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« Discretionary powers of public prosecution: opportunity or legality principle - Advantages and disadvantages »

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<u>The basis of the principle of discretionary prosecution</u>

The Grand Duchy of Luxembourg was part of France when the French Code of Criminal Procedure was adopted on 17 November 1808.

After the Treaty of Vienna of 1815 and the creation of the State of Luxembourg in 1839, the Code of Criminal Investigation was retained. The principle of discretionary prosecution, which was not to be found in the Code of Criminal Procedure, was acknowledged by legal writers and in Luxembourg case-law.

The principle of discretionary prosecution was regularly referred to and expanded in the various memoranda of the successive Principal State Prosecutors; those memoranda established more or less precise criteria with a view to its application.

Thus, a memorandum of the Principal State Prosecutor of 1977 reads:

The principle of discretionary prosecution "*constitutes the essential safety valve of the general system of prosecutions, without which we should end up with a blind and inflexible automatism, with the individual being overwhelmed by the implacable mechanics of the law.*

With a view to ensuring that the prosecutors have a uniform policy in discontinuing cases which represent only a slight threat to "l'ordre public"*, it is recommended that the following criteria be observed:*

it is suggested that cases be discontinued, at least provisionally, wherever:

1) *A prosecution would cause greater harm and would result in greater damage than that resulting from the offence.*
2) *Neither "l'ordre public" nor the injured party, nor the prevention of crime, either in general or in the particular circumstances, requires that the case be continued.*

it is recommended that the prosecution be waived:

1) *When the offence is minor;*
2) *When the offence was committed in a family or neighbour context and a prosecution would do more harm than good by aggravating ill-feeling that might lead to further offences;*
3) *In cases on the threshold of justification;*
4) *Where the offence, although above the threshold of tolerance of the criminal system, does not exceed the threshold of social tolerance;*
5) *Where the victim of the offence deserves less consideration than the offender";*

It was only by the Law of 16 June 1989 that the legislature introduced the principle of discretionary prosecution into the Code of Criminal Procedure, by inserting Article 23, which is worded as follows:

"The State Prosecutor shall be informed of complaints and accusations and shall determine what action is to be taken in respect of them".

Various types of decision that may be taken by the Prosecution Service as alternatives to prosecution.

Criminal mediation

In 1999 Article 24 of the Code of Criminal Procedure was supplemented by a provision introducing criminal mediation, to which the State Prosecutors had already had frequent recourse before it was officially introduced by law.

When the Law on domestic violence was enacted in 2003, that text, which initially provided that mediation was available for any offence, irrespective of the nature of the offence and the penalties prescribed, excluded mediation for offences against a person with whom the offender cohabited.

The legislature took the view that mediation requires the free consent of the victim and that in a case involving domestic violence the victim (normally) the woman is likely to be subject to pressure to consent to mediation, which would thus be distorted from the outset.

Article 24(5) of the Code of Criminal Procedure is now worded as follows:

"Before deciding whether to prosecute, the State Prosecutor may decide to employ mediation where it appears to him that such a measure is capable of ensuring reparation of the damage caused to the victim, or of putting an end to the nuisance resulting from the offence or of contributing to the rehabilitation of the offender. However, mediation shall not be available in cases involving offences against a person with whom the offender cohabits.

The mediator shall be required to observe professional secrecy."

Treatment orders

Under Article 23 of the Law on drug addiction, the State Prosecutor may give

- persons reported for unlawful use of drugs, and
- persons reported for selling or for unlawful possession of drugs, where it is established that they are primarily involved as users,

the opportunity to undertake a voluntary detoxification course.

The law provides that in the relevant cases, a person who has taken the detoxification course proposed by the State Prosecutor and has completed it will not be prosecuted.

In Luxembourg positive law there is no other alternative to prosecution.

In fact, however, there are other alternatives to prosecution, which frequently depend on the actual situation of the offender and on the offence with which he is charged. The Public Prosecutor can never employ coercion and impose an alternative measure on an offender.

The following alternatives to prosecution are available:

- A reminder of the law for minor offences, such as, for example, petty shoplifting by a first offender. Normally the offender is told that if he reoffends he may be prosecuted for the first offence.

- Conditional dropping of the proceedings in a case where the offender is invited to fulfil a condition. This conditional dropping of a case may take one of a wide variety of forms: for example, a person who has deposited refuse may be invited to remove it, provided that the offence against the environmental protection legislation is not too serious. Again, a person charged with indecent exposure may be invited to undergo medical monitoring and no further proceedings are taken if this is done. A measure of this type seems more appropriate than a fine.

- Rehabilitation courses for drivers of motor vehicles who have committed minor offences. These courses last one day and offenders must pay the costs of participating in them, which correspond more or less to the fine which they would incur if the case were to proceed. These courses are designed to make drivers aware of the risks which they incur and which they represent to other motorists. Only first offenders are able to attend these courses; the offence is not recorded and the driver does not lose any points from his driving licence.

- Settlement of civil claims interests where the civil aspect of the case is more important than the criminal aspect and where the disruption of "*l'ordre public*" is not too serious.

- In other situations it may be more appropriate to report a person to a social service (for example the commission on overborrowing) rather than to prosecute him or her for issuing a bad cheque (cheque not backed by sufficient funds).

The guarantees offered to the persons concerned in order to avoid any arbitrary decision on the part of the prosecution service. Advantages and disadvantages of the system of discretionary prosecution.

First of all, in each subject area there are guidelines to be followed by members of the prosecution service.

Furthermore, there is a certain specialisation by subject matter within the Prosecution Service, which makes it possible to refine the guidelines at specific meetings of the service.

The Prosecution Service's guidelines are not made public.

According to instructions within the service, any person who has lodged a complaint must be informed that the case is being discontinued, of the reason why it is being discontinued and of the possibility that, depending on the circumstances, he or she may bring a direct action or, alternatively, file a complaint, together with a claim for civil damages, with the investigating judge.

According to a Bill currently being debated, each complainant would have to be informed that he or she can appeal to the Principal State Prosecutor against a decision of the Prosecution Service to discontinue a case. This system has the advantage of making the discontinuance of a case less opaque for the person concerned. The system of discretionary prosecution has the disadvantage that, rightly or wrongly, it gives the person concerned the impression of a certain arbitrariness in prosecution policy, which is difficult to accept at a time when everyone demands the maximum "transparency" possible from the public service.

The other side of the coin as regards the information that an appeal may be lodged with the State Prosecutor General may be that young law officers will hesitate to discontinue a case of minor interest rather than have a decision reversed by the State Prosecutor General.

Thus, cases of minor interest may once again assume more importance than certain cases where the disruption of *ordre public* is more serious and the measure may contribute to an excessive penalisation of offences which after all are minor. Experience has shown, moreover, that the victims, often in a desire for revenge, do not agree to the alternatives to prosecution.

Last, it appears that in all the discussion of the principle of discretionary prosecution there is one rather simple fact that must not be overlooked.

It is obvious that, owing to the mass of cases with which the Prosecution Service deals, prosecutors perceive the gravity of criminal activities and fix priorities accordingly. That is currently the case with the Luxembourg Prosecution Service, where certain cases are discontinued although they should in principle be prosecuted, but where it seems inappropriate to proceed with the prosecution when the prosecution lists are full of other more important cases which must be disposed of within a reasonable time.

That selection makes it possible, in the prevailing conditions, to ensure that cases of some seriousness are dealt with rationally and effectively and pursued before the trial court within a reasonable time. The capacity of the Prosecution Service and in particular of the trial judges to absorb new cases is inevitably taken into consideration in the interest of disposing of the mass of cases that can be dealt with in the least unfavourable conditions possible.

Discretionary prosecution is then inescapably defined by reference to the possibilities of cases being completed by the court. There is, all in all, a "funnel" effect, which means that, independently of the mass of cases which remain unresolved, the neck of the funnel always remains the same and, consequently, it is necessary to decide what type of cases ought to pass through the neck.

These discontinuances are unhealthy, in that they betoken an inappropriate judicial system which does not allow a fair application of the criminal law. It is also a fact that a victim or public opinion in general, has difficulty in understanding such decisions to discontinue a case.

Discretionary prosecution is thus to a large extent defined by a definition of priorities.

Although little experienced among prosecutors subject to the system of mandatory prosecution, this problem may arise there too and the colloquy will certainly provide the opportunity to learn how this problem is resolved in that system.