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

**Intervention by Mr. Egbert MYJER
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A good opportunity

- Once upon the time in the eighties, when I was still a judge at Zutphen District Court (president of the Criminal Chamber), I was stopped by the police. I had ignored a traffic sign ordering me to stop before crossing a road. I had not stopped because I was well aware of the local situation and knew that I could easily cross without causing any danger. The policeman asked for my driving license. It took a while before he had studied all the paperwork. He then handed me the license back, while saying: “Sir, these traffic laws also do apply to you. I hope you understand, Sir.” That was it. He did not give me an official warning or a fine. Still, from a professional point of view I have never felt as embarrassed as at that particular moment. And I will never forget that moment. No official reaction would have had that impact for my future behaviour.

- In the Netherlands, as far as (traffic) offences are concerned, the police have the power
 - to do nothing (pretend they have not seen it),
 - to give a (unofficial) warning
 - or (as far as most traffic offences are concerned), according to a national pricelist, to give a fine (against which the person concerned can appeal at the PP and later at the administrative judge)
 - or (as far as some more serious traffic offences or ordinary offences are concerned) by general permission to offer a ‘transactie’ (which, if not paid, will mean that people will be charged before a cantonal court. In that case the fine which will be demanded is higher than the amount of the ‘transactie’ unless the suspect concerned has a good story why he wanted the case to be judged by the court: in that case the maximum fine demanded will normally be the same amount as the transactie. (Especially for Dutchmen, who always reason like merchants, paying the transactie is normally the most profitable thing to do),
 - or to investigate the case and send the file to the PP.

- In the Netherlands there exists also the practice of ‘gedogen’. This literarily means: something like tolerate. Some acts which are still punishable according to the law, are more or less ‘tolerated’. The police will not actively investigate cases like that, provided that some conditions are fulfilled. In the old days there was a policy to tolerate prostitution (better to tolerate prostitution than that your own wife or daughter would be raped). Nowadays there is for example a policy to ‘tolerate’ the selling of hashish and marihuana in a restricted number of so-called coffee-shops (depending on the local policy in that municipality) , provided the shop has only a very limited amount of the stuff in stock, no hard drugs are sold, and no stuff is sold to minors. Besides, no public advertisement is allowed. If a shopkeeper who is on the list and who strictly fulfils these conditions (and where there are no aggravating circumstances), will nevertheless be prosecuted, the court will almost surely dismiss a case like that. Besides, thanks to this policy of ‘gedogen’ the amount of drug addicts seems to be much lower in the Netherlands than in neighbouring countries. I will not comment on the fact that ‘gedogen’ goes as far as the ‘frontdoor’. The fact that the shopkeeper will be supplied via the ‘backdoor’ can still be a matter of criminal investigation.

- In the Netherlands the Public Prosecutor – after having received the file from the police – has the power
 - to drop the case because there is not sufficient evidence;
 - to offer a ‘transactie’;
 - to charge the person concerned;
 - to drop the case under specific conditions (e.g.. pay damages to the victim);
 - to drop the case unconditionally. The PP has no legal obligation to charge the suspect and bring him before the court. Art 167 of the (1926) Code of Criminal Procedure lays down the opportunity principle and provides that he may refrain from bringing a case before the court, for reasons of general interest. (NB. We only refer to the opportunity-principle in cases in which there is sufficient evidence of guilt to bring the case to court. Refraining from prosecution in case there is not enough evidence, has nothing to do with the opportunity principle.) If a victim has announced that he would like to join the procedure in order to get compensation, the PP will take his interests in account as well. If the PP decides to drop the case then the victim has the possibility– within certain time-limits - to file a complaint at the Court of Appeal (art. 12 Code of Criminal Procedure). The Court of Appeal may overrule the decision of the PP and order the prosecution. The same PP who has previously ordered not to prosecute is then under the obligation to prosecute. However, also the Court of Appeal may take into account the general interest and apply the opportunity principle.

- The opportunity-principle is based on the idea that it is impossible that the criminal law can foresee all circumstances in which crimes are committed. Sometimes prosecution might even do injustice to the suspect concerned, or even to society as a whole. It provides the possibility to give a tailor-made reaction to a specific crime or offence. Besides, if one takes into account the total amount of cases in which a crime has been committed and the relative percentage of the cases which are solved, one should not expect too much from the legality principle, according to which all solved cases are tried. (N.B. the opportunity principle has nothing to do with an easy way of dealing with a backlog of cases. Each decision should be based on reasoning what is the best reaction in a specific case.)

- According to the criminal ‘climate’ , as far as the application of the opportunity principle is concerned, there have been times, in which emphasis was placed on: non prosecution, unless... (times in which ‘decriminalisation’ was the magic word); at present it is more: prosecution, unless....

- It is clear that, in order to prevent arbitrariness, the decision not to prosecute should be transparent and should be accounted for.

- Under the responsibility of the Netherlands Board of Prosecutors-General a computerised scheme has been made, in which most common offences and crimes are laid down, plus mitigating and aggravating circumstances and conditions. If the (legal assistant of the) PP uses this scheme, the scheme will indicate what is the best answer to that particular crime and the circumstances under which it has been committed and the suspect concerned:

transactie (and if so: how much) or bringing the case straight before the court (and if so: what might be the demand). This scheme is also known to the defence-lawyers. If the PP demands in court a higher penalty than provided in the scheme, he has to give special reasons.

- The PP should always indicate for what reason he has decided not to prosecute a specific case. There exists a national list of different reasons not to prosecute.(e.g.. insufficient evidence, otherwise ‘punished’, damages paid voluntarily to the victim, other measures are preferable). The reason indicated by the PP can (and will) be supervised by his superiors.
- The Board of Prosecutors-General has ordered that only a certain percentage of all cases which have been sent in by the police and in which there exists enough evidence of guilt may lead to an unconditional non-prosecution. This percentage is discussed at a regular basis with the Chief PP.
- The minister of justice is responsible for the general criminal policy. He is also finally responsible to Parliament for the percentage of cases in which there has been a unconditional non-prosecution. He may give general orders in that respect.
- De facto, approx. 5% of the cases in which there is sufficient evidence of guilt, lead to unconditional non-prosecution.
- Back to the policeman with whom I started these remarks: If he would just have given me the fine, I would have paid and by now I would certainly have forgotten the whole story. By reacting the way he did, he indeed proved himself well worth of the powers bestowed on him. He managed to make good use of the opportunity.