
Chairman of EULEC

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# Basics: National

- In the Netherlands the hierarchical relationship government/police is two folded:
- In criminal matters, the police is subordinated to the Crown Prosecutorial Service directed by the Higher Prosecutorial Office in The Hague.
- In matters of public security and national order, the police is subordinated to the Ministry for the Interior.



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### Basics National 2

- In both cases there is, eventually, a political responsibility to be carried towards the Houses of Parliament by the politically responsible Ministers:
- the Minister of Justice is, ultimately, responsible for the way the Higher Prosecutorial Office conducts the national policy in criminal matters. He has to answer the questions putted forward in the Parliament; if the answers do not satisfy, he can be dismissed.
- The same goes for the Minister of the Interior: She has to stand interrogation by the Houses for the way she instructed by guidelines the Police.



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### Basics Local

- In criminal matters, the police is subordinated to the Local Prosecutorial Service. The Prosecutor is accountable to the Higher Prosecutorial Office.
- In matters of public order, the police is subordinated to the Mayor. The Mayor is accountable to the local Council.
- The Police is organised and financed within a national system by law.



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# Basics for prosecution

- Not every crime, coming to the cognizance of the Service, has to be pursued.

The Service, directed by the Office, has the

*“rule of expediency”*  
at its disposal.

- The discretionary power to prosecute or not

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# Example: Coffee shop



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Example:  
Child pornography and Child abuse



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# Example: Euthanasia

- \_Piergiorgio Welby december 2006



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In the EU-framework,  
with a view to the respective prosecutorial  
national systems, there are two systems, at first  
sight antithetical to each other:

### 1. The rule of absolute legality:

The Prosecutorial Service is submitted to the  
mandatory obligation to pursue each crime  
under its cognizance.  
There is no latitude of appreciation.  
This is the system of the Bundes Republik  
Deutschland.

### 2. The rule of relative expediency:

It is up to the Prosecutorial Service, on a case-  
by-case bound basis, to decide as to whether  
positive prosecutorial action will be serving  
*positive national interests of justice in the case.*

Munchen-Germany  
Justizpalast



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- But certainly, the system of relative expediency activates as an inherent element of the *balance of powers* in matters of criminal policy the constant braking system by the *primacy of politics*.
- By virtue of the fact that the Prosecutorial Service knows that there is a constant risk that the Minister of Justice has to come to the Parliament to carry full responsibility, the Office will act according to the presumed wishes and desires of the Minister of Justice.
- The Office will not wait until the Minister is going to show his disapproval or the Parliament its official disavowal.

- In the Dutch view, this gives the system the highest level of democratic legitimation.

Therefore:

LET'S PONDER UPON  
**THE RULE OF RELATIVE EXPEDIENCY**  
IN THE DUTCH LEGAL SYSTEM.



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# PP: Dominus Litis

- PP is the “master of the criminal proceedings”.
  - only the public prosecutor may initiate criminal proceedings
  - there is no such thing as a “civil party” (“partie civile” like in Italy or France)
  - it is only with the prosecutor to define the crime in the indictment
  - the judge is completely bound by the wordings of the indictment:
  - The judge is not entitled to “go behind the indictment” even in the cases he is convinced that the accused committed an other crime than the wordings in the indictment:
  - the indictment is “tyrannical” for the judge.
  - There is no jury; only the professional judge appointed by the QUEEN for lifetime may rule upon the indictment.
  - *This is one of the most characteristic features of the Dutch prosecutorial system. No other EU-country is acquainted with such a system.*



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# Europe and Napoleon

- **NAPOLEON**

- *essential that the “partie civile” could initiate proceeding.*
- *In criminal matters, according to his codex, ultimately, the VOX POPULI should be VOX DEI (the people’s voice is to be equivalent to the voice of God in criminal matters): t*
- *The jury system should have the predominance in criminal matters:*
- *COUR d’Assises should be the basic procedure in matters of capital crime.*



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# Main System EU countries

- *The Assizes may go behind the indictment.*
- *The indictment may be amended and changed during every phase of proceedings.*
- *There is NO factual appeal to a higher instance.*
- *THIS IS THE MAIN SYSTEM IN EU-COUNTRIES.*



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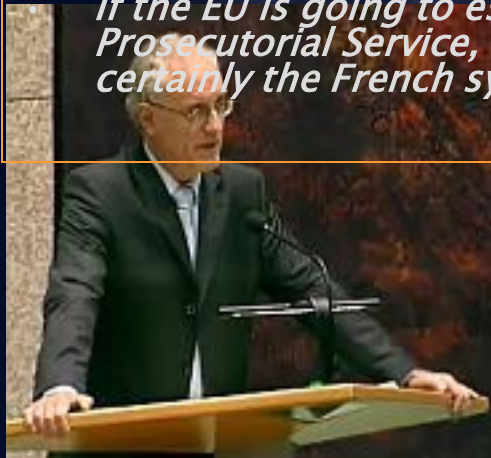
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• Eurojust

## Dutch system

- *In the Netherlands, it is not with the judge to rule upon the lawfulness and legitimacy of the prosecutorial policy:*
  - *the tyranny of the indictment prohibits that.*
  - *Only the PARLIAMENT may rule upon that policy.*
  - *It provides the highest level of democratic legitimacy.*
- If the EU is going to establish EUROJUST as EU-Prosecutorial Service, certainly the French system will be followed.*



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## THE DUTCH PUBLIC PROSECUTOR (PP)

- **ADVERSARIAL SYSTEM**
  - State against accused
  - Equal parties in criminal proceedings
- **INQUISITORIAL SYSTEM**
  - The pp is a part of the judiciary
  - Pp is investigator and advisor to judge



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### EXAMPLE: The Netherlands versus The UK

- UK:
  - NO 'PUBLIC' PROSECUTION
    - PUBLIC INTEREST
    - DISCRETION POWER
  - SOLLICITOR
    - PARTY IN CRIMINAL PROCEEDING
    - SOLLICITORS 'HIRED BY' POLICE
    - DEFENDS QUEEN'S PEACE IN HER REALM



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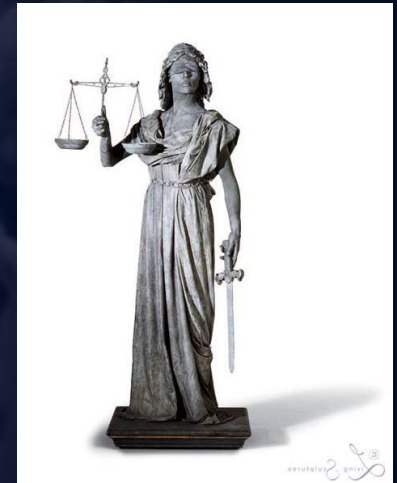
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### MAIN ROLE OF THE PP (CRIMINAL CASES)

- **DECISION IF A CASE SHOULD BE BROUGHT TO COURT**
  - The right to exercise prosecutorial discretion
- **POLICY ON CERTAIN CATEGORIES OF MINOR OFFENCES**
  - No involvement of the courts
- **PROTECTING THE RIGHTS OF VICTIMS AND OFFENDERS**
  - Throughout the judicial process



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## PROSECUTORIAL TASKS

- LAID DOWN BY POSITIVE LAW:  
IN OPERATIVE ARTICLES  
The PP
  - DETERMINATES INVESTIGATION THEME BY  
SUMMONING
  - SOLE PROSECUTOR OF OFFENDERS
    - DOMINUS LITIS – PRINCIPLE NOT SPELLED OUT IN CODE.
  - BINDS THE SITTING MAGISTRATE TO INDICTMENT
  - Discretionary latitude:
  - Issue of unwritten provisions, left to the appreciation  
of the Higher Prosecutorial Office



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# PROSECUTION AND DISCRETION

- INVESTIGATION

- BY POLICE
- DIRECT INSTRUCTION PP

- PROSECUTION

- INVOLVEMENT OF COURT
- PP DECIDES (a) WHETHER AND (b) HOW TO PROSECUTE

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## TO PROSECUTE OR NOT...

- DISCRETIONARY POWER PP
  - TECHNICAL REASON FOR DROPPING CHARGES
  - OTHER REASONS FOR DROPPING CHARGES
    - POLICY
    - UNDERAGED + OFFENDER HAS MADE GOOD DAMAGE DONE

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## PROSECUTE, BUT HOW... (1)

- OUTSIDE FORMAL PROCEDURES
  - RELATIVELY MINOR OFFENCES
    - SETTLEMENT, RECONCILIATION BETWEEN VICTIM AND OFFENDER, CAUTION, ORAL/WRITTEN ADMONITION, TRANSACTION, SIMPLIFIED PROCEDURE

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## PROSECUTE, BUT HOW... (2)

- TAKING THE CASE TO COURT
  - MINOR OFFENCES: 1 JUDGE
  - MORE SERIOUS OFFENCES: 3 JUDGES

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### CORRECTION MECHANISMS (1)

- COMPLAINT BY DIRECTLY INTERESTED PERSON(S)
  - ANYONE DIRECTLY INVOLVED
  - OBJECTION TO CHARGE BEING DROPPED
  - HEARD BY COURT OF APPEAL

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## CORRECTION MECHANISMS (2)

- GROUND FOR ORDERING PP TO PROSECUTE
  - NON LEGALITY OF DECISION TO DROP CHARGES
  - MISUSE OF DISCRETION
    - THE DECISION IS NOT IN LINE WITH GENERAL PROSECUTION POLICY



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### CORRECTION MECHANISMS (3)

- REQUEST OF DIRECTLY INTERESTED PERSON TO HIGHER OFFICIAL
  - REVIEW OF PP'S DECISION NOT TO PROSECUTE

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## CORRECTION MECHANISMS (4)

- **MINISTER OF JUSTICE**
  - POLITICALLY ACCOUNTABLE FOR GENERAL POLICY ON PROSECUTION
  - POSSIBILITY TO INTERVENE
    - SECTION 127 OF THE JUDICIAL ORGANISATION ACT
    - THE MINISTER CAN GIVE BINDING GENERAL/SPECIFIC DIRECTIVES ON THE EXERCISE OF TASKS AND POWERS OF THE PROSECUTION SERVICE

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### BACKGROUND EXPEDIENCY PRINCIPLE

- TWO BASIC PRINCIPLES PROVIDE THE BASIS FOR PROSECUTORIAL POLICIES:
  - LEGALITY
  - EXPEDIENCY



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## LEGALITY

- PROSECUTION MUST TAKE PLACE IN ALL CASES WITH:
  - SUFFICIENT EVIDENCE FOR GUILT
  - NO LEGAL HINDRANCES PROHIBITING PROSECUTION

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### EXPEDIENCY

- PP HAS DISCRETION OF THE PROSECUTORIAL DECISION
- EVEN WHEN
  - PROOF EXISTS ABOUT OCCURENCE OFFENCE AND IDENTITY OFFENDER
  - NO LEGAL HINDRANCES

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### LEGAL BASIS EXPEDIENCY

- SECTION 167 SUBS. 2 CODE OF CRIMINAL PROCEDURE
  - “THE PUBLIC PROSECUTOR SHALL DECIDE TO PROSECUTE WHEN PROSECUTION SEEMS TO BE NECESSARY ON THE BASIS OF THE RESULT OF THE INVESTIGATIONS. PROCEEDINGS CAN BE DROPPED ON GROUNDS OF PUBLIC INTEREST”
- THE PROSECUTOR MAY WAIVE PROSECUTION FOR REASONS OF PUBLIC INTEREST

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### RENDITIONS (1)

- POSITIVE RENDITION
  - RULE: PROSECUTION
  - EXCEPTION: PROSECUTORIAL WAIVER
    - WAIVER NEEDS JUSTIFICATION BECAUSE OF INFRINGEMENT OF LAW



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## RENDITIONS (2)

- **NEGATIVE RENDITION**
  - RULE: NON-PROSECUTION
  - EXCEPTION: PROSECUTION
    - INFRINGEMENT OF LAW IS NOT SUFFICIENT REASON FOR PROSECUTION





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### HISTORY PRINCIPLE OF EXPEDIENCY (1)

- MAIN REASON FOR ADOPTION OF EXPEDIENCY PRINCIPLE IN THE NETHERLANDS:
  - AVOID NEGATIVE SIDE EFFECTS OF STRICT APPLICATION OF LEGALITY PRINCIPLE THAT CAN LEAD TO INJUSTICE
    - NEGATIVE RENDITION: NON-PROSECUTION IS RULE

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## HISTORY PRINCIPLE OF EXPEDIENCY (2)

- BEFORE 1926
  - PRINCIPLE OF EXPEDIENCY LEGALLY UNKNOWN
    - LAW BASED ON CRIMINAL ACT NAPOLEON
      - NO DISCRETION POWER WHATSOEVER
      - NO 'PROSECUTION POWER' POLICY OUTSIDE OF CRIMINAL ACT



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### HISTORY PRINCIPLE OF EXPEDIENCY (3)

- 1926: PRINCIPLE OF EXPEDIENCY INTRODUCED IN DUTCH CRIMINAL LAW
  - NEGATIVE RENDITION: NON-PROSECUTION IS RULE





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# HISTORY PRINCIPLE OF EXPEDIENCY (4)

- 1970's: INCREASE IN CRIME
- GOVERNMENT POLICY:  
REDUCE HEAVY CASELOAD OF JUDICIARY
- POLITICAL MOVEMENT OF REDUCING PUBLIC EXPENDITURE
- ABOLITIONISTIC TENDENCY WITH REGARD TO CRIMINAL LAW
  - POSITIVE INTERPRETATION OF SOCIAL ENGINEERING
  - REDUCING DISTURBANCES IN SOCIETY  
PREFERABLY BY OTHER MEANS THAN USING CRIMINAL LEGISLATION

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### HISTORY PRINCIPLE OF EXPEDIENCY (5)

- NEGATIVE RENDITION: NON-PROSECUTION IS RULE
- EXAMPLE: PEDOPHILIA
  - NO PROSECUTION
    - NO DIRECT CAUSAL RELATIONSHIP BETWEEN PEDOPHILIA AND OFFENCE OF VIOLATION OF THE RIGHT TO CHILDS PHYSICAL OR PSYCHOLOGICAL INTEGRITY



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### HISTORY PRINCIPLE OF EXPEDIENCY (6)

- 1990's
  - MORE NEGATIVE INTERPRETATION OF SOCIAL ENGINEERING
  - GOVERNMENT: DIRECT CONTROL OVER PROSECUTION POLICY
    - POSITIVE RENDITION: PROSECUTION IS RULE
  - 1999: FOUNDING OF NATIONAL BOARD OF P-G (CENTRAL GOVERNING OF PROSECUTION POLICY)
    - SYSTEM OF 5 AREA'S OF JURISDICTION ABOLISHED ( WERE FUNCTIONING INDEPENDENTLY FROM EACHOTHER)

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### HISTORY PRINCIPLE OF EXPEDIENCY (7)

- PROSECUTION POLICY SUBJECT TO CRIMINAL POLITICS
  - NO AUTHORITY/POWER WITHOUT RESPONSIBILITY
  - NO RESPONSIBILITY WITHOUT POLITICAL ACCOUNTABILITY
- CONCENTRATED CIVIL SERVICE MEANS:
  - BOARD OF P-G HELD CONSTANTLY, DIRECTLY AND IMMEDIATELY ACCOUNTABLE BY MINISTER OF JUSTICE REGARDING POLICY PROSECUTION

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# Prosecution of authorities

As a matter of principle, there are no specialised procedures to articulate the criminal responsibility of civil servants except for:

1. the prosecution of judges and members of the prosecutorial service;
2. members of parliament;
3. ministers and those who are equivalised to them.

In those cases the indictment will be brought first to the cognizance of the Supreme Court of the Netherlands.



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# Prosecution of authorities –2

- In those cases the indictment will be brought first to the cognizance of the Supreme Court of the Netherlands.
- If the Supreme Court does corroborate (confirm) the indictment, stating that there is a “reasonable case” ,
- the Court will relegate the case to a Court of Appeal.
- In case the accused is a member of the judiciary, he has to stand trial before a court to which jurisdictional scope he does not belong.
- The official has to stand trial according to the common procedural rules.
- In the case of the prosecution of a minister, the supreme court itself will sit on the case.



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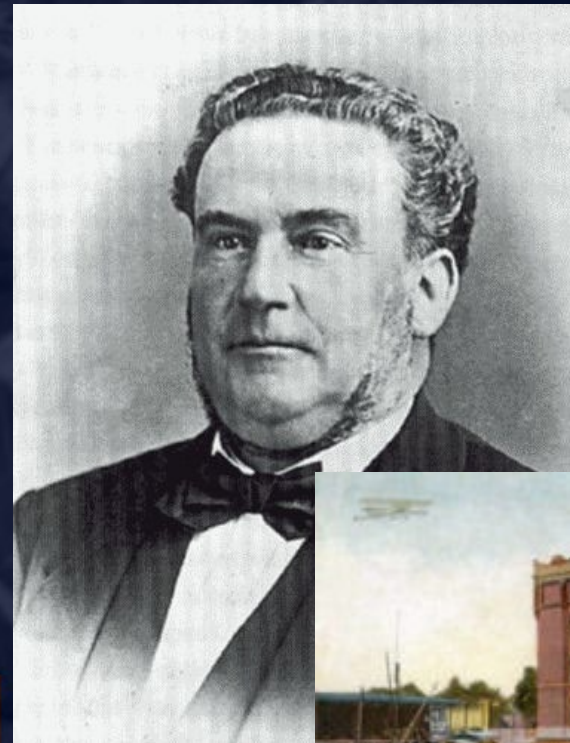
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### Prosecution of authorities:

- Lodewijk Pincoffs (1827–1911)
- Successful business man Rotterdam
- 1856 Municipal Council Rotterdam
- 1858 Provincial delegate
- 1872 Senator
- 1879 Collapse of business imperium
  - 6 million Euros debt
  - On the run to New York
  - End of all immunities
  - Extradition not possible
  - End of all Dutch functions by Court decision  
indictment fraudulent conversion



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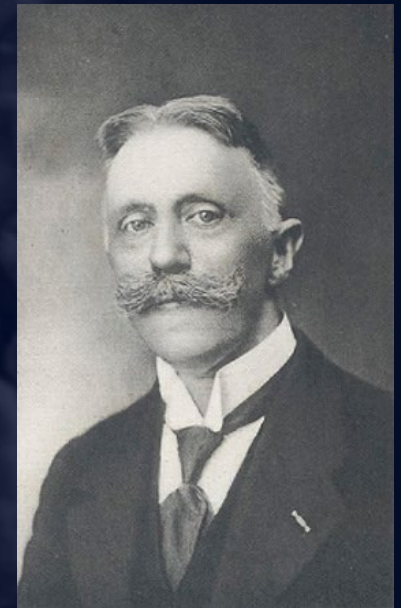
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### Prosecution of authorities: Example: Prime Minister D.J. de Geer

- Prime Minister during the first days of Second World War.
- Queen Wilhelmina could not stand the pessimistic views of de Geer, during the self chosen London exile of Queen and Government.
- De Geer was forced to step back, and was appointed to the Dutch colonies: Indonesia now a days.
- At a stop at Lisbon harbor, he took the train to Berlin and reentered the occupied Netherlands to join his family. This was seen as un loyal behavior, if not high treason.
- After the war a special Court "Raad van Cassatie" sentenced him on 29 October 1947 to 1 year of conditional imprisonment on the indictment of high treason., and took all his immunities, privileges and honors from him.



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# Waiving EU Immunities



- Since the first European elections in 1979, more than 100 requests for waiving or defending immunities have come before the EP.
- Until July 2005, an average of 75% of cases concluded with the defense or the refusal to waive immunity.
- The EP has generally decided to waive immunities when proceedings arose from MEP's conduct not applicable to the performance of their duties.

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# Evidential system

- Evidential system in the Netherlands: free.
- It is with the judge to decide whether he has reached a conviction that the accused committed the facts as laid down in the indictment.
- The judge can use the reports of experts in a non-judicial discipline (forensic experts, psychiatrists, physicians etc).
- There is no legal obligation to do this.
- The decision that the accused is guilty has to be a reasoned one. The law prescribes the way of legal reasoning.



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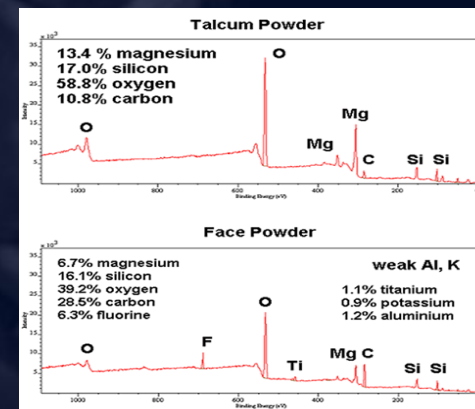
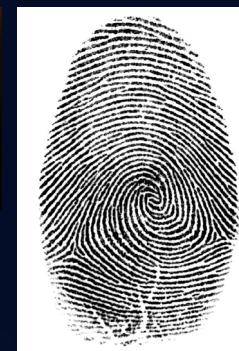
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# Expertise

- The Dutch Forensic Institute is one of the centers of expertise on which the judge can rely.
- The Institute is an agency subordinated to the Ministry of Justice.
- Its services stand at the disposal of the Prosecutorial Service.
- If the attorney for the defense wants to use the Institute's expertise, he has to ask the intervention of the Service. The Service is free to comply with the requests for the defense.
- Unwillingness to comply will be an issue to be discussed in Court. The judge can order the compliance.



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We thank you for your attention,

and wish you a  
safe return home.

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Mrs. Elle KEEMAN  
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