



THE DUTCH PUBLIC PROSECUTOR

—

THE PRINCIPLE OF EXPEDIENCY IN THE NETHERLANDS



Visit of the Afghan delegation
on December 8th 2006

A warm welcome to

DR. Mohammed Qasim Hashimzai
Deputy Minister of Justice of Afghanistan

Assisting:

- Mr. E. Turabaz
Consul honoraire for Afghanistan in the Netherlands
- Mr. Niels Berben
EULEC Brussels
(www.eulec.org)

You are hosted by

- Prof. Dr. Gerard Strijards,
International Penal Law
Senior advisor on International
Affairs within the Higher
Prosecutorial Office
of the Netherlands
- Mr. Floris Bouma
EULEC Chairman
- Miss Afef Ismail
Assistant to the international
division

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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: he has to stand interrogation by the Houses for the way he 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.

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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:

LETS PONDER UPON
THE RULE OF RELATIVE EXPEDIENCY
IN THE DUTCH LEGAL SYSTEM.

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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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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 LAW:
The PP
 - DETERMINATES INVESTIGATION THEME
 - SOLE PROSECUTOR OF OFFENDERS
 - DOMINUS LITIS
 - BINDS THE SITTING MAGISTRATE TO
INDICTMENT

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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)

- GROUNDS 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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We thank yo for your attention,

and wish you a
safe return home.

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