Alternative disposal of criminal cases by the prosecutor: Comparing the Netherlands and South Africa

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Chapter 1

1.1 Introduction

In 1984 the United States of America enacted the Sentencing Reform Act (SRA). This significant effort at systemic law reform created the United States Sentencing Commission and authorized the promulgation of sentencing guidelines which resulted in a radical transformation in the American (federal) criminal justice and sentencing system. Much of the system changed, including inter alia the allocation of the sentencing authority. Consequently the SRA changed the role of trial and appellate judges, prosecutors and defence attorneys, and federal probation officers and effectively vested sentencing authority in prosecutors. In 2004 Marc Miller evaluated this development and came to an extremely negative judgement. He qualifies the federal sentencing guidelines and their introduction as “one of the worst illustrations of sentencing reform”. One of the great faults of the federal guidelines system is in his opinion that:

“It has created one sentencer -federal prosecutors- with powers nominally more regulated, but in fact more absolute than the indeterminate system that came before. The consequence of this development, along with the severity of federal sanctions, includes the virtual elimination of trials and substantial evidence of efforts, visible and subterranean, to reach reasonably just decisions in individual cases. The implication of this insight is that further reform, when it comes, should seek as a general principle to allocate sentencing powers to more than one institution. The virtues of the fundamental concepts of checks and balances, along with the familiar and essential theme of the separation of powers at the level of structural constitutional law, have their parallel at the level of both rulemaking and application in the sentencing arena.”

The mandatory nature of the sentencing guidelines, which was one of the main difficulties that Miller had with the legislation, has subsequently been found to be unconstitutional and it has become advisory. His concerns with the exceptionally powerful position of the prosecutor, and the absence of (judicial) checks and balances, however, still remain. This
an extremely negative value judgement was re-evaluated by Erik Luna, who is Professor of Law at Washington and Lee University and currently an Alexander von Humboldt Foundation research scholar and project co-director with the Max Planck Institute for Foreign and International Criminal Law and Marianne Wade, who is Senior Lecturer at Birmingham Law School. Their re-evaluation also included comparative observations. In 1987 The Council of Europe issued Recommendations on the Simplification of Criminal Justice, which also show a definite trend towards greater authority given to, or taken by, prosecutors to dispose of criminal cases.⁵ Therefore Luna and Wade undertook the comparison between the developments in the United States and in Europe. In 2010, they published an article, aptly titled: “Prosecutors as judges”, in which they compared prosecutorial adjudication⁶ in the USA and a number of European countries.⁷ It was soon (2012) followed by a collection of essays by various authors on the very same topic, under the title: “The Prosecutor in Transnational Perspective”.⁸ Not surprisingly they argue that, in the US, there is largely unchecked prosecutorial discretion which creates very real potential for abuse,⁹ in their own words:

“The American prosecutor plays a powerful role in the judicial system, wielding the authority to accept or decline a case, choose which crimes to allege, and decide the number of counts to charge. These choices, among others, are often made with little supervision or institutional oversight.”

They make, however, at least three interesting observations. Firstly they conclude that there is international convergence towards greater authority of the public prosecutor to dispose of or independently adjudicate criminal cases and that there is in Europe a renewed interest regarding the functions, powers and authority of prosecutors. This, they contest, is as result of rising crime and rising criminal case loads. Secondly they are of the opinion that prosecutorial adjudication in America is mostly attained through plea-bargaining¹⁰ which shows a very coercive character.¹¹ This


⁶ With prosecutorial adjudication is meant the finalising of a case without a legal hearing and the attached procedural rights and impartiality.


¹⁰ In the (US) Federal system 95% of prosecuted cases are terminated by plea-bargaining. E Luna and M Wade, Prosecutors as Judges 67 Washington and Lee Law Review 1413, 2010 p. 1429.

corresponds with what S.C. Thaman\textsuperscript{12} found a couple of years earlier. Thirdly they see as a result of the increased interest in problems concerning independent prosecutorial adjudication a corresponding increase in empirical research, review of working practices and roles and powers of prosecutors, studies regarding the structure of their offices and analysis of prosecution guidelines and policies.\textsuperscript{13}

The first observation does not pertain to South Africa, which was not included in the scope of Luna and Wade. Nevertheless also in this country do we find an increasing tendency towards greater authority vested in the public prosecutor as result of rising crime and rising criminal case loads. The first problem is simply one of capacity. There are simply more cases coming into the system than it can deal with. There are not enough courtrooms, prosecutors or presiding officers available to hear all cases. Capacity problems also reflect in decreased conviction rates. The High Court has recently described it as the ‘woefully congested criminal justice system’.\textsuperscript{14} Coping with overloaded criminal justice systems seems to have become everyone’s problem\textsuperscript{15} and looking for solutions is a timely pursuit.

The Netherlands, on the other hand, introduced per the 1\textsuperscript{st} of February 2008 a radical transformation in the Dutch criminal justice system by vesting the mandate to impose criminal penalties in the prosecuting authority. The punishment order\textsuperscript{16} [\textit{strafbeschikking}] imposed by the prosecutor is a determination of guilt which becomes final and is equated to a conviction (and sentence) by a court unless the accused takes timely steps to oppose it. On a political level there is increasing enthusiasm for this development, which seems to spread like a drop of oil on the surface of water. Not only can the public prosecutor issue a \textit{strafbeschikking} but \textit{strafbeschikkingen} can also be issued by the police, several administrative and local authorities and the Receiver of Public Revenue.\textsuperscript{17} Consequently the question arises whether the \textit{strafbeschikking} as such contains elements which might seem fruitful for South Africa. This question stands in close connection with the second observation made by Luna and Wade, namely

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\textsuperscript{12} SC Thaman, Plea-Bargaining, Negotiating Confessions and Consensual Resolution of Criminal Cases, Electronic Journal of Comparative Law, 2007-11.3 (December 2007) \url{http://www.ejcl.org}


\textsuperscript{14} S v Yengeni 2006 (1) SACR 405 (T)


\textsuperscript{16} This translation for \textit{strafbeschikking} was found on the website of the OM, but “beschikking” means decision – so in my opinion it should rather be translated to punishment decision. I will further refer to this procedure as a \textit{strafbeschikking}.

\textsuperscript{17} AR Hartmann, De strafbeschikking: naar nieuwe grenzen van buitengerechtelijke afdoeing binnen het strafrecht, \textit{Tijdschrift voor sanctierecht & compliance} 2 mei 2012, p. 58. I would like to express my gratitude to the author who was so kind to make this article available to me.
that the strafbeschikking is certainly not the only alternative method of disposing of criminal acts. The Dutch already have a long-standing tradition in this respect. There is, however, nowadays a definite trend of rising power of Dutch prosecutors to adjudicate cases through a variety of “case-ending” mechanisms. The prosecutor has already been called a “judge before the judge”, meaning they determine which cases will eventually end up before a judge. In the Netherlands this trend is taken even further with the new procedure of a strafbeschikking. This procedure suggests that “the prosecutor is not only a “judge before the judge” but the sole judge of the case”.

Regarding the third observation made by Luna and Wade and considering the two preceding paragraphs, it seems to follow that there is an urgent need to compare the recent Dutch methods and procedures, developed in order to cope with the increase of criminal cases, with the South African needs. I will examine both parallels and distinctions in the processes available to and decisions made by prosecutors in the Netherlands and South Africa, in order to see whether the enhanced role of the Dutch prosecutor furnishes lessons for the latter country. This study will therefore seek to enrich the South African understanding of Dutch alternative disposal practises which may inspire changes to our own system. To this end I will explain not only what alternative disposal methods are at hand in the Netherlands, but also give some insight into how it came about and what the driving forces behind these procedures were. This discussion seems to be opportune at this stage, given recent developments in South African criminal procedure which lean towards greater emphasis on alternative disposal methods, restorative justice and other “informal” methods, and the simplification of the criminal justice process. I will, however, keep in mind the severe criticism of Marc Miller of the American system, given the fact that South Africa has to react to the challenge of the increasing case-load in its criminal justice system within the parameters of the new constitutional dispensation. The question whether the virtues of the fundamental concepts of checks and balances, along with the familiar and essential theme of the separation of powers at the level of South African constitutional law, can or cannot do without a parallel at the level of both rulemaking and application in the sentencing arena.

Developments in the Netherlands

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18 With “case-ending” decisions is meant one that ceases further criminal proceedings.
21 See chapter 3 where the various alternatives are discussed in detail. AR Hartmann, De strafbeschikking: naar nieuwe grenzen van buitengerechtelijke afdoening binnen het strafrecht, Tijdschrift voor sanctierecht & compliance 2 mei 2012, p. 58.
The Netherlands does not follow a system of compulsory prosecution and the principle of expediency was given statutory recognition in the Wetboek van Strafvordering of 1926. This allows for the prosecuting authority (Openbaar Ministerie O.M.) to waive prosecution if it is not deemed necessary. This waiver of prosecution can be with, or without conditions. Sepot, as this method of alternative disposal is known, is still one of the methods that are currently used to dispose of criminal cases. Another form of alternative disposal method, the transactie, was introduced in 1921 and was at first used to dispose of a limited category of transgressions by way of the payment of a fine or compliance with certain conditions. In 1984 the application of the transactie was extended to also include certain felonies and from 2000 community service may also be included as a condition. The developments regarding transactie was (also) extended in order to give the police limited authority to issue transactie notices. Another disposal method is called voeging ad informandum and boils down to adding similar charges to a particular charge and with the acknowledgement thereof by the accused, the court can figure those other charges into the sentence for the charge on trial. There have also been huge developments in the Netherlands regarding administrative adjudication/finalisation of offences which basically started when a number of lesser traffic offences were removed from the criminal law and an administrative adjudication system was implemented instead. This initial ‘decriminalisation’ has expanded and a whole regulatory system of administrative (criminal) law has developed where fines, transacties and strafbeschikkingen can now be imposed by administrative bodies. Restorative justice, or herstelrecht or mediation, or alternative dispute resolution and other similar informal processes, also continue to exist side-by-side with criminal justice processes. The latest weapon in the alternative disposal methods of the Dutch prosecuting authority is the strafbeschikking, which has been in use since 2008. Unlike the transaction which is only an offer to the accused which he can accept or ignore, the new procedure has the effect that it becomes final and equal to a conviction and sentence by the court if the accused does not oppose it. No system of private prosecution exists in the Netherlands, but prosecutorial discretion regarding alternative disposal of criminal cases is subject to judicial review in as far as victims or other persons with a direct interest in the case may challenge the choice made by the prosecutor.22 This effectively provides the necessary safeguards against abuse of discretion by the O.M.

Developments in South Africa

The South African criminal justice system is undergoing, and has undergone since democratisation in 1994, various changes. As a result we find a new constitutional and prosecutorial structure and prosecution

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22 See later in chapter 3 the discussion of the Art 12 procedure by which alternative disposal decisions of the prosecutor may be challenged.
management programmes aimed at enhancing efficiency, improving victim services and increasing public trust in the justice system. The most significant development regarding trial alternatives in South Africa has been the introduction of (semi) mandatory diversion in all cases dealing with young offenders. This is as result of the introduction of the Child Justice Act\textsuperscript{23} (applicable since 2010). The background to this was concerns about children, some very young, being held in prison-and-police cells which led in 1995 to the formation of an Inter-Ministerial Committee on Young People at Risk (IMC) consisting of representatives of seven government ministries led by the Department of Welfare. This committee came up with various initiatives and experiments with diversion, fast-tracking and assessment of young offenders. The creation of the non-governmental organisation, NICRO\textsuperscript{24}, in the early 1990s and their development of a life-skills programme for young offenders increased the utilisation of diversion of juvenile criminal cases.\textsuperscript{25} Since there was little/limited legislative framework for diversion, it mostly took place within the framework of prosecutorial discretion, and was implemented in a selective and disjointed manner.\textsuperscript{26} It became clear that what was needed was a comprehensive and effective child justice system. The whole child justice sector was then subjected to an investigation by the Juvenile Justice Project Committee of the South African Law Commission (1997) who brought out a Final Report (2000) recommending new legislation to comprehensively regulate this issue. A draft Child Justice Bill (2002) saw the light which, after considerable deliberation and revision, led to another draft Bill in 2007 and ultimately resulted in the Child Justice Act of which diversion as an alternative disposal method is the central feature.

In a further attempt to improve the criminal justice system, the South African Law Commission investigated Out-of-court settlement of Criminal Cases and brought out a report\textsuperscript{27} in which they recommended the introduction of legislation to formalise out-of-court settlements. The (new) National Director of Public Prosecution also issued Prosecution Policy\textsuperscript{28} (in 1999) which includes a part 7 with the heading: ‘Diversion of Prosecution’. This directive introduces the possibility that criminal prosecutions can be

\textsuperscript{23} Act 75 of 2008.
\textsuperscript{24} National Institute for Crime Prevention and the Reintegration of Offenders.
\textsuperscript{27} Project 73 Final Report on Simplification of Criminal Procedure: Out-of-court settlements in criminal cases, August 2002. This report had been submitted to the (then) Minister of Justice long time ago, but no action has resulted from it.
\textsuperscript{28} The National Prosecuting Authority Act [sec 2(2)(a)] provides that the national director shall, with the concurrence of the minister of justice, and after consulting the directors of public prosecution, determine prosecuting policy and issue policy directives which must be observed in the prosecution process.
“diverted” in suitable and deserving cases and that criminal cases can be disposed of in a manner other than through normal court proceedings. The directive further indicates that, although diversion is primarily employed in the case of juvenile offenders, other diversion programs (for adult offenders) are also in operation, like victim-offender mediation programs and the performance of community service as alternatives to prosecution. Little has, however, been done to facilitate alternative disposal methods, to familiarise prosecutors with such methods, or to give precedence to alternatives in relevant situations.29

Another decisive development in South African criminal justice again resulted from another Law Commission recommendation, which saw the implementation of legislation formalising Plea-and-sentence agreements (2001). This development recognises that the exercise of discretion by the prosecuting authority is an integral part of the criminal justice system and the conclusion of plea-and sentence agreements a manifestation of the exercise of such discretion. This brings this important method of concluding criminal cases out of the shadows and into clear view.

Restorative justice, as well as other informal conflict resolution processes involving reparation/restitution, negotiation, mediation, continues to be prevalent in efforts to refashion traditional criminal procedures.30 This is again not only a South African challenge.31 The question is, however, what role it should play in the formal justice system? There has been renewed impetus for applying restorative elements in sentencing by the court, but it is still unclear whether informal mechanism will be developed as total alternative disposal method. A National Policy Framework for Restorative Justice (2011) has been initiated in an attempt to develop a consistent, multi-sectoral approach to this dilemma. A further new development is the proposed administrative adjudication of traffic offences, which has already been partly introduced as a pilot in two metropolitan areas. A final decision about when the whole regulatory system will be implemented nationwide has still not been taken, but such a procedure will remove a significant number of cases from the court-roll of criminal courts.

With regard to alternative disposal methods currently available in South Africa, the discretionary withdrawal or stopping of prosecution, and the admission of guilt and payment of a fine as alternative to appearing in

court, are already well established and have been applied for quite some time. The (formal) plea-and-sentence agreements which have been possible since 2001 are however new.

1.2 Terminology – what is meant by alternative disposal?

Various studies in South Africa, and elsewhere, focus on the diversion of prosecution of criminal cases. Diversion is, however, only one of various alternative methods the prosecuting authority can use to finalise a case without going to trial. Diversion can also be seen as a way in which a matter can be settled out-of-court.

Out-of-court settlement has been defined by the SA Law Commission as:

‘an agreement between the prosecution and the defence in terms of which the accused undertakes to comply with conditions as agreed upon between the parties, in exchange for the prosecution discontinuing the particular prosecution’\(^{32}\)

So out-of-court settlements entail agreements (between state and accused) which lead to discontinuation of prosecution with certain conditions attached. The Commission contends that such conditional discontinuation results in diversion. Diversion is therefore a result of an out-of-court settlement. Diversion of prosecution is not new, nor is it unusual in the criminal process. It has become a practical reality and deliberate policy choice in many justice systems.\(^{33}\)

Diversion is defined by the Commission as:

“The referral of *prima facie* cases away from the criminal courts, with or without conditions”\(^{34}\)

If the diversion is conditional, one can assume that the diversion will be terminated, and prosecution probably reinstated, if the conditions are not met. Unconditional diversion is akin to simply sending the matter away somewhere else, e.g. referring/diverting tax cases to a specialised tax court. But is this really diversion?

This study, however, is not limited to diversion and out-of-court settlements, but focuses on all the various alternative disposal (or “case-ending”) methods available to the prosecuting authority in the Netherlands and South Africa. The Dutch terminology gives a better description of

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\(^{33}\) For a more complete discussion of diversion, see G Dingwall & C Harding, Diversion in the criminal process, Sweet & Maxwell 1998.

alternative disposal – *buitengerechtelijk afdoening* – which literally means: dealing with/finalising cases outside the court. Whereas out-of-court settlement relies on an agreement between the state and accused, there is not necessarily such agreement element in the case of other alternative disposal methods. It does, indeed, require of the accused/suspect/offender to ‘not oppose’ the alternative. One could be tempted to refer to it as out-of-court disposal, but this is once again not wholly accurate since some of the alternative disposal methods do indeed play out in court, for example the plea-and-sentence agreements that must be presented to court, and the *ad informandum* practice which disposes of charges against the accused at the trial, but not by means of a separate trial.

What is different about this study?

In the last number of years a whole lot has been written about diversion in South Africa. Almost without exception it dealt with diversion of child-offender cases. Except for mentioning in passing that, oh yes, diversion may also be used for adult offenders, very little is known about this subject. Annual reports of the National Prosecuting Authority contain statistics regarding diversion of both adult and child offenders, but a legislative basis for adult diversion is absent. There is also no recent comprehensive analysis of all alternative disposal methods in South Africa. The Law Commission report on out-of-court settlements dates from as far back as 2001 and is limited to out-of-court settlement processes which are not inclusive of all alternative disposal methods. This study therefore focuses on alternative disposal methods and will also specifically analyse the full range of Dutch alternative disposal methods in relation to those already available in South Africa to determine aspects that might strengthen the latter. Alternatives which are not usually included in diversion/out-of-court studies like the *ad informandum* practice and plea-bargaining, as well as the new Dutch procedure of a *strafbeschikking*, will also be brought into the equation. A further evaluation will be made about the current control mechanisms regarding the exercise of prosecutorial discretion, not only hierarchical and political control, but specifically when alternative disposal methods are employed. The Dutch system allows for a complaint lodged with the Appeal Court, whereas the South African system provides for the possibility of private prosecution by a person with a direct interest in the matter. The new constitutional dispensation in South Africa contains not only various due-process (or fair-trial) rights for persons who are arrested, detained or accused\(^{35}\) of a crime, but various

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\(^{35}\) A person becomes an accused when they are charged with committing an offence. In Du Preez v Attorney-General, Eastern Cape 1997 (2) SACR 375 (E) the court held that a person is not charged with an offence until he is advised by a competent authority that a decision has been taken to prosecute him. This is quite different from the European Court of Human Rights definition that a charge relates to the official notification given to an individual by the competent authority of an allegation that he has committed a criminal offence. ECHR 10dec 1982, NJ 1987,828 m.n.t. P van Dijk, zaak Foti. Also PJ Schwikkard, Arrested, detained and accused persons, in I Currie& J de Waal, The Bill of Rights Handbook, 5th ed. Cape Town: Juta Publishers, 2005, p.744.
other rights in the Bill of Rights are also applicable in the criminal justice process (equality, human dignity, freedom and security of the person etc.) The Constitution also prescribes that a clear separation of power be maintained between the legislative, judicial and executive branches of the State. This study will also evaluate alternative disposal methods against these constitutional requirements as well as the due-process rights contained in the European Convention on Human Rights (which is applicable to the Netherlands).36

1.3 Advantages and disadvantages of alternative disposal

Resorting to alternative disposal methods is not only about efficiency, cost-effectiveness and compensating for a lack of capacity, although these factors indeed do play a huge role. Emphasis is often placed on the efficiency of criminal justice mechanisms, which does not necessarily guarantee justice. The question is whether alternative disposal can achieve the same or similar results as a trial, conviction and sentence by a court, without compromising the values and positive outputs of the traditional method.37 Alternative disposal methods do indeed also display inherent values, but carry with it certain risks or pitfalls. These will be discussed next.

Values/advantages

A “negotiated penalty” takes away the risks of discretionary sentencing. In the Netherlands it is not such a huge problem because of things like the “requireer-beleid” and sentencing guidelines,38 but sentencing in South Africa is still very much an individual discretion exercised by the presiding officer.39 The popularity of plea-bargaining has shown that knowing the full extent of the sentence, and agreeing to it, plays a role in an accused pleading guilty to charges. Alternative disposal usually relies on consensus, however one chooses to define it. Participation in the alternative must be voluntary. By agreement the accused waives reliance on certain rights. Corstens40 (for the Netherlands) and Labuschagne41 (for South Africa) have both dealt with consensual aspects in the criminal

38 See also the discussion of BOS/POLARIS (also available at www.boscentre.nl) and the Kader voor Strafvordering in chapter 2. Similar the Wet aanscherping handhaving en sanctiebeleid SZW-wetgeving 4/10/2012 staatsblad 462.
39 As was pointed out in the Law Commission Sentencing report, Project 82 Report November 2000, p. 3.
40 GJM Corstens, Consensualiteit en strafsancties, AA–46, 1997, p. 133. He is not only an authoritative author on Dutch Criminal Justice, but also happens to be the current Chief Justice of the Netherlands (President van de Hoge Raad der Nederlanden).
41 JMT Labuschagne, Konsensuele strafregpleging: Opmerkinge oor die spanningveld tussen regstaaltlikheid en doelmatigheid SACJ 1995 p. 158.
justice set-up. More recently there is also the work of Crijns who provides us with an inventory of ‘on consensus based procedures’ in the Netherlands. The argument is, however, that because the outcome of the consensual procedure is an agreement between the prosecution and the accused, there is a higher acceptance of the outcome. It is after all what you agreed upon.

The alternative disposal methods can be more humane, the accused usually gets a sentence discount (leniency), and in theory the stigma of a trial is avoided. The result of alternative disposal methods is often regarded as being more lenient than that which would have (probably) resulted from a trial. At the same time this is used as criticism against alternative disposals – the idea that the accused is “getting away with it”.

Where the system still allows for the alternative disposal method (for example paying the admission of guilt fine) to be regarded/recorded as a previous conviction, there is no real avoiding the stigma of being a criminal, except that the accused does not have to publicly appear in court. But ultimately some form of a record will have to be kept, like it is in the Netherlands, to track completion of cases, and in the event of prosecution decisions regarding subsequent offences by the same person.

The results of alternative disposal methods can be less damaging, not only with regard to the accused, but also to victims who will no longer be required to testify in court and be subjected to fierce cross-examination etc. The alternative chosen may also be “victim empowering” in the sense that a victim’s opinion may/must be taken into account in finalising the matter.

Due to the nature of the alternative disposal, the penalty/punishment of the accused can be more flexible, more creative, innovative etc. It can include restorative or reparative elements and involve other parties than just the prosecuting authority, accused and victim. Sentencing circles and other community based methods may be employed. The conditions imposed can be individualised to encourage a change in behaviour of the accused but must remain appropriate to the offence, otherwise it will soon forfeit its credibility.

There are, however, limits to the creativity: conditions which are degrading or harmful cannot be agreed upon, and a punishment of

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44 SS Terblanche, Guide to Sentencing in South Africa, 2nd ed. Durban: LexisNexis publishers, 2007, p. 177 and p. 291. Although he was referring to indiscriminate use of correctional supervision and restorative justice respectively which can lead to reduced credibility or effectiveness, the same argument can be applied to indiscriminate use of alternative disposal methods.
45 JC von Bonde, Restorative Justice: bringing back the pillory? Obiter 2008-29(2) p. 133 where the author discusses the case of S v Saayman where the Supreme Court of Appeal overturned a “restorative justice” sentence requiring the offender to stand outside the courtroom (for 15
incarceration cannot be included since the latter can only be imposed by a court.

Alternative disposal methods do, however, encourage offender accountability, since participation in the alternative method is usually dependant on the accused at the very least admitting responsibility, if not legal guilt. During a trial, if the accused pleads not-guilty but is ultimately found guilty by the court, he can still insist on his innocence. With alternative disposal methods the acknowledgement of responsibility is required from the offender him/herself. An accused pleading guilty, or at least acknowledging responsibility, may also serve as a positive example to other offenders in a similar situation. Alternative disposal methods can promote reparation, reconciliation and re-integration. With regard to efforts to implement restitution as an additional option within the system of the criminal law there can be no objection, but there are some who argue that criminal penalties and procedure can best be replaced by mediation and restitution. The argument for retaining the criminal threat in the utilisation of informal conflict procedures is that successful conflict resolution is dependent on the availability of formal procedures and the potential of coercive measures if the informal procedures do not live up to the expectation. The threat that the State may (still) resort to the criminal law, may be conducive to informal procedures and also to mediation.

Lastly, but certainly not the least important consideration, is that alternative disposal can possibly be quicker than a traditional trial which can lead to earlier finalisation of cases, something which may be to everyone’s advantage.

Pitfalls/disadvantages

Alternative disposal methods contain the possibility of unequal treatment. Criminal justice must be administered even-handedly without regard to aspects such as race, gender, origin, social standing, but socio-economic weaker members of society may be more easily intimidated by

minutes) bearing a placard apologising to the victims. The SCA found this sentence degrading and therefore invalid.

police or prosecutorial action. A concern in South Africa, with its huge economic disparities, must certainly be ways to prevent alternative disposal methods to be abused by the rich, being able to “negotiate” themselves out of court, and only the destitute going to trial.

There is also perceived difficulty with determining the sufficiency of guilt. Reasons exist why an innocent person may choose to admit guilt. One may find that an accused may decide to abide by an out-of-court disposal, even if innocent, just to keep a low profile or not wake the proverbial sleeping dogs that might awaken in a public trial. Another reason may be to avoid a lengthy, complicated and/or expensive trial. Alternative disposal methods often require the accused to admit guilt, or at the very least accept some personal responsibility. This may indeed compromise the person’s right regarding the presumption of innocence. Objective ‘truth’ is replaced with ‘truth by agreement’. What about an accused who denies guilt? Should the possibility of alternative disposal be afforded to him? Would that not fly in the face of the presumption of innocence?49 The recommendations of the European Council regarding the simplification of criminal justice50 suggest that the offender should at least admit some responsibility for what has happened. As some commentators indicate51 this is a rather technical distinction - being legally innocent but accepting responsibility at the same time. One can hardly expect a layman to understand the technical aspects of grounds of justification that exclude unlawfulness.

One also finds concerns with secrecy/lack of openness and transparency attached to alternative disposal methods. The openness in principle guarantees both the quality of the jurisprudence as well as the acceptance thereof by the general public.52 Most forms of alternative prosecutorial disposal lack this public element of transparency.53

There always remains the possibility that unscrupulous members of the prosecuting authority may abuse the alternative methods because of a lack of judicial oversight. The exercise of discretion (not) to prosecute may be susceptible to discrimination or corruption. But – alternatives to trial mostly deal with standard, frequently-occurring cases with fairly simple proof of evidence where fairly standardised sentencing is expected. The

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50 Explanatory Memorandum to the Recommendations of the Council of Europe: The simplification of criminal justice, R (87) 18 Strasbourg 1988 (p. 27).
52 L Stevens, Strafzaken in het nieuws: over ontsporende media en de verantwoordelijkheid van het Openbaar Ministerie, NJB 2010-11, p.660
extent of abuse is therefore limited. One must, however, be mindful of the (benefits of) traditional checks and balances, and protection against the potentially dangerous concentration of power in one body that are at the heart of the objections of Miller against the situation in the US.

What role do defence lawyers play? At what stage should legal assistance be available to a suspect? Should he be informed of this right? The SA Constitution guarantees anyone who is detained or accused of a crime the right to legal representation and also to be informed of such right. If this is denied, evidence obtained in the absence of the lawyer can be ruled inadmissible in any subsequent trial.\textsuperscript{54} This was not the case in the Netherlands, but as result of the Salduz\textsuperscript{55} decision of the European Court of Human Rights this will have to change. It seems as if it will be required that a person should have access to a lawyer if in police custody and whilst being interrogated by the police. Still on the topic of lawyers: Lawyers in SA are trained in an adversarial model of justice. Often the first line of defence is not to make any admission, to deny responsibility or rely on the right to remain silent and to be presumed innocent. This in itself may be counter-productive where the possibility of alternative disposal exists. “Without prejudice” discussions between the prosecutor and defence council may be necessary. The nature of the (adversarial) criminal trial allows for little dialogue between the victim and the offender. Prosecutors and investigating officers, fearful that the offender may compromise the case often insist on stringent bail conditions, prohibiting the offender from having any contact with the victim. The case is regarded as a “legal battle” and interaction and participation between the two parties are stifled. This can be contra-productive to possibilities of alternative disposal.

Is the admission of guilt or participation in an alternative disposal method a voluntary and informed choice? With all the disposal methods which will be discussed in the following chapters it is clear that the accused has a choice whether to accept (the transaction, \textit{ad informandum} etc.) or to insist on judicial adjudication. That is what aligns these methods with sec 6 of the European Convention on Human Rights. The accused is not hindered in his right to a trial but there is a voluntary waiver of those rights. But how voluntary is the participation of the accused really? He is confronted by a mighty state organ with (seemingly) limitless expertise and resources. Especially in the case of an ignorant layperson, maybe from a different culture than the prevailing, the choice may not be made freely. A further consideration is the leniency of the alternative disposal method that will give way for the likely increase in sentence if the accused should choose not to accept the alternative and to insist on a trial.

\textsuperscript{54} Section 35(2)(b) and35(3)(f) Constitution. 
\textsuperscript{55} Salduz v Turkey (27/11/2008)
Where there is more than one possible alternative disposal method that can be applied in a particular situation, the choice as to which to use can be confusing. Not only the choice of alternative itself may be confusing, but the procedures of each alternative, the question as to which authority is to apply it (or be given preference above other possible institutions), the consequences thereof, appeal or review mechanisms can all be above the understanding of an average citizen in trouble with the law.

Concerns can be raised with the confidentiality of information shared in the process of an alternative disposal. Who will have access to such information?

It is a general concern that alternative disposal options may be used to get rid of not only petty offences but also complicated and possibly prolonged proceedings – predominantly cases involving economic or environmental offences committed in a corporate context. Although the out-of-court settlements discussed in Albrecht’s report are aimed primarily at petty and moderately serious offences, he admits that there is a certain tendency to move deeper into serious crime with conditional dismissals. The question remains whether there are adequate safeguards against abuse/misuse.

The protection of (due process) rights of an accused could be seen as a continuum – the greater the interests at risk, the greater the procedural guarantees should be. The accused can agree to various penalties/punishment but can only go to jail if a judge has found him guilty. However, a system that makes access to the courts difficult, if not quite impossible, is equally unacceptable. An aspect which complicates the work of the prosecutor both in South Africa as well as in the Netherlands, is the increasingly more powerful position that victims of crime take in the judicial process. This is also the case where alternative disposal methods are employed. Labuschagne does not support the idea that the victim should have some form of veto or appeal concerning the final decision. That would interfere with prosecutorial discretion as well as with the principle of equal treatment. He believed that the victim’s particular insight, characteristics and emotions should not be allowed to play a conclusive role in determining the appropriate way of finalising the matter. The increase in restorative justice, especially as a new trend in sentencing policy, insists that the voice of the victim not only be heard, but that appropriate weight

56 R van Schijndel, De rol en reikwijdte van vertrouwelijkheid in de context van strafrechtelijke bemiddeling, AA januari 2010, p. 68.
59 JMT Labuschagne, Konsensusuele strafregpleging: Opmerkinge oor die spanningsveld tussen regsstaatlikheid en doelmatigheid SACJ 1995 p. 158.
is accorded to it. Once again it is not quite clear how this can consistently be guaranteed in alternative disposal methods.

1.4 The South African criminal justice system under pressure

The South African criminal justice system faces many challenges and is not always coping too well. We will next identify some of the reasons/symptoms:

In addition to the serious lack of capacity already alluded to in the introductory paragraphs, there is a serious concern with procedural delays, some unfortunately built into the system itself. The principle of orality, which applies in South Africa, demands that the trial has to take place in the presence of the accused and that evidence is presented, and witnesses heard, in court. The suspect is also entitled to various rights and entitlements, the compliance with which can lead to delays. The non-availability of crucial personnel at all times during the trial is also problematic. The above mentioned capacity problems also lead to delays – it slows down the “doorstroomsnelheid”. These delays also lead to disturbingly high numbers of awaiting-trial and convicted but as yet unsentenced prisoners.

Equality and the prevention of discrimination is a high priority in the South African criminal justice system. It is given constitutional protection in the right to equality in section 9 of the Constitution which states that every person is equal before the law and has the right to equal protection of the law. Any procedure, therefore, which differentiates between accused persons without a justification, will fall foul of the right to equality. This is reiterated in the National Prosecuting Authority Act which states prominently that prosecutors must fulfil their mandate “without fear,
favour or prejudice”. Guaranteeing equal treatment (in a system of alternative disposal) is therefore important.

Due to various factors there is a lack of legal certainty at different stages of the process. The execution of prosecutorial discretion is problematic if it relies on the whim of the individual prosecutor. There is insufficient consistency regarding prosecution decisions and unpredictable outcomes of factual situations. This lack of predictability regarding the possibility of arrest, which charges are to be favoured, the possibility of conviction and the severity of the sentence upon conviction is unacceptable.

We also find that there is a lack of coordination between the three branches of the criminal justice system (police, prosecuting authority and correctional services). From time to time one finds big “anti-crime campaigns” by police without prior consultation with the other “links” in the chain to determine what effect these campaigns would have and whether it is advisable at this moment in time. The three branches also resort under different ministers and different policies and procedures apply.

Another area of concern, which, although not having direct relevance to this study but is indeed something that hampers the development of coherent and continuous prosecution policy, is the rapid staff turnover, and even more disturbing, the turmoil in the last number of years regarding the appointment of a National Director of Public Prosecutions. Equally disturbing is the situation regarding the head of the South African Police Service, an important partner of the prosecuting authority.

1.5 Can the Dutch system of alternative disposal help in solving some of these problems?

The Dutch prosecution service is known for effectively dealing with certain forms of criminal conduct by way of alternative disposal. This study will therefore investigate whether the Dutch system of alternative disposal as applied by the prosecuting authority in relation to countless less serious criminal offences, does indeed have any application in South Africa, and whether it will indeed achieve the positive result that I have suggested, taking into consideration the constitutional (and ECHR) environment in

64 L Fernandez, The pathological malaise within the criminal justice system: Why the courts are not seen to be delivering. Law, Democracy and Development, 2000-4, p. 199.
65 Slightly dated but nevertheless still relevant is the article by L Fernandez, Profile of a vague figure: the South African public prosecutor, SALJ 1993-110-3, p. 115
66 See the recent court challenge of the appointment of Adv. Simelane to the post of NDPP by the official opposition [Democratic Alliance v President of the Republic of South Africa 2012 (1) SA 417 (SCA)] leading to the invalidation of his appointment, the controversial dismissal of the previous NDPP and the disarray presented by successive acting National Directors.
67 The previous Commissioner dismissed by the President amidst a cloud of controversy, the Commissioner before him jailed for corruption.
which it has to function. Comparative legal research is for the most part valuable when one can compare an aspect which is well developed in a mature justice system against a new problem in the other, less developed justice system. However, one must realise that there are inherent differences (in capacity, functionality) between the Dutch and South African criminal justice system, so a whole-scale transplant may be unwise.

1.6 Describing the methodology.

This study will investigate the theoretical and legislative framework behind the existing alternative disposal possibilities in both countries which is a necessary pre-condition before any sociological or statistical research methodology can be followed. In any event, the statistics regarding crime, prosecution and execution of sentences in South Africa is insufficient and/or unreliable, making such method impossible.\(^{68}\)

It is important to determine the parameters of this study and to indicate which aspects fall outside its scope. When it comes to serious and/or violent crime, which is indeed a significant problem in South Africa, we will find that we probably reach the boundary of the application of alternative disposal methods. Alternative disposal methods are as a rule only applied to offences of a less serious nature, or where the situation of offender, victim or legal order is such that a public trial before an independent judicial officer is not required. Given the legislative proscription, alternative disposal is also ruled out where mandatory minimum sentence legislation\(^{69}\) applies or crimes in the international dimension where there are treaties dealing with extradition and local execution of sentences imposed by foreign courts.

There are specific laws and rules applicable to young people in trouble with the law. Except for demonstrating the development that has taken place in South Africa to create a legislative framework for the diversion of prosecution of crimes involving children (Child Justice Act 2008) juvenile justice falls outside the ambit of this study. In the Netherlands there has been huge gains made with regard to “administrative criminal law” – an elaborate system of administrative fines imposed by, and executed by,

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\(^{68}\) Statistics on crime is compiled by the Police, on prosecutions by the NPA and on the execution of sentences, by the Department of Correctional Services. News blackouts regarding crime figures (as has been ordered in the past by the Minister of Police) further complicate the situation.

\(^{69}\) Introduced into the Criminal Procedure Act by the Criminal Law Amendment Act 105 of 1997. It was introduced as a temporary legislative measure, but is still in place and seems to remain so. Minimum sentences are proscribed ranging from 5 years to life imprisonment for various (serious) crimes contained in a schedule. Although these sentences are not mandatory, it must be imposed unless substantial and compelling reasons exist not to impose it. Minimum sentences legislation is also likely to be introduced in the Netherlands but the issue was put on hold whilst a new government was formed. T de Roos, Kroniek van het strafrecht en het strafprocesrecht, NJB 2012, p. 2405
administrative bodies. With the exception of an analysis of the administrative adjudication of traffic offences (so-called Lex Mulder), I will not dwell too long on this separate system of enforcement. Likewise, I will not be dealing with informal justice and the (limited) adjudication of criminal conduct by indigenous and traditional courts in South Africa.

1.7 Why compare The Netherlands with South Africa?

At an early stage of the research it became clear that the Dutch criminal justice system, as it has evolved in the last 40 years or so, has developed various alternatives disposal methods to deal with crime without having to take the matter to trial. As I will show in chapter 4, there are some alternatives available in South Africa, but its application is limited and it lacks a comprehensive legislative framework. There is therefore much to learn from the Dutch. Both criminal justice systems are subject to similar developments regarding crime and criminality. The way the Dutch solved some of these problems by amongst others resorting to alternative disposal methods may therefore be useful to the South African justice system.

On the face of it there seems to be a lot of similarities in the two justice systems. Both feature a functionally independent prosecuting authority organised along hierarchical lines with the mandate to prosecute crime. In both systems there is no mandatory prosecution, so – in principle – prosecutors have the discretion to refrain from prosecution when they deem it appropriate. The principle of expediency in the Netherlands took on a particular format after 1945 and the end of German occupation, whereas the principle of discretionary prosecution in South Africa is also being reformulated after the democratic elections of 1994. In both systems the prosecuting authority reports to the Minister of Justice. In both systems the prosecuting authority gives instructions to the police concerning investigation of crime [opsporing]. In the Netherlands there are detailed, formal agreements also regarding the quality and quantity of these investigations. Although this is not the case in South Africa, there is in principle nothing that prevents this from happening. The Dutch prosecuting authority, however, commemorated its 200th year of existence as an organisation in 2011, whereas the South African National Prosecuting Authority in its current structure dates from only 1998 when the National Prosecuting Authority Act was adopted.

The South African law is characterised by various Constitutional guarantees of fair procedure which accused and suspected persons have.

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70 Increased crime, more violent crime, more complex cases, international crime etc.
71 In addition to the specific fair trial/due process rights in sec 35, there is also the right to equality (sec 9), the right to human dignity (sec 10), the right not to be treated or punished in a cruel, inhuman or degrading way (sec 12(1)). N Steytler, Constitutional Criminal Procedure - a commentary on the Constitution of the Republic of South Africa, 1996, Durban: Butterworths publishers, 1998.
This is, however, not unlike similar guarantees contained in the European Convention on Human Rights which applies to Dutch criminal procedure.\textsuperscript{72} The South African constitution is supreme, which has the implication that any law or conduct inconsistent with the constitution is null and void. Similarly, aspects of national law of European countries can be tested against the European Convention and can also be declared invalid if in conflict with it. The challenge for lawmakers, law-enforcers and the justice systems in both South Africa as well as the Netherlands is to find a balance in its approach to crime and its approach to human rights.\textsuperscript{73}

All in all, there seems to be no reason why successful aspects of the Dutch alternative disposal could not also be applied in South Africa. Lastly, and more pragmatically, what makes this comparison possible is the ease of access to material and the language.

Differences

There are, however, also significant differences between the two countries and their respective criminal justice systems. For one, the crime rate in South Africa is notably higher. Not only that, but South Africa also has a high level of serious (and violent) crime – armed robbery, hi-jacking, murder, sexual crimes, corruption and other economic crimes.\textsuperscript{74} So the crime rate differs. The comparative prison population is also very high in South Africa with hugely overcrowded correctional facilities.\textsuperscript{75} So the problems with capacity are greater.

On a different level, we have to recognise that there are huge differences between the countries on socio-economical levels. South Africa experiences very high unemployment levels and, in general, a much lower standard of living. This is definitely of relevance when considering the usability of fines as penalties. Because of the lower standard of living, there is also a relatively high level of illiteracy in South Africa. This has as result that alternative disposal methods which rely on documents and the accused’s ability to understand them (like the transactie or strafbeschikking) therefore have less application.

\textsuperscript{72} Article 6 EHRC which deals with the right of an accused/suspected person to a fair and public hearing. This inter alia entails the presumption of innocence, an independent and impartial tribunal, rights to legal assistance, information etc. As will be indicated later, these rights are also extended to offenders when alternative disposal methods are applied.

\textsuperscript{73} R Calland & T Masuku, Tough on crime and strong on human rights: The challenge for us all, \textit{Law Democracy and Development} 2000-4, p. 121.

\textsuperscript{74} SA Peté, Between the devil and the deep blue sea – the spectre of crime and prison overcrowding in post- apartheid South Africa, \textit{Obiter} 2006, p. 429.

The Dutch legal system is a codified system whereas that of South Africa is not. However, when it comes to the procedural system, the South African law of criminal procedure is mostly contained in legislation (Criminal Procedure Act) and there are indeed not such differences in practice as one would expect. The maxim nullum crimen, nulla poena sine praevia lege poenali applies to substantive criminal law in South Africa, meaning that, where a crime is not incorporated in legislation, it must be found in the common law.

The fact that the Dutch criminal justice system is in principle an inquisitorial system, whereas that in South Africa is in principle accusatorial, does not have too much relevance. In practice there are more similarities and fewer differences of procedure than one would expect. It is often incorrectly assumed that, just because in an adversarial/accusatorial system the prosecutor is the equal “opponent” to the defence, they must/will do anything possible to secure a conviction. This is far from the truth and South African courts have, repeatedly over the last 100 years or so, indicated that the prosecutor must display the highest degree of fairness to an accused, especially towards an unrepresented accused. Any information that the prosecutor may have that favours the accused must be disclosed to the court, any serious discrepancy in the testimony of state witnesses, with their original statement, must be disclosed. It is therefore not true that prosecutors must seek a conviction at all costs. Their overriding duty is to assist the court in ascertaining the truth. “The function of the prosecutor is not to secure a conviction, but their clear and solemn duty is to see that justice is done”.

In the Netherlands there is increasing importance of the development of European Criminal Law which will have huge impact on the ability of member countries to formulate domestic law which is in conflict with it. There is no similar demand on South African law.

The Dutch criminal justice system provides for neither a plea of guilty nor plea-bargaining. There is great emphasis on finding the material truth.

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77 S v Nteeo 2004 (1) SACR 79 (NC). Also S v Jija 1991 (2) SA 52 (E).


80 JAW Lensing Vonnisafspraken in strafzaken, een revolutionaire ontwikkeling in het Duitse strafprocesrecht (I) Trema 2008, p. 306 – 316. As well as J.A.W. Lensing Vonnisafspraken in strafzaken: ook “iets voor ons”? (II), Trema 2009 - 3, p. 84. Also LJJ Peters, Vonnisafspraken in
[waarheidsvinding] independent from the admission of guilt by the suspect. With regard to the strafbeschikking this view comes under fire. It is the prosecutor who ‘determines’ the truth without judicial overview. When the strafbeschikking is also the result of the so-called ZSM-behandeling (super-fast determination of method of disposal) and the accused is not legally represented, one can hardly argue that the material truth has been revealed. Some court processes (in the Netherlands and South Africa) are also different. Since the principle of orality does not apply to the criminal trial in the Netherlands, the trial presents itself differently. De auditu statements can be used in certain circumstances (which would be regarded as inadmissible hear-say evidence in South Africa). Statements made by witnesses (under oath) which are included in the case dossier are considered as evidence which means that their evidence does not need to delivered viva voce in court. The presence of the accused in court is also not required. This is known as verstekzaken where the case is finalised in the absence of the accused.

1.8 Sequence of deliberation

Chapter 1 Introduction

I will firstly make a few general remarks regarding the present state of affairs regarding the prosecution of crime in South Africa. In short: what are the problems experienced? Next I will spend some time to define what is meant with alternative disposal, the parameters within which it operates, the advantages, the limitations etc. Central to this discussion is also the question whether it fits into a constitutional system of fundamental and procedural guarantees. The study will also indicate some of the similarities and differences between the criminal justice systems of the two counties. Similarities may give us an indication of the possibility for the wholesale “transplant” of a concept or method from the one to the other. The differences, on the other hand, can limit the effectiveness of such comparative approach. Another important aspect of such comparison could simply be to see to what extent one system can learn from the other, without necessarily then utilising the exact same process.

Chapter 2 Historical and systematic background regarding prosecuting decisions in the Netherlands
The current Dutch prosecution model did not come about overnight. It is rather the result of both principled as well as pragmatic thought regarding the role of the criminal law and criminal sanctions over that last 40-odd years. The developments that have taken place regarding the Principle of Expediency will first require our focus. The study will indicate how thoughts (and political policy) regarding criminal justice, have developed from an initial point where a prosecution, resulting in a public trial, was considered necessary and the rule rather than the exception. Later the study identifies a period where the necessity of a trial (or any form of prosecution at all) was considered to be the exception. Anything except really serious offences was withdrawn / prosecution waived. Rising crime, amongst other reasons, brought about further changes, finally reaching a stage where, today, it is in any event regarded as necessary that every offence leads to a juridical reaction, whether by the prosecuting service or other competent authority, but where the necessity of a trial is reserved for only the most deserving cases. The result of these developments is something which can roughly be translated as prosecution policy. This is much more than just the specific clauses of the Criminal Procedure Act or Criminal Code, but it is in fact a way of thinking about what is possible and preferable, and what is not, concerning crime detection and crime control. Although it is not something that is static, as the above developments indicate, and is indeed rather sensitive to political and public opinion, we find that the Dutch prosecution service has developed both principled, as well as very pragmatic, ways of reducing the pressure on the courts, whilst at the same time meeting the demands for a tougher/harsher approach to crime. [groter gestrengheid] The way in which policy is developed, the consequence thereof, the guidance it provides is explained. So is the important triangular consultation that takes place between the civil authority, the prosecuting authority and the police. A discussion of political and hierarchical control over the prosecuting authority follows. The developments regarding the administrative adjudication of (what was earlier) criminal offences, is also relevant. Legislation has removed countless (lesser) traffic offences from the criminal justice process and has brought it under the domain of administrators. This is the tendency not only with regard to traffic offences, but has led to a separate system of administrative adjudication which is only briefly referred to. Lastly there is a summary introduction of some new developments and further demands being placed on the prosecuting authority.

Chapter 3 Prosecutorial disposal of criminal cases in the Netherlands

Having illustrated the historic and philosophical background to the present alternative disposal practice, the study will next present the alternatives available to the Dutch prosecutor in more detail. It starts with the concept of “seponeren” (waiver of prosecution) which takes two forms: technical
waiver, and policy waiver. The practice of “seponeren” – and more specifically conditional policy waiver - gave rise to the next alternative, namely “transactie”. This well established method of reacting to crime has in turn been transformed into an even more far-reaching alternative disposal method namely a “strafbeschikking” which was first introduced in 2007 and partly in force since 2008. The “strafbeschikking” basically entails that the prosecutor decides on a penalty, communicates it to the offender, and if the latter does nothing, it becomes final and has the same consequence as if it were a judgment, and sentence, by the court. “Punishment by prosecutor” if you like. What is also rather radical, from a South African point of view, is that the authority (albeit under the guidance of the prosecuting authority) is also given to “opsporingsinstanties” (actually the police) to initiate transacties and strafbeschikkingen. This authority is also further extended to local authorities, administrative bodies, the receiver of revenue etc.

Other alternatives to a trial which are available to the prosecution service are also presented: the so-called ad informandum practice – adding other charges (of a similar nature) to the charge before the court for purposes of sentencing only which means the accused cannot be charged with these offences again. There have also been some (formal and less formal) experiments with negotiation and mediation of criminal cases which will only briefly be referred to. Legislative decriminalisation has removed huge numbers of traffic offences from the criminal justice process. These only revert back to the criminal circuit when opposition against it is lodged. Neither offender, nor victim has to stand by helplessly if they disagree with the choice that the prosecutor has made regarding the finalisation of the matter. Complaints by victims and offenders will also receive our attention briefly.

Chapter 4  Prosecutorial disposal of criminal cases in South Africa

Next we turn our attention to what is happening in the South African criminal justice system. A prosecutor can only deal with a matter differently than bringing charges in an open court if (s)he is clothed with discretion. So we will first have to determine the extent of, and criteria for, prosecutorial discretion available to the South African prosecutor. Next the investigation will determine what current alternative disposal possibilities already exist in legislation and practice. The South African prosecutor can withdraw or stop any prosecution before the accused has entered his plea in court. This is usually done unconditionally, but nothing currently prevents a conditional withdrawal of charges. In addition, the admission of guilt and payment of a fine without appearing in court is discussed. A new development in South Africa, similar to the WAHV procedure, removes

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83 In the year 2004 more than 700 000 transacties were finalised. I deliberately used these “old” statistics because transactie was very prevalent during that time. Subsequently we find transactie figures dropping whilst strafbeschikkingen are replacing it.
(lesser) traffic offences from the criminal process and redirects them for administrative adjudication. This is discussed, as well as informal efforts of mediation, arbitration or negotiations to resolve criminal offences. This tie in with developments with restorative justice, and a persistent referral to Ubuntu as underlying principles, if not in deciding criminal cases, then at least in reaching an agreeable penalty.

In recent years there have been significant developments in Juvenile Justice. The Child Justice Act has introduced diversion of prosecution as preferred, if not compulsory, method of dealing with youthful offenders. This provides diversion, at least for children, with a legislative foundation and puts it in a central position in the justice system. The new juvenile justice system provides for early assessment, a pre-trial preliminary enquiry, various diversion options, minimum standards for diversion and a system of record-keeping of diverted cases. The South African Law Commission has worked on a number of suggestions regarding streamlining the justice system. They have also come up with suggestions for improving the availability of out-of-court settlements such as diversion from prosecution. These and other developments, amongst others also with regard to plea-and sentence-bargaining, will be evaluated to finally come to a conclusion what the status of diversion alternatives are in South Africa.

Like their Dutch counterparts, South African victims of crime, as well as suspects, are not without remedies and the exercise of prosecutorial discretion is not immune to judicial scrutiny. There are indeed ways in which they may attempt to influence the decision made by the prosecutor regarding finalisation of the case. The study will also briefly illustrate the position regarding private prosecution which is an option whereby a victim can overrule, as it were, a decision by the prosecutor not to prosecute a particular matter by prosecuting the case her/himself.

Chapter 5 Evaluation and Recommendations

In this chapter the Dutch alternative disposal methods are assessed and criticised where need be. The same is also done with regard to the alternative disposal methods available in the South African justice system. The next step is to assess what the Dutch system can contribute in the South African context. It is evident that the Dutch prosecutor not only has a wider choice of alternatives that he can choose from, but also operates within a different philosophical and practical reality. The Dutch prosecution system operates as a unity. Detailed directions come from the top. National, regional and local “crime-control agreements” are regarded

85 In addition to the Act there has also been detailed directives published by the prosecuting authority regarding the when and how of diversion of criminal cases affecting children.
as binding on individual prosecutorial decisions. Alternative disposal as preferred method, with regard to well-defined offences and offenders, is deeply entrenched in the system. It is not something which individual prosecutors engage in at whim, but is indicated from a central authority. That is very different from the present practical position of the South African prosecutor. Nevertheless I propose that there are aspects, or specific methods, of alternative disposal that could possibly have application in South Africa.

There is ample room, and probably also great need, for extending the use of alternative disposal methods in South Africa. The South African prosecutor has always had very wide discretion regarding decisions about prosecution, including decisions not to prosecute. The alternatives available for a prosecutor who has decided that a matter need not necessarily be brought to trial is, however, rather limited. This is further complicated in that very limited guidance from “the powers that be” has also been forthcoming. The extensive, well documented, researched, agreed-upon and published prosecution policy, and the extended alternatives to prosecution that it allows of his Dutch counterpart can indeed be seen as an oasis in the wilderness of independent thinking of the struggling South African prosecutor and I will make certain recommendations in this regard.