Alternative disposal of criminal cases by the prosecutor: Comparing the Netherlands and South Africa
Anderson, A.M.

Citation for published version (APA):
Anderson, A. M. (2014). Alternative disposal of criminal cases by the prosecutor: Comparing the Netherlands and South Africa

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Chapter 2

Historical and systematic background regarding prosecuting decisions in the Netherlands.

2.1 Introduction

The current Dutch prosecution policy did not come about overnight but is rather the result of developments especially over the last 40-odd years. This chapter will look at these developments, but will first examine the role and function of the prosecuting authority within the Criminal Justice System. The Dutch prosecuting authority, Openbaar Ministrie (O.M.), is a relatively independent, hierarchical body consisting of professional lawyers who derives its power to prosecute crime from Section 124 of the Judicial Organisation Act. This Act mandates the O.M. with maintaining the law, prosecuting offenders and supervising the enforcement of sentences handed down by the courts. In addition to the Judicial Organisation Act, the Criminal Procedure Code (which originally dates from 1921) and the Criminal Code (from 1886) also lay down the framework within which the O.M. operates. The powers and responsibilities of the various officials within the prosecuting authority are set out in the Criminal Procedure Code, together with various policy guidelines and political decisions, whereas Section 74 of the Criminal Code contains the legislative framework for one of the forms of prosecutorial disposal applicable in Dutch law called the transactie.

The O.M. plays a pivotal role in the prevention of the increasing number of cases where a criminal norm has been transgressed. For the purpose of this research, however, I will focus only on the means employed by the O.M. to deal with conduct which constitutes a crime. What is of great importance for our study is the fact that the O.M. has until recently been clothed with a prosecution monopoly, to the exclusion of other bodies/institutions. The

86 Prosecution is a translation of the Dutch phrase "vervolging". It is interesting that there doesn't seem to be an authoritative definition of the concept vervolging. MJ Borgers, Het vervolgingsbegrip anno 2013, DD 2013, p. 20. Also Corstens, Het Nederlandse Strafprocesrecht, 7th ed. Bewerkt door MJ Borgers, Arnhem: Gouda Quint, 2011.

87 Wet rechterlijke organisatie [RO] Art 124 “Het openbaar ministerie is belast met de strafrechtelijke handhaving van de rechtsorde en met andere bij de wet vastgestelde taken” Since recently, with the introduction of the strafbeschikking, the prosecuting definition has also been extended to include prosecution by means of a strafbeschikking. Art 167 lid 1 and 242 lid 1 Sv

88 Wetboek van Strafvoerdering, wet van 15 januari 1921, houdende vaststelling van een Wetboek van Strafvoerdering. Act came into operation in 1926.

89 Wetboek van Strafrecht, wet van 2 maart 1881, Stb.35.

90 Some administrative bodies are also now able to issue a strafbeschikking – which is regarded as a method of prosecution. This brings the prosecution monopoly of the O.M. to an end. T de Lange, Over de vlag en de lading: Een bespreking van de Wet O.M.-afdoening, Strafblad 2007 p. 69. Also CPM Cleiren & JF Nijboer (eds), Text & Commentaar: Wetboek van Strafvoerdering. 8th ed, 2009. Besluit OM-afdoening van 4 juli 2007, Stb.255 (applicable since 1 February 2008). See further Chapter 3 with regard to the authority to make prosecution decisions and to issue strafbeschikkingen.
O.M. can, however, be seen as a gatekeeper to the judge. It is the prosecutor who decides which matters are brought before the court for trial, and which are withdrawn, diverted or dealt with in any other manner. This is a serious responsibility and the O.M. is held accountable for the choices that it makes, through the Minister of Justice and parliament. In all its functions, the O.M. must display unquestionable objectivity, integrity and judicial quality in its decision-making, and even more so in its gate-keeping decisions not to present the matter for trial since the usual judicial guarantees and protection either fall away or are limited.

The criminal justice system in the Netherlands can best be described as a chain of events, but also a chain of responsibilities - from detecting crime, the investigation thereof through to prosecution in court and ending with execution of the judgement. The various functionaries in principle act independently from one another, but their various actions or decisions have impact on, and consequences for, the work of those further down the chain. The ideal is to achieve synergy of outcomes at the various stages of the process. In this process the O.M. can be described as the principle or lead actor since it, at least formally, has the authority to direct police investigative action and is dominus litis with regard to charges preferred against accused or decisions regarding withdrawal or the alternative disposal of criminal cases. In the Netherlands the prosecutor has, when it comes to maintaining the law, the task to participate in a neutral and unbiased manner in the court’s “finding of the truth”. The O.M. also assures the lawfulness of the investigative processes. The judge must be able to rely on the correctness of any information originating from the prosecuting authority. In this regard members of the prosecuting authority are recognised as judicial officials.

91 The judge-Commissioner (rechter-commissaris) plays a limited role in the criminal justice process but does have certain overseeing authority regarding the investigation. Art 170 tweede lid Sv: “De rechter-commissaris is in het bijzonder belast met de uitoefening van toezichthoudende bevoegdheden met betrekking tot het opsporingsonderzoek, ambtshalve in door de wet bepaalde gevallen en voorts op vordering van de officier van justitie of op verzoek van de verdachte of diens raadsman”. The prosecuting authority, however, remands in charge of the investigation. MJ Borgers Het vervolgingsbegrip anno 2013, DD 2013, p. 20.
92 The powerful position of the O.M. is tempered by the rights of aggrieved parties: Section 12 Sv provides that persons with a direct interest in the case can complain (to the Court of Appeal) if the public prosecutor decides to dispose of the matter in any other way than a traditional trial.. The accused can also challenge the validity of the summons in terms of sections 250, 250a and 262 Sv. See also later 3.8. and 3.9 in Chapter 3. Although conduct by the prosecuting authority can also be the subject of investigations by the (Dutch) National Ombudsman, the ombudsman is not competent to adjudicate matters which are subject to judicial control such as decisions to prosecute or not.
94 This viewpoint is coming under fire, see T Schalken, De jurist en de kunstenaar: waar het verschil in denkstijlen toe kan leiden, NJB 2006 - 2, p. 72. Also M Hildebrandt, Consensualiteit in
2.2 The O.M.’s view on its own role and the purpose of and limitations within the criminal justice system.

Over the last number of decades there has been an increasing influx of cases where a criminal norm was transgressed, thereby increasing the work of the prosecuting authority. What role should the criminal law, criminal law instruments and the criminal courts play in upholding values, protecting the community and ensuring acceptable conduct? The essence of the criminal law is, after all, to influence conduct and specifically that of potential offenders.95 A policy-note from the Department of Justice in 1991 admits that the authorities have for long held too high expectations of the role that criminal law, and criminal prosecution, play in enforcement of legal rules and moral/ethical standards. In this they have relied heavily on two inter-connected assumptions which do not hold track with reality any more: The first assumption is that legal rules will be obeyed simply because the transgression thereof constitutes a crime. This might well have been the case in 1886 when the (present) Criminal Code was adopted, but given the enormous increase in legislation and policy instruments that rely on criminal law enforcement, this does not hold true any longer. The second assumption is that, should merely labelling certain conduct as criminal not have the necessary effect, then the threat of a severe penalty in the event of a transgression, will do so. In the modern era more than the above seems to be required. Factors like the risk of being caught and prosecuted, the speed of the criminal law response and the actual execution of the penalty are equally important to ensure compliance with legal rules.96

The O.M. realises that what they as professional-judicial body expect of the criminal law as enforcement mechanism may differ substantially from the political-social (or societal) expectation.97 In an annual report as far back as 2001 the O.M. mentions that the law, and specifically the criminal law, however powerful, does not always contain the solution. This seems to be the reality whether one likes it or not. The O.M. concludes firstly that the criminal law is no panacea for all evil and secondly that the demand for more and better enforcement will always be bigger than what can be realised with the available means.98 The prosecuting authority must,

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97 AH Klip, Totaalstrafrecht DD 2010, p. 34, from which it is apparent that political parties and politicians still seem to expect (and promise) more with regard to criminal law enforcement.
98 Cell capacity in the Netherlands have increased from 7 000 in 1990 to 20 075 in 2004 – a threefold increase in 14 years. AH Klip, Totaalstrafrecht DD 2010, p. 34. More recently there is
therefore, seek ways to fulfill its mandate within a limiting justice system. It then becomes apparent that a carefully planned and directed approach to enforcement becomes necessary. Prosecution in 100% of all cases is impossible. It is also true, on the other hand, that applying the criminal law to transgressing conduct indeed acts in a norm-confirming manner, whereas continuous restraint or failure to do so, may lead to a degeneration of the norm. The question then begs: When will criminal conduct indeed be prosecuted, and when not? The O.M.’s response to this is that prosecution is necessary when it is in the public interest to prosecute, and within the parameters of available capacity. Criminal conduct will, therefore, result in a prosecution when it is required to protect the society, especially when there is indication of serious or continuous threat, and criminal prosecution is considered as necessary. In the determination whether or not to introduce criminal prosecution, the following three criteria are central: Firstly the question of legitimacy. This simply means whether prosecution is possible according to the law? Secondly is the criterion of proportionality. Is there a reasonable relationship between the transgression and the proposed penalty? Thirdly is the question of subsidiarity. Can other, possibly less intrusive or severe methods, also achieve the required result? In addition to the above criteria the nature and seriousness of the offence, the damage or harm caused by the prohibited conduct, the personal circumstance of the offender, the position of the victim etc. will also play a role in the determination.

A next important question is: how does the prosecuting authority promote compliance with the legal norms in those instances when a trial is not considered necessary? This it achieves in two ways: Even when a trial before a judge does not take place, there are alternative methods by which unacceptable conduct is sanctioned by the prosecuting authority. These methods will be the focus of the next chapter. The second avenue involves non-penal methods of administrative fines, civil redress, preventative measures, education etc. With the latter, other policy- and enforcement-organs come to the fore and the prosecuting authority takes a back-seat. Applying the criminal law is primarily preserved for serious offences or the enforcement of rules that protect fundamental interests. For less serious transgressions, these other means of enforcement could possibly take preference. In the 1990’s preference was also given to decriminalisation where the undesirable influx of new definitions of criminal offences which

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100 Perspectiefnotitie Openbaar Ministerie- naar een nieuwe organisatie O.M, p. 6
102 Bestuursrechtelijk, civielrechtelijk, tuchtrechtelijk - but also including methods of prevention (scholing, voorlichting, toezicht)
caused congestion in the enforcement mechanisms was alleviated by attentive legislative action.  

Criminal enforcement of the legal order is, and will always remain, a dynamic process. The O.M. should, therefore, be flexible to adapt to changing circumstances. Priorities may change: whereas it was a priority to apply more serious action against theft in the 1980’s, current priorities include action against serious (or organised) crime, violent and domestic crime and human trafficking.\(^\text{104}\) As we will see in the next segment, thoughts on the feasibility, and efficiency, of a criminal law response to criminal conduct have not remained static. This change in attitude is also evident in the documentation of the O.M. over the last three decades.\(^\text{105}\) Already in 1985 the O.M. agreed that, in principle some legal reaction or juridical\(^\text{106}\) intervention, if not sanction, should follow each transgression of a legal norm and unconditional withdrawal of potential cases should be reduced.\(^\text{107}\)

2.3 The principle of expediency

Legality versus Expediency

Traditionally there are two broad principles regarding the prosecution of crime. On the one hand is the principle of legality. Here one should distinguish between legality in formal sense, which entails that prosecution may only take place in terms of the law\(^\text{108}\), and legality in material sense. The latter, also called the principle of legality (or the principle of compulsory prosecution), is seen as mandatory prosecution. All conduct that is in breach of a criminal norm should in principle be prosecuted\(^\text{109}\) and any person suspected of an offence should be charged before a judge in an open trial if there is sufficient (admissible) evidence to prove the offence. The other traditional principle is that of expediency\(^\text{110}\).

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\(^{104}\) See for example Aanwijzing huiselijk geweld, Stcrt 2003, 61 as well as the latest: Aanwijzing huiselijk geweld en eergerechtigd geweld (2010A010).

\(^{105}\) Here I refer to various annual reports, year-plans, multiple-year-plans, studies, research-reports etc. over the last 30 years.

\(^{106}\) Juridical is the closest English term I can find for the Dutch term judiciële- which is used for conduct by a judicial body - which in the Netherlands at the time, was believed to include both judge and prosecutor.


\(^{108}\) Formal legality is based on sec 1 of the Criminal Code – Strafvordering heeft alleen plaats op de wijze bij de wet voorzien. Similar sec 107 lid 1 of the Constitution.


(also called the principle of opportunity) which has the effect that a prosecutor has a discretion whether or not to prosecute in a particular case. Expediency is based on the idea that criminal prosecution may, in a given set of circumstances, not be the best or most efficient way to deal with the situation. In terms of expediency it is argued that prosecution may in fact do more harm than good, whereas other methods of dealing with the transgression may, sometimes, be more effective, more humane or lead to better results. Supporters of expediency argue that a system that compels prosecution in all cases where a crime has been committed, could lead to senseless use, or even abuse, of the criminal justice system. The Dutch criminal justice system has deliberately chosen to follow the principle of expediency which is established in artt. 167 and 242 of the Code of Criminal Procedure. Central to the concept of expediency is the notion that the prosecutor in the Netherlands is *dominus litis* - which entails not only the authority to prosecute crime, but also the discretion to decline prosecution in circumstances where they deem prosecution unwarranted. Even in the current circumstances where there is greater emphasis on the prosecution of crime, albeit through the method of *strafbeschikking*, it is still the principle of expediency that allows the O.M. to exercise its discretion in favour of a particular method of prosecution. Expediency, therefore, means more than just having the authority to decide not to prosecute a particular case (or specific types of cases), but in its extended meaning it entails a whole system of policy guidelines, priorities and integral enforcement that have developed since. Lately, as result of modern developments, the principle of expediency in the Netherlands is increasingly coming under fire. For one the Netherlands are bound by certain international treaties (for example the treaty on terrorism) which prescribe prosecution of certain offenses. Similarly, there have been recent developments to introduce (criminal) policy for European Union member states. This policy is in the process of being developed and will probably impede on the expediency decisions made by the O.M. Also, within the Netherlands, there are calls for the adaptation of the principle of expediency in specific instances.

**Origin of expediency**

It is not clear exactly when the principle of expediency was first applied in Dutch criminal law, but as early as 1847 reference was already made of a

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103 This policy is found at [http://ec.europa.eu/justice/criminal/criminal-law-policy/index_en.htm](http://ec.europa.eu/justice/criminal/criminal-law-policy/index_en.htm)

See also W Geelhoed, Een Europees Openbaar Ministerie, het opportuniteitsbeginsel en de theorie van dédoublement fonctionnel, Strafblad 2010- 14 October, p. 246.

Van Ruller & Faber state that the principle of expediency was indeed nineteenth century common law that was given statutory recognition in the Code of Criminal Procedure of 1926 with the introduction of art. 167 lid 2 Sv and art. 242 lid 2 Sv. These articles provided a formal statutory basis for the principle that had, in fact, existed as standard practice for some time.

Art 167 lid 2 Sv provides as follows: “Prosecution can be waived if it is in the general interest to do so” (new – Prosecuting Authority may conditionally postpone the taking of a prosecution decision).

and art 242 lid 2 Sv: “As long as the trial has not commenced yet, further prosecution can be waived if it is in the general interest to do so”.

This second section would be applicable where a preliminary investigation was held or the accused arrested, and would in that sense entail the waiver of further prosecution of a case where prosecution is already deemed to have commenced. The term: “in general interest” was neither defined in the original act, nor has subsequent legislative changes clarified its meaning. It is also not quite clear why the principle of expediency came about in the Netherlands and not in some of its immediate neighbours, although it is generally held that its purpose was to reduce the hard/rigid workings of the principle of legality. The theoretical interpretation as well as practical application of the principle of expediency has undergone decisive changes since its introduction in 1926.

117 “Van vervolging kan worden afgezet op gronden aan het algemeen belang ontleend”. In light of the new strafbeschikking procedure “prosecution” in this context is “prosecution in the traditional sense”.
118 Introduced by the Wet O.M.-afdoening, Wet van 7 juli 2006 tot wijziging van het Wetboek van Strafrecht, het Wetboek van Strafvordering en enige ander wetten in verband met de buitengerechtelijke afdoening van strafbare feiten (kortom: de Wet O.M.-afdoening – Disposal of Cases (Public Prosecution Service) Act). Stb 2006, 330. Also relevant in this regard are a number of aanwijzingen or directives. Originally the Aanwijzing O.M.-afdoening 2007A007 Stcrt 2008 nr 19, with the latest being the Aanwijzing O.M.-afdoening (2012A010).
119 “Zoolang het onderzoek op de terechtzitting nog niet is aangevangen, kan van verdere vervolging worden afgezet, ook op gronden aan het algemeen belang ontleend.”
120 GJM van den Biggelaar, De buitengerechtelijke afdoening van strafbare feiten door het openbaar ministerie (dissertatie RUL), Arnhem, 1994.
121 GJM Corstens, citing the Staatscommissie-Ort II in Waarborgen rondom het vervolgingsbeleid, a.w., p. 16, also D. Steenhuis, “Criminal prosecution in the Netherlands” in The Role of the Prosecutor - report of the International Criminal Justice Seminar held at the London School of Economics and Political Science in January 1987, ed JE Hall Williams, Avebury: Aldershot, 1988, p. 53.
Development towards the current understanding of the expediency principle\textsuperscript{122}

The development of the understanding of the principle of expediency can be divided into three broad periods. It starts with a first phase - a negative interpretation – it was procedure to prosecute every offence unless good reason indicated otherwise. This period was followed by a next phase of a more positive interpretation - the prosecutor would not prosecute an offence unless good reason indicated otherwise. In more recent times we find a more nuanced interpretation indicating that prosecution \textit{per se} is not always necessary, but in any event some juridical intervention should follow every transgression of the law. Van den Biggelaar\textsuperscript{123} contends that there were various reasons including ideological, economic and criminal-justice political reasons responsible for the changes in the understanding of expediency.

\textbf{First phase - negative interpretation (pre 1970)}

Initially the principle of expediency was interpreted in a negative sense. That is to say prosecution of all cases is the norm, but the prosecutor can refrain from prosecution when it is not necessary in a particular case and in general interest, for example if certain conditions are met or a certain set of facts exists. As a rule, all offences were prosecuted, but especially in the case of minor or petty offences it might not be regarded to be in the general interest to prosecute. Where the advantages that may flow from prosecution were outweighed by the disadvantages, prosecution could be waived.


During the nineteen-sixties a change set in when, as result of numerous factors, different expectations about criminal law enforcement developed.\textsuperscript{124} The earlier negative interpretation of expediency changed into a positive interpretation, as first described by Moons in his article in the \textit{Nederlands Juristenblad} of 1969.\textsuperscript{125} Moons interpreted the expediency principle to present the prosecutor with more alternatives than just the decision to prosecute, or not. In addition it also offered the possibility of conditional waiver of prosecution or restricting prosecution to the least serious offence. The Moons-interpretation resonated with the prosecuting

\textsuperscript{122} For an overview of the development of the interpretation of expediency as well as reference to other titles on this concept, see P Oisinga, \textit{Transactie in strafzaken - een onderzoek naar de positie van de transactie in het strafrechtelijk systeem}, dissertatie KUB, Arnhem 1992, p. 11 – 17.
\textsuperscript{123} GJM van den Biggelaar, \textit{De buitengerechtelijke afdoening van strafbare feiten door het openbaar ministerie} (dissertatie RUL), Arnhem, 1994.
\textsuperscript{125} JMAV Moons, \textit{Het Opportuniteitsbeginsel; Enige notities over zijn inhoud en omvang}, \textit{NJB} 1969, p. 485-529.
authority and, with its inclusion in the 1970 Annual Report of the O.M.,\textsuperscript{126} the positive interpretation became the new yardstick. So instead of motivating why it was expedient not to prosecute a matter, the prosecutor now had to motivate why it was indeed expedient to do so. The paradigm became: “why prosecute?” instead of “why not prosecute?” This principle was initially restricted to questions regarding the decision to prosecute or to waive prosecution, but with time it was also extended to include the investigation and “verbalisering”\textsuperscript{127} stages of the process. The 1981 Annual Report of the OM explicitly extended the principle of expediency, and the prioritisation that is allowed there under, also to the phases of investigating and “verbalisering” of crime by the police. Why the change? In essence it is the result of two concurrent developments: on the one hand there was a quantitative explosion\textsuperscript{128} in crime which in itself threatened to grind the wheels of justice to a halt, but also new manifestations that criminal conduct took: organised crime, drug trafficking, international criminal organisations, environmental crime, economic offences and a tremendous increase in motor-vehicle related offences. On the other hand, a philosophical change in interpretation or view of the purpose, and possibilities of the criminal law became popular. So it was a mixture of ideological (political) and pragmatic (practical / economical) reasons. Since it was not deemed necessary, or indeed possible, for the prosecutor to prosecute each and every criminal transgression, the O.M. was forced to prioritise their work and concentrate on taking those cases to court that deserved the attention of the judge, and to deal with the other cases in alternative ways. More often than not, the alternative was an unconditional waiver of prosecution, although, at least since 1983, greater use was made of the transaction as an alternative to prosecution. Statistics for 1983 indicate that less than 40% of cases found its way to the judge, whereas in 1960 it was still 60%.\textsuperscript{129} The positive interpretation of the principle of expediency thus led to a large instance of criminal conduct where no juridical intervention at all resulted. It appears that in practice, in the years ‘60 – ‘70 the predominant notion was to refrain from prosecution where-ever possible.

**Third phase - return of “juridical intervention” (1985 - )**

Once again a new era in the interpretation of expediency was heralded in with the publication of the political policy document, *Samenleving en Criminaliteit* in 1985. Research again indicated further increases in

\textsuperscript{127} There is no direct English translation for this word or similar process in South African criminal justice. It refers to the process when the “proces-verbaal” is made up. This relates to formal charges and evidence being recorded by the appropriate official under oath.
\textsuperscript{129} Samenleving en criminaliteit, p.27 See also: De Integrale Veiligheidsrapportage 1993 and WJM de Haan, Evaluatie Integraal Veiligheidsbeleid, Rijswijk: Sociaal en Cultureel planbureau, 1997.
criminal activity but also civilian discontent with the criminal justice responses thereto. Cabinet concluded that the disparity between criminal conduct, and the actual criminal law responses to it, became unacceptably high. It was evident that the criminal law response to serious transgressions of criminal law norms was inadequate. A quantitative increase in (criminal justice) capacity alone was not enough - a more effective response by the OM was required. Central to the new approach to enforcement were two essential points of departure namely differentiation and consistency. Cabinet accepted that the juridical response to less serious offences and transgressions can be different from the response to more serious crime. But, once differentiated, juridical response to transgressions should be consistent and uniform in application and execution.\(^{130}\) This view has specific implications for prosecution policy, but this will be discussed later.

The effect of *Samenleving en Criminaliteit* was that the O.M. was instructed to ensure that a juridical intervention or response follow every reported and constituted transgression of a criminal law norm. The intention was that the juridical response (as opposed to an unconditional waiver) would enhance general crime deterrence and norm-confirmation. The required response did not necessarily have to mean prosecution in court and a complete trial, but the number of unconditional waivers had to be reduced. A 50% reduction for 1990 was proposed. From the 1986 annual report of the O.M. it is evident that the prosecution authority took this new direction seriously and started to give effect to these recommendations. The statistics for 1986 show that the number of unconditional waivers was reduced from 16% to 13%. The result of this was that in the years ‘80 – ‘90 the unconditional waiver became more the exception than the rule, whereas the number of conditional waivers or transactions increased.\(^{131}\)

The trend is still that more and more cases are disposed of by the OM, but it is no longer by way of an unconditional waiver but by implementation of some or other form of sanction. Statistics indicate that the targets set for prosecution and waiver by the documents *Samenleving en Criminaliteit* (1985), *Recht in beweging* (1990) and *Strafrecht met beleid* (1990 – 1995) were indeed reached.\(^{132}\) In 2010 actual interventions, therefore not unconditional waivers or acquittals by the courts, reached 88% of all cases dealt with by the O.M.\(^{133}\) The punishment order, which is discussed in chapter 3 is the latest in the possible arsenal of (sanction) implementation by the O.M.

This latest nuancing of expediency allowed the O.M. to prioritise their workload and to make choices with regard to their response to

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\(^{130}\) *Samenleving en criminaliteit*, p. 35. Also Tien Jaar “Samenleving en criminaliteit”, JV 1995(3).

\(^{131}\) *Goed Beschouwd*, p. 36


\(^{133}\) O.M. Jaarbericht 2010, p. 23.
transgressions of the law from the arsenal of available means. It is, however, also important that these decisions be taken uniformly or consistently to prevent arbitrary application of the law. This means that direction must be given in clear terms in concrete cases and that criteria be determined - in short, it requires the development of a consistent prosecution policy. 134

2.4 Emergence of Prosecution policy

An uninitiated reader of the Dutch Criminal Code and Criminal Procedure Code may not be left with a completely accurate view of reality. Further detail can be found in something called prosecution policy, which operates in addition to, and sometimes in lieu of, the legislative framework. Swart has gone so far as to call it “pseudo-legislation”. 135 The reasons for, origins and present functioning of, prosecution policy will be looked at next.

Rationalised decision making

In the preceding discussion of the interpretation of the expediency principle, reference was briefly made to the important societal changes that took place in the Netherlands during the second part of the last century. During the years 1960, and following upon the renewal after the 2nd World War, the Cold War and globalisation, increasing internationalisation, etc. the values of society seemed to change. New ideas about family, work, authority etc. was in the order of the day. A further factor was the deterioration of the significance of traditional social control mechanisms like family, church, community, etc. 136 The increase in the number of motor-vehicles led to an increase in traffic-related offences, which increased the workload of the police and justice department sevenfold. Huge-scale demonstrations, mass actions and provocations clearly showed the inadequacy of the police and prosecution service to deal with the situation. 137 This necessitated new and different approaches to the criminal law and the function it had to play in maintaining the values of society. Better guidance of the criminal judicial system became necessary. Faced with the problems mentioned before, the O.M. was obliged to prioritise its workload. Prioritisation means making choices, and this inevitably means that policy develops. One of the first, in 1968, to advocate the need for a directed, general prosecution policy, was a leading jurist of the time, Duisterwinkel. 138 He was soon followed by others,

136 The so-called “ontzuing” of society. The traditional “pillars” became less significant.
137 For a more complete exposition of the history and development in that time see: AC ’t Hart,Openbaar Ministerie en rechtshandhaving, een verkenning, Arnhem: Gouda Quint, 1994.
amongst them the Werkgroep-Hustinx who had the task to suggest structural reform measures for the prosecuting authority. They suggested that a co-ordinated investigation-and prosecution-policy was essential.\textsuperscript{139} This started the development of prosecution (or criminal) policy. In practice it means that the Dutch prosecutor, therefore, decides what particular results it wishes to obtain in the public interest, within agreed policy parameters and with the resources it has available. It then takes decisions and uses its power and discretion to obtain those results. This can be by way of specific instructions to the investigative/detective forces or by diverting criminal conduct away from a trial before a judge, whilst at the same time ensuring that an adequate, timely and effective penal or other legal reaction (intervention) follows the transgression.

**Definition of (prosecution) policy**

Policy is defined by Rosenthal, Van Schendelen & Ringeling\textsuperscript{140} as: (rather freely translated)

“A sequence of conduct, or intended conduct, of administrative organs, or its members, relating to a particular issue”.\textsuperscript{141}

Policy, therefore, relates to administrative or executive conduct concerning a particular issue which follows a pre-determined or pre-arranged sequence or pattern. Prosecution policy can then be described as pre-arranged (or agreed) conduct by the relevant organ (in this case the prosecuting authority) with relation to the implementation of the criminal law and procedure. An early annual report of the O.M. indicates that prosecution policy should meet the following requirements: Firstly policy should be transparent and verifiable; Secondly, once policy has been determined and published, it should be applied consistently; Thirdly, policy should remain flexible enough to serve local interests without forfeiting legal certainty and uniformity; Fourthly, the possibility should always remain open for policy to be tested by the judiciary; Fifthly, accountability for decisions must be retained within the hierarchical and political mechanisms of the justice system.\textsuperscript{142} Even though this viewpoint is already more than 20 years old, it is suggested that this should still be the parameters within which policy should be tested today.

Prosecution policy in this sense is thus much more than just a way of weeding out dubious and trivial cases, although this also results. It is a method of directing the normative and systematic execution of

\textsuperscript{139} Werkgroep structuur-O.M. Interim-rapport, s.l., 17 juni 1968.


\textsuperscript{141} “Beleid is een complex van voornemens tot handelen, dan wel een serie handelingen van bestuurlijke organisaties of hun leden ten aanzien van een bepaald probleem.”.

\textsuperscript{142} Jaarverslag Openbaar Ministerie 1986, p. 17.
prosecutorial discretion in order to achieve goals previously approved or agreed upon. Policy manifests itself in the day-to-day decisions that are made by prosecutors, but obviously within the prioritisation that has been chosen beforehand. If it proves impossible or undesirable to take all cases to trial, policy must ensure that all the right ones end up in court. Policy is a continuous and dynamic process. It should be adaptable to changing circumstances. The way in which policy is guided and sufficient legal certainty is achieved has traditionally been through policy guidelines.\textsuperscript{143}

**Policy Guidelines\textsuperscript{144} [richtlijnen]**

What then is to be understood with the term guideline? De Doelder contends that, in general terms, a guideline deals with generally required conduct of the O.M. in relation to the investigation and prosecution of certain types of crime. It prescribes to members of the O.M. how they should act/react in a particular circumstance with regard to a specific offence: should they waive prosecution, offer a transaction, or continue with prosecution.\textsuperscript{145} Although guidelines are generally regarded as a recent innovation, Faber illustrates that guidelines have indeed been around in one or the other form since at least 1811.\textsuperscript{146} Policy can therefore consist of policy plans\textsuperscript{147}, policy notes \textsuperscript{148}, directives \textsuperscript{149}, guidelines \textsuperscript{145}, instructions \textsuperscript{150} and manuals \textsuperscript{151}. For the sake of brevity, or unless otherwise indicated, I will use the term “guideline” for all documents and instruments used to formulate and direct prosecution policy. Guidelines can, and should be able to, change, since it is primarily intended to react to changing societal circumstances. A publication which includes all criminal law policy in the Netherlands would preferably have to be a loose-leaf edition to make provision for the frequent changes that do and will occur.\textsuperscript{149} Guidelines can be categorised according to its origin, that is to say, who formulates it. Thus policy guidelines can be local, regional or national. Guidelines can also be categorised according to its function: investigation guidelines deal with the technique and tactics of

\begin{footnotes}
\item[143] Perspektiefnotitie Openbaar Ministerie (1997), p. 15.
\item[144] The so-called BOS/Polaris guidelines can be found on the website and can also be downloaded from there. http://www.om.nl/organisatie/beleidsregels/ (2/04/2013).
\item[147] An “aanwijzing” is used to establish policy rules regarding the execution of tasks and competencies of the O.M. specifically regarding investigation and prosecution of offences.
\item[148] A “richtlijn” for prosecution contains imperative normative rules that prosecutors must follow. It usually deals with transaction amounts or “requireerbeleid”. Both aanwijzingen and richtlijnen for prosecution are in principle valid for four years but it may be extended or replaced by similar instruments.
\item[149] AC ’t Hart: Openbaar Ministerie en rechtshandhaving, een verkenning, Arnhem: Gouda Quint, 1994.
\end{footnotes}
investigation; prosecution guidelines prescribe how and when prosecution should take place (or waived). There are also guidelines prescribing what penalties the members of the OM should request from court for certain categories of offences.

In the first ten years of guided policy (1970-1980) some 50 national policy guidelines saw the light, most dealing with the standardisation of settlements and conviction requests for uncomplicated cases, especially traffic offences. From this humble beginning more elaborate policy documents followed, dealing with a plethora of other aspects such as policy on waiver of prosecution [sepotbeleid], conditional penalties, prostitution, drugs policy etc. At first these policy documents were regarded as secret, but in 1979 it was decided in principle to make it public. The public nature of guidelines supports consistency of conduct, supervision over policy and ease of insight or understanding thereof by other institutions. This fosters legitimacy and acceptance thereof. Since 1981 all national guidelines of the O.M. are public and are available on the internet. One of the hazards of publicising prosecution policy is that it entails the admission that certain criminal prohibitions will not be so vigorously enforced. An example of such detailed guidance is found in the 1994 Transactiebesluit which introduced a wider application of the transaction provisions in the Criminal Code. This directive prescribed in which circumstances a transaction could be considered/offered [artikel 3], by whom such decision may be taken [artikel 2] as well as when the police were not authorised to offer a transaction [artikel 5].

Who determines policy?

Prosecution policy on a national level is determined by the Minister of Justice after consultation with the Board of Attorneys-General. The O.M. policy has to reflect the political policy of government.

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151 Aanwijzingen and richtlijnen are published but instructies and handleidingen are not given active publicity by the O.M. although interested parties can indeed request copies thereof in terms of the Wet openbaarheid van bestuur. Also GJM Corstens, Het Nederlandse strafprocesrecht, 7e druk, bewerkt door MJ Borgers, Arnhem: Gouda Quint, 2011, p. 26.

152 Whenever a transaction or (conditional) sepot is applied in a contentious matter (met grote maatschappelijke belangstelling) the O.M. must prepare a press-release similar as for a “high” transaction. Aanwijzing voorlichting opsporing en vervolging, 10 sept 2007, Stcr 2007, 202. See also L van Lent, Externe openbaarheid in het strafproces. Den haag: Boom Juridische uitgevers, 2008.


154 College van procureurs generaal. The regular meetings of this body have become an important control mechanism of the policy execution by the OM. Since 1995 the “meeting” has been transformed into a “college” and was formally recognised in the (new) Wet RO (1999).

consist of various policy directives originating from a variety of sources, be it regional directives originating from a resort, or national directives that are derived from the Board of Attorneys-General. Prosecution policy can thus be formed on three levels. Local directives can, if properly motivated, deviate from national directives. Some directives, however, specifically stipulate that no deviation will be allowed, for example the guideline regarding social security misuse. In determining prosecution policy, the O.M. cannot decide or act on its own. Especially when it comes to the execution of policy, consultation with other actors in the criminal justice arena should take place and agreements made. More often than not the policy is actually the result of agreements, or arrangements between the various participants in the justice “chain”. If the O.M., for example, wishes to make greater use of community service as suggested penalty, it has to consult, and make the necessary arrangements with the relevant authority that enforces sentences/penalties to ensure adequate capacity. The O.M. also has to consider a multitude of interests - that of the state, the interests of the community, and those of individuals. Here again one should distinguish between the interests of the accused, victims, third parties etc. For a while a national commission regarding criminal policy operated as an advisory body (to the Board of Attorneys-General) regarding both introduction of new guidelines, as well as modernising or actualising existing ones. See also the discussion of the Framework for prosecution later in this chapter.

Consequence and legal nature of guidelines

Publication of a guideline informs the public about its contents, but also implies that one can rely on the fact that the O.M. will act in accordance with the policy contained in that guideline. The authorities are then bound to act in a manner that corresponds with the guideline. In an important judgement the tax-law chamber of the Hoge Raad found that the O.M. was bound by a previously published guideline. The basis for this “binding” is found in the principles of a fair trial [beginselen van een goede procesorde]. In essence there are four principles of a fair trial against which the execution of policy is tested or upon which the legal status of guidelines can be based: the principle of equality [gelijkheidsbeginsel] and the vertrouwensbeginsel are the more important ones. In addition there are also the principles of pure intention [zuiverheid van oogmerk] and just and fair weighing of interests. [redelijke en billijke belangenafweging] There is no clear English translation for vertrouwensbeginsel – and no exact corresponding legal concept in South African law. It can possibly be described as a form of public-law estoppel. It operates similar to the

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156 Landelijk Commissie Sv richtlijnen.
principle of legitimate expectation\textsuperscript{159} in Administrative Law or Labour Law or the principle of reasonable reliance in the Law of Contract. In essence the expectation is based either on an express promise given by an authoritative body, or on the existence of a regular practice, which the claimant (or person relying thereupon) can reasonably expect to continue.\textsuperscript{160} Of these principles, the \textit{vertrouwensbeginsel} seems to be of greater importance in criminal policy, since Wiewel argues that criminal cases are seldom “equal” and the positive application of the principle of equality is somewhat new to Dutch jurisprudence.\textsuperscript{161} Another \textit{Hoge Raad} judgement, this time decided by the criminal chamber, held that the published guidelines of the O.M. can be regarded as law (\textit{recht}) in terms of section 79 of the Judicial Organisation Act.\textsuperscript{162} This has the effect that, since it is regarded as law, it can be subjected to the adjudication of the court of cassation – the \textit{Hoge Raad}. Once again the court relied on the principles of fair trial as reason why the O.M. can be bound to the published guideline. The Court can thus test prosecution policy of the O.M. against the principles of a fair trial/due process.\textsuperscript{163} Not only can the court test policy - or rather the guidelines that direct the policy - but the court can also test an individual decision (to prosecute or to waive prosecution, for example) against the policy. This, however, can only apply with relation to policy that is known or public. Once policy guidelines have been published, it cannot be replaced with other policy unless the alternate policy guidelines are also published or made known.\textsuperscript{164}

The court itself is not directly bound by prosecution guidelines, but this does not mean that the guidelines cannot influence the court, or that the court can wholly ignore it, since guidelines are now regarded as law (\textit{recht}) as result of the mentioned judgements of the HR. The court, although not itself bound by the guideline, can be called upon to hold the O.M. to a guideline.\textsuperscript{165} At the same time it is understood that the O.M., through its determination of guidelines, can influence the court in, for example, the determination of a sentence.

\textsuperscript{159} “A legitimate, or reasonable, expectation may arise either from an express promise given on behalf of a public authority or from the existence of a regular practice which the claimant can reasonable expect to continue...” Administrator, Transvaal and others v Traub and others 1989 (4) SA 731 (AD) at 755.  
\textsuperscript{162} HR decision: 19 juni 1990, NJ 1991, 119 m.nt. ThWvV en MS.  
\textsuperscript{163} HR 13 januari 1998, NJ 1998, 407. Also MJA Duker, Toetsing van de opportuniteit van vervolging door de zittingsrechter, Trema 2010 - 6, p. 238. Although he argues that the testing is very marginal and only really tests whether the decision is arbitrary or not. Also HR 8 oct 2002, NJ 2003, 61 and HR 6 nov 2012, NJ 2013, 109.  
\textsuperscript{165} MJA Duker, Sanctionering van het verzuim een transactieaanbod te doen alvorens te dagvaarden, Strafblad feb 2012, p.65.
Deviation from policy

Guidelines have a harmonising effect. By binding the O.M. to its guidelines, greater consistency is achieved. If the guidelines are effectively applied, it will lead to the development of a more just policy. One should, however, guard that the compliance with guidelines doesn’t totally replace the individual discretion of the prosecutor. Corstens argues that a certain measure of freedom is important so as not to lead to stagnation.\(^{166}\) It is also quite evident that the guidelines may not itself transgress the law, treaties or unwritten law.

The next question is now whether it means that there cannot be any deviation from a guideline? The basic point of departure of guidelines is that it serves to structure the freedom of discretion of the O.M., and that guidelines are to be followed in the standard case. The guideline itself thus bestows the possibility for deviation in “non-standard” cases.\(^{167}\) In fact, the principle of equality implies that “non-standard” cases should in fact be treated differently in order to guarantee equality. Since the deviation from a certain guideline is subjected to judicial control, the citizen is protected from the arbitrary exercise of discretion by the prosecutor. It is also possible that the general application of a guideline can be suspended for a particular period of time, or for a particular district or region. Corstens shows that such “unfair” deviation from a general guideline is indeed possible if the O.M., on good grounds, is of the opinion that such deviation would be advisable and if such opinion is reasonable.\(^{168}\) But such deviation should be temporary and should be applied uniformly, meaning that they cannot enforce the guideline haphazardly – enforcing it one day, not enforcing the next. Proper transitional arrangements should also be in place. This should also apply whenever a guideline is adjusted. The change in policy should be properly published and the implementation of the new policy cannot be immediate.\(^{169}\)

2.5 Prioritisation

If it was indeed possible to investigate and prosecute every criminal offence, there would be no need to make these choices and to compile a prosecution policy. The reality, however, is that the capacity of the criminal justice system is limited. This means that in not all cases where a crime has been committed can a trial take place. This inevitably means


\(^{167}\) HR 8 oktober 2002, NJ 2003, 65. There must be good reasons to deviate from the policy. See also HR 20 sept 2010 NJ 2010, 535 and HR 12 juli 2011, NJ 2011, 301.

\(^{168}\) An example is the strafbeschikking which was introduced in several phases, firstly only applicable in Amsterdam and Den Bosch – in other areas the same conduct would be dealt with by way of a transaction.

\(^{169}\) GJM Corstens, Het Nederlandse Strafprocesrecht, 7e druk, bewerkt door MJ Borgers, Arnhem: Gouda Quint 2011, p. 33
that choices have to be made within the total criminal picture. And these choices are often made as a result of what is regarded as priority at that time. As we have seen, the positive interpretation of the principle of opportunity allows that particular choices can be made regarding criminal activity against which one would want to take action in a particular area or for a particular period. As we will see later in this chapter, the Dutch prosecuting authority does not wait to see what particular crimes may, or may not, present itself, but take decisions based on solid evidence or research and what is politically required, over what its priorities are, and therefore what its plan of action should be. We will look in a bit more detail later at the amount of planning which is required from each branch of the O.M. in order to determine, as well as to give effect, to this prioritisation.

If the priorities are properly communicated to the other role-players in the criminal justice chain, it can prevent the waste of unnecessary recourses of the other role-players on matters which are not within the previously determined priority area. If the police, for example, know that bicycle-theft is not a priority of the prosecuting authority, then it will be wasting it's time to spend a lot of effort in investigating matters of theft of bicycles. However, as already indicated, the prioritisation cannot be haphazard or willy-nilly. It must furthermore be publicised and the public should be able to know what these priorities are. This is emphasised and encouraged by the so-called Polaris-guidelines\textsuperscript{170} which have the effect to standardise matters. Similar offences should, in principle, lead to similar responses. In the last decade or so there has also been a much greater political interest in the priorities regarding investigation and prosecution of crime. Greater public interest and transparency have also resulted.\textsuperscript{171} De Wijkerslooth argues that the switch to the positive interpretation of opportunity was not only an ideological breakthrough, but has also had very far reaching implications for the practical application of the criminal justice. It has meant an increase in the discretionary capacity of the O.M. and had as logical consequence that prosecution policy had to develop. And since it has been made public, it has also led to greater political interest and control over O.M. activities. He also argues that ideas about criminal justice (and its function and limits) is somewhat like a wave – ideas and new trends come and go. Today’s priorities may therefore not be the same as tomorrow’s.\textsuperscript{172}

2.6 Framework for prosecution [\textit{Kader voor strafvordering}]

\textsuperscript{170} Polaris stands for: Project landelijke richtlijnen voor strafvordering – project for national criminal guidelines – applicable since 1 April 1999. Also introduced is the GPS – Geïntegreerd Processtelsel Strafrecht – which is a new registration system for the digital administration and processing of case docket.

\textsuperscript{171} ME Verburg, De Minister De Baas – Minister van Justitie en Openbaar Ministerie; Grepen uit de historie van de aanwijzingsbevoegdheid, Den haag: Sdu Uitgewers, 2004.

\textsuperscript{172} JL de Wijkerslooth, “De officier van justitie en de nieuwe gestrengheid”, \textit{Goed Beschouwd} 2005, p. 10.
This important policy document\textsuperscript{173} deals with the way in which particular offences are dealt with by the O.M. The point of departure is that there should be a uniform manner in which similar offences are dealt with and similar penalties imposed, regardless of where it occurred. In the past interpretation differences (regarding the seriousness of a particular crime for example) have led to different sentences being asked for. An extensive system of very detailed and connected directives which must lead to more uniformity has resulted.\textsuperscript{174} It was developed for those offences where the lack of uniformity would be most obvious – namely for offences that occur often or the so-called high impact crime. The \textit{kader} has also now been extended to provide for more serious offences in as far as they are included in the Polaris-system. The system is made easily accessible in that the various directives for specific offences that form part of the framework all follow basically the same structure. In essence what the directives achieve is to “standardise” a particular offence by assigning objective deciding-factors [\textit{beoordelingsfactoren}]. Some factors apply consistently, regardless of the particular offence, for example whether the person is a first-time offender or recidivist, whether a weapon was involved, or any person harmed or any damage incurred etc. Other factors relate to specific offences, for example with assault – whether the victim is known to the accused or whether it relates to a randomly chosen victim, whether the person acted alone or together with others etc.

The most elementary format of an offence (the “base-crime”) is taken as starting point from where mitigating or extenuating circumstances are subtracted or added. The base-crime counts for a certain number of “crime-points”. The number of crime-points allocated to a particular offence is an indication of the seriousness with which the offence is being regarded. Mitigating factors reduce points, whereas extenuating factors increase the number of points. In practice it would, therefore, not matter where the offence is committed, but any prosecutor using this method will “calculate” the offence in a similar manner and reach the same number of crime-points. These, in turn are translated into “penalty-points” which indicate what sentence, and the length/amount thereof, will be requested. A penalty-point relates to an amount of money, a number of hours of (community) service or number of days imprisonment. Another factor which may be considered is the financial position of the particular offender. This factor is too difficult to use for individual offenders who are natural persons, but it does play a role in economic or environmental crime where the size of the company/firm determines the amount of the fine issued. These factors have, to a large degree, been automated in a computer system. The prosecutor must feed in the relevant factors and the system will then indicate the parameters of the possible sentence. So it will indicate whether a transaction should be offered, and if so, for what

\textsuperscript{173} Latest: Aanwijzing kader voor strafvordering (2011A030) applicable since 1 June 2012. The important mechanism BOS/Polaris is based on this framework.

\textsuperscript{174} Beleidsregels Openbaar Ministerie, http://www.om.nl/organisatie/beleidsregels/ (9/14/2009)
amount or on what conditions. It is possible that a prosecutor may deviate from the prescribed (or rather indicated) penalty or modality, but then it requires motivation which must be clear and convincing.\textsuperscript{175} From the point of view of equal treatment, it is however not desirable to allow local projects to deviate from the penalty or modality indicated.\textsuperscript{176} When motivated deviation from the guideline occurs on a regular basis, it may of course be an indication that the guideline needs amendment/refinement. The practice of criminal justice remains dynamic. The directives (within the framework), must therefore be maintained constantly to ensure that it remains topical and consistent in relation to the political, social and economic system within which it operates. Within the O.M. personnel is allocated specifically to monitor and maintain the system.

It is exactly because of the fact that such a large part of the “discretion” of the prosecutor has been standardised, that it is possible to direct the activities of the O.M. to such a great extent. If the Board of Attorneys General wants to “send out a message” that public violence will not be tolerated, the amount of crime-points attached to the offence is increased, thereby uniformly increasing the penalties requested for these types of offences on a national basis. Or an instruction can be issued that no transaction should be offered for any offence regarding family violence etc. The framework therefore makes it easier to direct uniform prosecution from a central position.

2.7 Triangular consultation \textit{[Driehoeksoverleg]}

In order to make sure that police, civil- and prosecuting authority are “on the same page”, regular meetings take place between them. These meetings are called the triangular consultation because it involves representatives of the police, prosecuting authority and the civil authority, be it local or regional. One of the results of such consultations can be the formulation of new policy.\textsuperscript{177} The meeting can also determine local priorities for detection and prosecution, and decisions can be taken concerning the preferable method of dealing with a particular (criminal) problem. This is not only an informal practice which may be undertaken at whim, but the Police Act\textsuperscript{178} prescribes regular meetings on local level between the mayor, chief of police and the head of the prosecuting authority (in the particular municipality). In these meetings all three participants are valuable participants. An extended form of this meeting can also include other institutions where necessary, for example involving

\textsuperscript{175} MJA Duker, Sanctionering van het verzuim een transactieaanbod te doen alvorens te dagvaarden, Strafblad feb 2012, p.65.
\textsuperscript{176} Latest: Aanwijzing kader voor strafvordering (2011A030) applicable since 1 june 2012.
\textsuperscript{177} GJM Corstens, Het Nederlandse strafprocesrecht, 7e druk, bewerkt door MJ Borgers, Arnhem: Gouda Quint,2011, p. 97.
\textsuperscript{178} Politiewet 1993, art 14.
investigators and managers of the Department of Environmental Affairs in matters pertaining to environmental crimes.

The O.M. is required to compile a “criminal map” for each region and to supply statistics regarding the commission of crime, the nature thereof, etc. to the Board of Attorneys-General. The regular triangular consultation meetings is a valuable opportunity for the O.M. to obtain such information (as well as opinions thereupon) from the two other discussion-partners. This meeting not only assists in formulating the priorities for investigation and prosecution, but is also the venue where national policy decisions originating from higher up will have to be translated into concrete activities on a local/regional level. The meeting also results in agreements regarding the minimum number of cases which have been identified as priority which will have to be brought to the prosecuting authority to deal with. These agreements are called performance contacts. In 2003 the ministries of Internal Affairs and Justice agreed with the Heads of the police that 40 000 more cases would be presented to the O.M. The Board of Attorneys-General also issued a directive concerning the kind of cases that should receive increased investigation.\textsuperscript{179} The triangular consultation is the ideal forum where the details of such general directive will be translated into local performance agreements.

2.8 How does it work exactly? Some details of a Planningsbrief: Arrondissementsparketten

The following is only a short discussion of some of the aspects which are dealt with by the O.M. in the planning and development of policy. Every branch of the O.M. receives a Planning-memo \textit{[planningsbrief]} from the Board of Attorneys-General and is required to comply therewith as well as complete certain parameters thereof. This document is a part of the planning and control functions of the Board of Attorneys-General to ensure optimal efficiency of O.M. strategy. The document firstly determines concrete and measurable goals \textit{[prestatie-indicatoren]} which should be attained by the branch \textit{[parket]} during the coming year. Most goals contain a minimum requirement about which management-agreements can be made. This relates both to strategy and policy, but also to the implementation of the policy itself. A second part of the document deals with (proposed or envisaged) developments which can be expected in the near future and indicates how it is expected to influence the branch.

Under the heading “Strategy and policy” it is indicated that, in determining whether the O.M. is achieving good results, the following three sub-questions are asked:

- Are we addressing the right matters/cases? \textit{[doen we de goede zaken]}

\textsuperscript{179} C Wiebrens, M Mak & A Slotboom, “Plankzaken en prestatieafspraken”, \textit{Goed Beschouwd} 2004, p.7.
• Are we addressing sufficient numbers of the right matters/cases? [doen we genoeg van de goede zaken]
• Are we doing a good job of addressing these matters? [doen we de zaken goed]

The first two of these questions are prescribed by prosecution policy and entails selectivity and prioritisation and the last is measured against quantitative performance indicators applicable to each branch. Adequate selection/prioritization is aided by having as detailed information as possible about the total “criminal picture” within the country, as well as each region or district. Statistics and criminological research are thus of great importance to “map” crime and its occurrence. Selectivity is defined as selectively investigating a sufficient number of priority cases, with due regard to its seriousness and its occurrence based on the findings of a “criminal map”. Are the matters that do land up on the desk of the prosecuting authority in line with the findings of the criminal map? If this is not the case, then hard questions should be asked regarding the choices that were made during the triangular consultation. To ensure that sufficient numbers of “the right cases” are brought for prosecutorial attention, concrete agreements over required performance, both qualitative as well as quantitative, will have to be made with the police. In this regard the head of the O.M. branch will have to be very clear in what is required of the police with regard to focused investigation and/or detection of specific offences. The O.M. is adamant that it has this authority. Even if the police claim that it lacks the required capacity to comply with the required minimum requirements, this should not be accepted and the prosecuting authority should put pressure on the police to organize its capacity to enhance efficiency and balance. The planning-memo requires O.M. branches to illustrate present investigative capacity of the police in its area and it must also indicate in how far this is sufficient or lacking. Other information which must be reported includes trends regarding the various forms of criminal behaviour in the region, information regarding the offenders and victims of these crimes, as well as the places where it is committed. Obviously this information, gathered on a year-to-year basis from all the regions, in time and through comparison becomes a very handy planning tool in determining trends and filling in the bigger picture regarding an adequate “criminal map”. Branches must indicate which matters have locally been identified as priority and what agreements have been reached (with the police or other investigative bodies) regarding the expected number of such cases that need to be investigated and prepared for further attention by the prosecuting authority.

The following is an example of how national policy impacts on a particular branch: Parliament approves a motion that greater emphasis be given to

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180 The O.M. is also assisted in this by having a dedicated department of Research and Development that is active in various national and regional “benchmarking” studies regarding criminality.
the prevention of human-trafficking. Parliament prescribes a 10% increase in O.M. investigation and prosecution of human-trafficking cases.\textsuperscript{181} Once this parliamentary instruction is translated into a policy guideline, it means that O.M. branches (together with its triangular-consultation partners) will have to effect this increase in its day-to-day activities. If it is not possible to realize the increase, the O.M. will have to give account for its inability to do so. This “failure” will only be accepted if it is accompanied by a motivated explanation and if the Board agrees with it. The “criminal plan” will once again play a great role in motivating the reasons why the suggested increase could not be achieved. Another example of the impact of policy on the choice of the O.M. branch to utilise its capacity, is with regard to serious and relatively serious fraud. There are inter-regional fraud teams investigating and prosecuting these cases. The planning-memo prescribes the number of such cases which are to be considered as the minimum which have to be investigated (and prosecuted) by each region.

Regarding the question whether the O.M. is doing a good job at addressing those cases that do come its way, qualitative as well as quantitative performance indicators apply. There are 6 indicators which the O.M. uses and it is applied against the measured performance of each branch of the O.M. (and also the O.M. collectively): The first of these is the intervention-percentage. This relates to the percentage of cases brought before the O.M. which are dealt with by an actual intervention. The second indicator is the time it takes for a matter from being entered into the system until it has been dealt with by the O.M. and is measured in terms of the number of days it takes to finalise the case. The third indicator deals with the question whether the intervention that was applied is indeed the appropriate reaction to the offence, taking into consideration not only such factors as the particular crime, the circumstances in which, and the person by whom it was committed etc., but also aspects such as whether forfeiture of the proceeds of crime has sufficiently been considered. The fourth indicator deals with the question whether the O.M. actions and procedures (also in a particular case) adequately provide for the care of victims. The fifth indicator deals with the juridical quality of O.M. actions and procedures. The members of the prosecuting authority are not just ordinary civil servants, but civil servants with a particular duty of care towards the law because the prosecuting authority is considered to be a judicial body. The sixth indicator is one of efficiency – that is, does the O.M. apply its personnel and resources efficiently?

2.9 Political and hierarchical control over the prosecuting authority.

\textsuperscript{181} Eg: Aanwijzing mensenhandel, Stct. 2008, 253.
The Dutch prosecuting authority has always been a hierarchical organisation but has in the last decade or so been transformed from an organisation consisting of more or less independently functioning professionals to a more centrally structured, coordinated and controlled organisation.\textsuperscript{182} A change brought about by the (new) Judicial Organisation Act in 1999 has formalised the position and authority of the Board of Attorneys-General\textsuperscript{183} as head of the O.M.\textsuperscript{184} Art 139 lid 1 RO stipulates that the heads of the regional and local branches of the prosecuting authority fall under the authority of the Board of Attorneys-General in the execution of their duties. The regional and local heads, in turn, have hierarchical control over their respective branches.\textsuperscript{185} The Board has the authority to issue general or specific directives regarding the execution of functions of the O.M. Within this hierarchical (and centrally controlled) structure the discretion of an individual prosecutor is therefore limited to what policy determines.

The Minister of Justice is accountable to parliament for the policy of the prosecution service. Parliament can hold the minister accountable for his failure to intervene. Because of this, the minister holds regular meetings with the Board of Attorneys-General who supervise the actions of the O.M. The board issues instructions for the proper implementation of policy. The minister is vested with the power to issue general as well as specific instructions to members of the O.M. with regard to the exercising of their functions\textsuperscript{186} but must consult the Board of Attorneys-general first. Although the minister’s power to issue instructions under section 127 is, in principle, unlimited, he will use this power rarely\textsuperscript{187} since in most cases of consultation with the Board, the latter will give the necessary prosecution instruction. In terms of art 127 RO the minister may give general and specific directions regarding the performance of tasks of the O.M. The minister may also give directions in terms of prosecution decisions in a concrete case.\textsuperscript{188} The memorandum of explanation of the RO (when this was introduced) expressly indicates that this authority should be used with great circumspection.\textsuperscript{189} Before the minister may issue a directive regarding investigation or prosecution in a concrete matter, the Board is given the opportunity to respond to the proposed directive. If the matter is then prosecuted, the ministerial directive, as well as the response of the

\textsuperscript{182} LAJM de Wit, Omgord de wapenen van het OM! Reactie op de afscheidsoratie van Tom Schalken, \textit{NJB} 2006 nr 13, p. 753.
\textsuperscript{183} The “meetings” of the various Attorneys-General were converted into a “Board of Attorneys-General” in 1995, which were given official recognition in the (new) Wet RO in 1999.
\textsuperscript{184} Art 130 lid 4 RO.
\textsuperscript{185} Art 139 lid 2 RO.
\textsuperscript{186} Art. 127 RO.
\textsuperscript{188} Art. 128 RO. Although the Act allows such specific instructions by the minister, there has not yet been a case where such instructions have been issued. Kamerstukken II 2007/08, 31 200VI, nr 181.
Board is then attached to the court documents [processtukken] of the case.\textsuperscript{190} This is done in order to assure that ministerial intervention in prosecution decisions is made in a transparent manner. Whenever the minister intends to issue a directive not to prosecute in a concrete matter, the legislation requires that, in addition to obtaining the response of the Board, the minister must also subject the (proposed) directive and the Board’s response to both houses of parliament. What the implications of this is for the independence of the O.M. has been debated in great detail by various writers\textsuperscript{191} but does not wholly fall within the scope of this study. The question can rightly be asked if the ministerial control cannot in itself contain the danger of political interference in the criminal justice sphere? Parliamentary debate about specific prosecution decisions and actions departs from the concept of division of power within a democratic rechtstaat. Political considerations and claims are translated into judicial terminology which may create tension with the requirement of independence and impartiality of the judicial role-players.\textsuperscript{192} The question is then: how can one guarantee political responsibility without attaining political interference? Cleiren & de Roos\textsuperscript{193} argue that parliament should involve itself with determining the propriety of policy and mechanisms of justice, but should not descend to the level of discussing and deliberating individual concrete cases. The decisions on that level remain that of the O.M. to take, and political responsibility is more of a watchdog than an appeal body. One should also guard against \textit{ad hoc} democratisation, for example in sensational cases or cases of great public interest.

Whatever the pros and cons thereof, the current situation is that, in effect, the Minister can control decisions of the Board of Attorneys-General, who in turn can control decisions by the rest of the prosecuting authority.\textsuperscript{194} This is why Corstens refers to the O.M. as a “relative” independent organisation in that it is competent to make its own decisions, but subject to ministerial control.\textsuperscript{195}

\textbf{2.10 Developments with regard to administrative remedies: Rise of the administrative fine}

Another development which has had an influence on the criminal justice system has been the development of the enforcement mechanisms of the

\begin{footnotesize}
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\item \textsuperscript{190} Art 128 lid 1-5 RO.
\item \textsuperscript{191} See also various sources referred to by GJM Corstens, Het Nederlandse strafprocesrecht, 7e druk, bewerkt door MJ Borgers, Arnhem: Gouda Quint, 2011, p. 100, footnote 234.
\item \textsuperscript{192} CPM Cleiren and T de Roos, “Democratisering van de strafrechtspleging”, in K. Boonen (et al) eds: De weging van ’t Hart, Kluwer: Deventer, 2002, p. 179.
\item \textsuperscript{194} ME Verburg, De Minister De Baas – Minister van Justitie en Openbaar Ministerie; Grepen uit de historie van de aanwijzingsbevoegdheid, Den Haag: Sdu Uitgewers, 2004.
\item \textsuperscript{195} GJM Corstens, Het Nederlandse Strafprocesrecht, 7e druk., bewerkt door M.J. Borgers, Arnhem: Gouda Quint, 2011.
\end{itemize}
\end{footnotesize}
administrative law. Not only have many traffic-offences, which were previously dealt with in terms of the criminal law, been brought under the domain of the administrative law (more on this in the next chapter), but there has also been tremendous growth in administrative adjudication which has developed side-by-side with the criminal justice system.\textsuperscript{196} Except for the discussion of the Wet administratiefrechtelijke handhaving verkeersvoorschriften (WAHV) in chapter 3, this will not be looked at in great detail for the purposes of this study. It has become highly popular in the last twenty years or so to make use of administrative fines to respond to numerous transgressions.\textsuperscript{197} In some cases it deals with minor offences like nuisance to neighbours, or littering, but it has also been used extensively also for more serious matters in the areas of environmental law, economic regulatory practices etc. A “decision” [beschikking] is issued by an administrative organ whereby the “transgressor” is ordered to pay a fine and/or do some corrective action (cleaning up the pollution etc.). If the person receiving the beschikking is not happy with it, a procedure is available to have the beschikking reviewed before a judge.\textsuperscript{198} The European Court of Human Rights has found that penalising administrative fines should be seen as a “charge” which must comply with the due-process requirements of section 6 of the Convention.\textsuperscript{199} However, in several cases\textsuperscript{200} the European Court ruled that such administrative fines do not fall foul of Sec 6 of the European Convention of Human Rights as long as the process provides the possibility of having the decision tested before an independent court of law.

There are basically three reasons for the growth and development of administrative enforcement. Firstly because of capacity shortages resulting from the tremendous escalation of regulations called for the decriminalisation of a lot of the enforcement. The second reason concerns the responsible administrative bodies wanting to retain control over what they regarded as “their” legislation and enforcement – believing that they, rather than the O.M., possess the necessary expertise necessary to enforce the particular regulations. The third reason was to aid the criminal justice system, which was already overburdened, by diverting a lot of cases to

\textsuperscript{196} Perspectief op 2010 – meerenjarenplan O.M, p.9. See also Evaluatie van Perspectief of 2010, O.M.
\textsuperscript{197} AR Hartmann, Strafbeschikking en bestuurlijke boete: wildgroei in de handhaving? Justitiële verkenningen, 2005–31–6, p. 85. The author indicates that the developments have led to what can be describes as a alternative criminal law (nevenstrafrecht) or administrative criminal law.
\textsuperscript{198} In wet Mulder cases there is an additional redress to the prosecutor, after which still the possibility of a trial before a judge.
\textsuperscript{199} A criminal charge is “the official notification given to an individual by the competent authority of an allegation that he has committed a criminal offence” ECHR 10 December 1982 A56, NJ 1987, 828 m.n.t. P van Dijk, Zaak Foti.
\textsuperscript{200} AR Hartmann Bestuurstrafrecht DD 2010, p. 40. However, it seems as if criminal prosecution is making a comeback. Further Bendenoun EHRM 24 februari 1994, Series A 284. Also at NJ 1994, 496 m.nt. E.A. Alkema. Also HR 10 maart 2005 NJ 2005, p. 201. See also GJM Corstens, Het Nederlandse strafprocesrecht, 7e druk., bewerkt door MJ Borgers, Arnhem: Gouda Quint, 2011, p. 536.
other enforcement possibilities. In addition to various (more than eighty) pieces of legislation or regulation that provide the possibility for administrative enforcement of norm transgression, a further, general, provision makes it possible for local government to apply administrative fines against public nuisance [overlast in de openbare ruimte]. The local authority can now issue an administrative fine for nuisance, but at the same time it may also be possible to offer an administrative transaction or to issue an administrative strafbeschikking. Essentially the local authority will have to make a choice regarding the most appropriate method to deal with the transgression. It will be interesting to see how choices are made in practice for the one or other method of enforcement.

This tendency towards more administrative punishment, however, has a number of important consequences for the criminal justice system. It is firstly of great importance that the administrative- and criminal-justice decision-making processes should be in tune with one another, especially with regard to the formulation of policy and the execution of enforcement actions. It would indeed be untenable in terms of the principle of equality if one set of consequences flows from a particular transgression if it is adjudicated administratively, whereas the same transgression leads to a totally different consequence should the criminal justice adjudication be followed. Developments in the one area are therefore definitely also of importance for the other. The second important point for our purposes can be the question: When should which system apply? How do we determine when a matter can be dealt with administratively and when is it absolutely necessary to employ the criminal justice system? It is quite obvious that the criminal justice should always be employed if the offence is committed in an area where no administrative body operates. One will also choose for the criminal justice adjudication in circumstances where the particular

201 AR Hartmann, Bestuurstrafrecht DD 2010, p. 40. However, it seems as if criminal prosecution is making a dramatic come-back by way of the administrative strafbeschikking. See J Crijns, Efficiëntie in het kwadraat: Over de lotgevallen van de kleine strafzaak na invoering van de strafbeschikking en het verlofstelsel, PROCES 2010-89- 6, p. 392.


204 Bestuurlijke transactie – art 37 WED.

205 Art. 257ba Sv. Introduced by the Wet OM-afdoening. See also AR Hartmann, De strafbeschikking: naar nieuwe grenzen van buitengerechtelijke afdoening binnen het strafrecht, Tijdschrift voor sanctierecht & compliance 2 mei 2012, p. 58.

206 There are indeed significant differences between a strafbeschikking and an administrative fine. A strafbeschikking is regarded as a form of prosecution which leads to conviction and sentencing, whereas a fine is regarded as an alternative disposal method and the payment of the fine does not lead to a conviction. The process of appeal, the court that hears the appeal etc. are also completely different. These differences are discussed further in Chapter 5.

sanctions or investigative measures which are unique to the criminal justice would be required. To assist in the choice of sanction-system when new legislation is created, the cabinet has come up with a memorandum regarding the choice between the two sanction-systems. It is not applicable to existing legislation and will only apply when choices must be made regarding new legislation. The purpose is to provide clarity to the legislative assembly in the choice between the administrative or criminal sanction-system. The criteria suggested is that, where it relates to conduct in a “closed” context, the administrative sanction-system must be chosen. When is it a “closed” context? If there is a specialised administrative body/organ responsible for the execution/enforcement of the legislation which has a defined purpose, and existing channels of communication with regard to the control/implementation is in place, then it is “closed”. In the absence of these factors, the context is regarded as “open” and the criminal sanction system (which may include the administrative strafbeschikking) must be used.

Kessler & Keulen argue that the introduction and development of the administrative fine has been of great importance in the development of Dutch punitive law since it has introduced the idea that it is not only the criminal judge/court who should have the authority to impose penalties on behalf of the state. In the next chapter I will discuss the new strafbeschikking which, although not intended to replace administrative adjudication and enforcement, will indeed bring the criminal justice and administrative methods more in line with one another.

2.11 Further developments

The proliferation of guidelines during the years seventy led to the need to come to some sense of legal certainty and consistency on the one hand, but at the same time the growing number of criminal cases demanded a more policy-oriented and co-ordinated approach. In recent times the demands on performance have increased even more. The following has been identified by the O.M. as some of the reasons:

- the options of available sanctions and/or methods of concluding a case have expanded, making the decision about a proper or fitting remedy more difficult;

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210 Although the administrative strafbeschikking originates from the administrative body, it moves to the realm of the O.M. the moment protest is lodged against it.
211 P Boer & D de Kok, Nieuwe keuzes tussen strafrechtelijke en bestuurlijke sancties, NJB, 2009 - 11, p.671. They are of the opinion that this distinction between “closed” and “open” are rather artificial.
- the interests of victims or affected persons have moved to the forefront. Compensation for damage has entered the arena of criminal law enforcement;
- specific procedural demands with regard to asset-forfeiture require additional O.M. consideration and capacity;
- jurisprudence of the European Court for Human Rights has influenced the law of evidence which has consequences in the eventual trial stage of proceedings, but also with regard to the guarantee of due-process rights of suspects in disposal cases;\(^{214}\)
- enforcement against organised crime often results in so-called “mega cases” that places high demand on already scarce capacity of the O.M. and judiciary.

To enable the O.M. to make optimum decisions, it is important to know the exact extent of the task faced. In this regard the development of a “criminal map” was regarded as being particularly important - a map containing detailed information on crime, criminals, tendencies etc. This assists the O.M. with the planning of effective juridical responses'.\(^{215}\) Further developments in the implementation of policy is the fine indicator \([boetebasis]\) on the website of the O.M. that can be consulted\(^{216}\) by interested parties, as well as a computer-driven evaluation system \([Beslissing Ondersteunend Systeem-POLARIS]\) to enhance the efficiency of decisions by the O.M.\(^{217}\) The Polaris system is a uniform process that works with a number of points allocated for predetermined aspects – the seriousness of the offence, previous convictions of the offender etc. About thirty standardised offences have been “graded” and the system predicts the likely sentence that would be considered. It is computer driven and accessible not only to the O.M., but can be accessed via the internet by interested parties. In addition, the O.M. is introducing the digitalisation of all case dockets through an administration and processing system \([GPS]\) where all case information can easily be tracked. Other recent developments include changes to the O.M. structure to provide for greater centralisation of certain functions to be dealt with by experts\(^{218}\) as well as the implementation of an integrated processing system to replace paper dockets with electronic ones.\(^{219}\)

2.12 New political (and criminal justice) landscape in the Netherlands

\(^{214}\) E.g. Salduz v Turkey (27/11/2008) which deals with the right of access to a lawyer during police interrogation and police custody.
\(^{215}\) Perspektiefnotitie O.M. 1987, p. 9.
\(^{216}\) Since September 1999.
\(^{218}\) With regard to environmental matters, recovery and confiscation of proceeds of crime, as well as the appeal procedure of WAHV matters.
Earlier the criminal justice system was largely in the hands of the lawyers who fulfilled their functions judicially. Whereas the leading thought in the seventies was that the criminal law had to play a protective role against an over-powerful state and that the protection and re-integration/rehabilitation of the accused was a primary goal, the tide has turned. Together with the rise of crime in the western world, the philosophy regarding criminal law has also changed. The criminal law is no longer seen to have the primary function to protect citizens against the state, but to protect citizens against crime. The interests of the victim, and of society as a whole, have become the primary focus. Corstens contests that the criminal justice system in the Netherlands has gone through radical changes in the last thirty years: it has become “bigger” and “harder”. And it seems as if there is new faith in criminal justice enforcement. Previously held abolitionist views about crime have decidedly taken a few steps back.”Humane paternalism was replaced with a managerial instrumentalism aimed at restoring credibility to the system of criminal justice” as Downes & Van Swaaningen so aptly put it. Documents emerging from the O.M. distinctly took on a more moralistic tone. The situation where the legal protection of the accused/suspect stands in a central position has been abandoned.

Crime, criminal justice and prosecution policy have become central in the political and public debate. Politicians felt they could no longer be seen to be “soft” on law and order. Safety in the public sphere became non-negotiable. More media attention was focussed on criminal cases. Public discontent about “feelings of safety” translated into political party manifestos. From the early 1990s a number of administrative changes to the criminal justice system resulted in the growing power of the O.M. to coordinate and direct policy overall. Over and above the bigger emphasis on efficiency and effectiveness of the Dutch criminal justice system were calls for stronger measures against crime. “Zero tolerance” became politically popular. This new trend, especially in parliamentary circles is,

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221 GJM Corstens, Veranderingen in het Strafrecht in Nederland : de spanning tussen enerzijds politiek en samenleving en anderzijds de strafrechtspleging, NJB 2007- 12, p. 669. Also J Crijns, Efficiëntie in het kwadraat: Over de lotgevallen van de kleine strafzaak na invoering van de strafbeschikking en het verlofstelsel, PROCES 2010-89- 6, p. 392 who states that, where earlier criminal justice organs were regarded with apprehension, and various checks and balances (to the exercise of their power) were devised, there seems to be a renewed belief in their professionalism and thoroughness.
224 AH Klip, Totaalstrafrecht, DD 2010, p. 34.
225 And on spectacular miscarriages of justice revealed in recent times like the so-called “Schiedammer parkmoord” and others, see L Stevens, Strafzaken in het nieuws: over ontsporende media en de verantwoordelijkheid van het Openbaar Ministerie, NJB 2010 – 11, p.660. See also Th A de Roos, O.M.-rapport over lijst Zembla fouten Openbaar Ministerie, Strafblad 2010, p. 170.
what De Wijkerslooth calls, “de Nieuwe Gestrengheid”. The element of this concept is described by him as:

- every crime where there is an identifiable victim must be detected/clarified;
- every criminal offence should result in punishment;
- the priority of the criminal justice system must be to address those crimes which directly impact on the citizen’s sense of security (e.g. nuisance and violence);
- it is not acceptable to tolerate offences anymore;
- sentences itself are too lenient, or the choice of punishment is too lenient;
- although the rights of accused are protected it would be acceptable to encroach on these in the interests of protecting society;
- with regard to offenders there seems to be preference given to categorization (e.g. “multiple offender”, “violent offender” etc.) and the offender is not individualised;
- the rights of the victims of crime have taken centre-stage.

This new trend certainly has great consequences for the functioning of the O.M. As previously referred to, the pressure has in the last few years gone out from cabinet to intensify investigation and prosecution efforts specifically aimed at curbing violent crime. This is, amongst others, the result of a 2002 policy document “Veiligheidsprogramma: Naar een veiliger samenleving” in terms of which a less tolerant government approach to aspects of protection of citizens against violence is prescribed. This document also adopted the concept of concluding performance-contracts with the police. Valid criticism against the application of criminal law policy may be that crime (and crime prevention) has become politicised – politicians attempt to gain support of voters by holding/supporting certain viewpoints regarding crime and crime prevention. And, De Roos argues, that the plans of the politicians may also have become unrealistically ambitious.

Most recently the Department of Justice has been renamed the Department of Safety and Justice, there are plans afoot to restructure the police into a National Police Force also under the authority of the Minister

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226 L de Wijkerslooth, De officier van justitie en de nieuwe gestrengheid, Goed Beschouwd, 2005, p. 10.
227 This has led to concept legislation to introduce compulsory minimum sentences with regard to certain offences. T de Roos, Kroniek van het strafrecht en het strafprocesrecht, NJB 2012, p. 2405.
229 Den Haag – Ministeries van Justitie en van Binnenlandse Zaken.
231 T de Roos, Het gedoogakkoord en het repressieve veiligheidsbeleid. NJB 2010 - 36, p. 2353. It is not only the O.M. which are increasingly in the cross-fire: see also the increasing pressure on, and criticism against the judiciary in the Netherlands, Y Buruma Vertrouwen in de strafrechtsspraak. Een essay na een ontrustbarend jaar, DD 2011, p. 1 and F van Tulder, De straffende rechter, NJB 2011 - 24, p. 1544.
of Safety and Justice – so the police and the O.M. will be under the same political authority. The position of victims of crime has further been improved with the introduction of a separate section in the Criminal Procedure Code.\textsuperscript{232} The rights of victims\textsuperscript{233} include the right to be informed about a variety of issues (amongst which the disposal option chosen by the police/O.M. etc.), to legal assistance and translators (if required), to wider/extended compensation possibilities (which include compensation in cases of \textit{voeging ad-informandum}). See also the discussion of the rights of victims with regard to the section 12 Sv \textit{beklacht} in 3.8 of the next chapter.

Since 2011 the O.M. has also introduced a system which provides for accelerated assessment and punishment known as ZSM.\textsuperscript{234} A pilot project was conducted in 5 cities and the intention is to extend this nationwide. What it basically entails is that decisions about new criminal cases are taken as soon as possible. It relies on the co-operation of all the various role-players (O.M., police, child services, victim support structures, defence council, correctional services) playing their part to instantly provide the necessary information upon which further prosecution/disposal decisions can be made. A ZSM site is established at a police station manned by the necessary personnel so that clarity regarding the further processing of a case can be made there and then. These sites operate for extended hours and the amount of administration required is minimised. Use is also being made of technology such as video links to confer with suspects detained elsewhere. As far as possible the matter is disposed of by way of a \textit{strafbeschikking} or \textit{transactie}, but where that is not possible an accelerated summons is issued for a speedy trial. The benefit of this process is that it is an immediate judicial response and offender, victim and society know quickly after the incident what the likely outcome will be. This is meant to strengthen confidence in the justice system. In 2011 about 18\% of all felony cases at the participating pilot schemes were disposed by way ZSM.\textsuperscript{235}

Concerns with the ZSM method, however, are firstly that increased speed (in exercising the discretion) can lead to less accuracy. Secondly the due process rights of the suspect may be jeopardised if access to legal representation/advice and time to consider his options are not allowed.\textsuperscript{236} A third concern is that the interests of victims may not adequately be taken into consideration. The O.M. document \textit{Perspectief op 2015}, however, clearly spells out that the ZSM-route is the direction they wish to take for

\textsuperscript{232} Wijziging van het Wetboek van Strafvordering ter versterking van de positie van het slachtoffer in het strafproces. In operation since 1 January 2011.

\textsuperscript{233} For more on the rights of victims, see NJM Kwakman, Het Openbaar Ministerie en slachtoffers van delicten, \textit{Strafblad} 2010 – 6, p.478 and AC Bijlsma Positie slachtoffer in strafproces versterkt, \textit{Trema}, 2010– 4, p. 157. Corstens argues (Ontwikkelingen in 25 jaar strafprocesrecht in Nederland \url{www.rechtspraak.nl} 22-6-2011) that the victim has almost become an actual party in criminal matters.

\textsuperscript{234} Zo Snel, Slim, Selectief, Simpel, Samen en Samenlevingsgericht Mogelijk.

\textsuperscript{235} Jaarbericht O.M. 2011.

\textsuperscript{236} NJM Kwakman, Snelrecht en de ZSM-aanpak, \textit{DD} 2012-3-42, p. 188. See also Factsheet ZSM at \url{www.om.nl/onderwerpen/zsm/158586/factsheet-zsm/}. 
the coming years. Related to the dilemma of speeding up the criminal justice system is the question from what moment a suspect should be allowed access to a lawyer, since this can delay matters. In the Netherlands legal representation was not allowed during the initial period of police detention and interrogation, but as result of an European Court of Human Rights decision\textsuperscript{237} this has to be reconsidered. There are moves afoot to introduce a European guideline\textsuperscript{238} regarding minimum standards of rights of access to legal representation, so this matter will be revisited.

2.13 Prosecution policy and prosecutorial disposal?

There are also limits to opportunity. The (already mentioned) principles of proper management entails that an impression which has been created must be honoured, equal treatment must always be attempted and conflicting interests must be weighed against one another and fairness must be pursued. The prosecuting authority indeed has discretion to select alternative disposal methods, but like the execution of other discretion, this one is also subject to limitation. For the effective functioning of prosecution policy it is, however, essential that various suitable alternative ways exist to deal with the matter at hand. If the only decision is to prosecute or to refrain from prosecution, then it limits the usefulness of any policy. The more varied the alternatives available to the prosecuting authority of the possible disposal options, the more nuanced the policy can become. In the next chapter I will examine the various methods of disposal that are available to the O.M.

\textsuperscript{237} Salduz v Turkey (27/11/2008). See also T Spronken, Kroniek van het straf(process)recht, \textit{NJB} 2012-880.

\textsuperscript{238} Voorstel voor een richtlijn van het Europees Parlement en de Raad betreffende het recht op toegang tot een advocaat in strafprocedures en betreffende het recht op communicatie bij aanhouding COM (2011)326def.