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

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Chapter 5

Evaluation and Recommendations

5.1 Introduction

The 1984 law reform efforts in the USA have lead, in the opinion of Marc Miller, to the virtual elimination of trials and substantial evidence of efforts to reach reasonably just decisions in individual cases. He complained against the unhealthy concentration of sentencing powers in one institution, namely the prosecuting authority, in conflict with the doctrine of separation of power and without sufficient checks and balances. Luna and Wade, in their evaluation of prosecutorial adjudication in the USA and a number of European countries, concluded that (in the USA) there is a largely unchecked prosecution discretion which creates very real potential for abuse. Numerous studies have shown that prosecutors have become more influential with greater authority to (independently) dispose of criminal cases. This is most certainly also the case in the Netherlands where the prosecuting authority exercises considerable discretion in applying various case-ending procedures. So what is required to balance Miller’s desire for “reasonably just decisions in individual cases” with the enormous pressure (to do more, be more efficient, be more effective against crime) on prosecuting authorities, whilst still guaranteeing Constitutional (and ECHR) and other due-process rights of suspects (and victims) of crime?

Crime violates the rights of others, can undermine individual and collective security and a crime-ridden environment can lead to a collapse of ethics and morality. Not taking adequate steps against crime and criminals would also be a breach of the constitutional duty of the State to respect, protect, promote and fulfil the rights of its citizens contained in the Bill of Rights.

If, however, authorities choose to deal with certain form of crime in any other manner than to institute prosecution, what must the requirements of the alternatives to prosecution be? Labuschagne argued that the overall aim of a criminal justice system should quite simply be to ensure that justice is done. The main role players in the criminal justice system are the accused, victim and the State, represented by the prosecuting authority. Justice, according to Labuschagne, would

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697 See numerous references in Chapter 1.
698 Section 7(2) of the South African Constitution. See also the editorial comment of Corstens – GJM Corstens, Een recht op strafrechterlijke bescherming? NJB 2003, p. 169.
699 R Calland & T Masuku Tough on crime and strong on human rights: The challenge for us all, Law Democracy and Development Vol. 4 2000, p. 12. The Constitutional Court in the case of S v Basson (2007 (3) SA 582 CC) held that it is the constitutional obligation of the prosecuting authority to prosecute those offences that threaten or infringe the rights of citizens. Alternative disposal of all (even serious) crime, is therefore not an option.
mean reaching an equitable balance between the interests of these three. Is it necessary to insist on a full criminal trial when the accused is willing to voluntarily waive his right to such a trial, the considerations of the victim have been taken into account and the general interest of justice can be adequately served without it?

In the preceding chapters I have presented the various alternative disposal options available in both the Netherlands and South Africa, as well as indicating the driving forces behind the particular developments in the Netherlands. Some of the Dutch options may appear to be radical, and may not withstand the (South African) constitutional imperatives. But the question is – do we find aspects that might inspire changes to the South African system? That is what we will be grappling with next.

5.2 Evaluation of the various alternative disposal methods in the Netherlands

1. Sepot

The technical waiver, where there is insufficient proof of an offence, is in fact no waiver at all. It is simply the proper application of the law. An important point to note is that the reason for the withdrawal is recorded not only on the case-docket but also in the “justitiële documentatie” and may become relevant at a later stage if similar charges are brought against the same offender.

The policy waiver is a form of out-of-court settlement which is the result of the application of prosecution discretion. In the Netherlands this long-standing practice is adequately directed by general policy directives as discussed in chapter 2. Even after the development of first transactie and later strafbeschikking, the policy waiver remains a possible alternative in situations where a transaction or strafbeschikking cannot be used because of the seriousness of the offence, when other conditions than the prescribed ones are considered or the penalty imposed more severe. It can be very innovative and can be designed to suit a particular situation and can even be used in “high” or extra-ordinary cases. The rights of victims are also adequately protected in that their interests must be considered when choosing this option, the prosecutor must give adequate information why the choice is made, and victims retain the right to challenge the decision in the court of appeal.

2. Transaction

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700 JMT Labuschagne, De minimis non curat lex as strafregtelike verweer in ‘n regstaat: Opmerkinge oor strafsinvolheid en die groeiende rasionele dimensie van geregtigheid, 2003 THRHR p. 455.
Transaction is mostly used when the offence is of a less serious nature and therefore does not warrant adjudication by court. This long-standing alternative disposal method will in all probability be completely replaced\(^701\) by the strafbeschikking. The transactie has undergone huge development since its first introduction in 1921. Steadily more and more offences\(^702\) could be finalised by way of transactie. Its application was also extended to police transactie and later also administrative transactie. At the height of its development it was an often-used alternative to a trial which prevented prosecution on certain conditions. The transactie led to a relatively quick, if the accused accepts it immediately, finalisation of lesser criminal offences. The offender received a 20% reduction of the penalty amount as incentive to accept it, as well as certainty regarding the outcome of the case. Eventually the transactie-penalty was not restricted to a fine only, but also provided for community service and other conditions attached.

However, the transactie proved to be ineffective where the offender simply ignored it, or opposed it without valid defence. In these instances the O.M. had to resort to issue a summon to go to court with a matter that really called for alternative disposal. The vast majority of cases (where a transaction was offered without reaction) ended up being heard in absentia or by default. In the end the penalty imposed by court is exactly or closely the same as the initial transaction fine and/or conditions previously suggested by the prosecutor in the transaction. This is why it was deemed necessary to introduce the strafbeschikking which becomes final unless there is positive action on the side of the offender. Although the outcome of a transactie is recorded in the justitiële inlichting, it does not, like the strafbeschikking, equate a conviction by court.

After extension of the transaction capacity, and including (community) service as possible condition, there is not much difference between the transaction and sepot. The transaction conditions are limited to those included in the legislation, whereas the sepot conditions can be more innovative, for example a condition that the person stays away from a particular place, or the payment of a sum of money for a good cause, or the condition may not be doing something in itself, but refraining from doing something, or even the prosecutor holding back prosecution for a “proeftijd”.

\(^701\) Due to the staged introduction of the strafbeschikking the transactie will remain intact until it is replaced. Article XI of the Wet OM-afdoening provides the transitional arrangements. Although there are commentators who are of the opinion that the strafbeschikking will not (or at least, should not) replace all transactions. R Geerts & RR Ramautarsing, De Fiscale Strafbeschikking in douaneland, een voldongen feit?, TBF 2012 – 8, afl 8, p. 30-34.

\(^702\) At first only misdemeanours could be subject of a transaction. This was later expanded to also apply to (some) felonies. The vast majority of offenses in the Netherlands fall within the scope of the transaction (and now strafbeschikking) since it fall below the maximum jail time of six years.
Where the transaction is applied in unusual cases, the *Aanwijzing hoge transacties en bijzondere transacties*\textsuperscript{703} applies. Often these cases deal with crimes that have upset society and normally these types of offenses are taken on trial. If the prosecution decides, nevertheless, to offer a transaction, the *aanwijzing* prescribes how the upper echelons of the O.M. should be involved in the decision. The seriousness of the matter may even lead to the Minister of Justice being involved in the decision. High transactions are in practice utilized for legal persons and big institutions. The transaction is often criticized for the lack of, or limited, openness. The publicity given to high transactions and certain *strafbeschikkingen* may go a long way in compensating for this. If a high transaction is decided upon, it is in principle accompanied by a press-release. The press-release compensates for the lack of public participation or involvement customarily attached to a trial in open court, although Nijboer argues that this is insufficient, since the O.M. can manipulate the information contained in the press-release.\textsuperscript{704}

3. *Ad informandum* practice

In a system which does not recognize a guilty plea, this is a method of dealing efficiently with multiple charges of a similar nature which the accused admits.\textsuperscript{705} The effect is similar to having pleaded guilty to these charges and it is taken into consideration for purposes of sentencing. Once a case has been added in this manner and taken into consideration in the sentence, no further prosecution is possible regarding that case unless ordered by the court of appeal (i.t.o. section 12 Sv). *Ad informandum* can also apply in instances where the trial takes place in the absence of the accused as long as it is clear that the accused indeed acknowledges the cases added for information. It seems as if this practice is used for rather limited number of cases (in 2011 only 4 600 *ad informandum* cases were dealt with\textsuperscript{706}) and the rights of victims of crime is once again protected in that they may challenge (in the court of appeal) the decision of the prosecutor to dispose of the case in this manner. One thing that may actually limit the application of this method, is the requirement that the added case(s) must be of the same nature than those in the summons. In the South African context where pleas of guilty are possible, even for multiple charges, this method will be superfluous.

4. **Negotiation and Mediation**

\textsuperscript{703} (2008A021). The application of this aanwijzing has been extended to 30-09-2013 by Stcrt. 2013, 11362.


\textsuperscript{705} Requirements for the *ad informandum* method were formulated in HR 13 februari 1979, NJ 1979, 243 m.nt. Th.W.v.V.

\textsuperscript{706} OM Jaarbericht 2011.
Finding an appropriate place for negotiation, mediation, alternative dispute resolution, restorative justice and other informal methods of dealing with criminal conduct is problematic, not only in the Netherlands and South Africa, but in most criminal justice systems.\textsuperscript{707} Every now and again this pops up in experiments, trial-runs, pilot projects etc. One big distinction seems to be whether the alternative dispute resolution methods require direct involvement of the prosecutor or not. In the Netherlands there is no (formal) negotiation between the offender and the prosecuting authority, although some form of involvement/consultation is usually required in determining the damage caused by the offence and the question whether the accused is prepared to compensate such damage. One cannot speak of mediation (etc.) as alternative disposal by the prosecution, unless the prosecuting authority is involved in accepting the outcome of the alternative disposal method by withdrawing charges, or requesting a reduction in sentence if the matter continues to trial. With informal methods it is important to clarify who the parties are to the mediation/negotiation. Who decides whether this alternative can be pursued? In other words: who has the authority to decide the course of a particular criminal case? Is this decision, or the ADR process as a whole, subject to judicial oversight?

It is not necessary to (again) repeat all the argument for and against informal disposal, except to reiterate that, from a procedural point of view, a number of aspects are particularly troublesome such as:

- punishment is privatised. It is not the judge (or even the prosecutor) that decides what the outcome of the criminal conduct would be, but the perpetrator and victim! This allows the possibility for unequal treatment and power imbalances, although the solutions generated can indeed be more innovative and community centred;

- there are no clear “rules of the game” and an absence of procedural (fair-trial) guarantees;

- what is to be done regarding the confidentiality of communication between the parties?\textsuperscript{708}

- agreements are usually shrouded in secrecy and there is a lack of openness.

The second aspect which requires clarity is what exactly will be the purpose of the negotiation or mediation? Is it supposed to be complementary to the criminal justice process or supposed to be an alternative to it?\textsuperscript{709} However, systems of informal disposal may not exclude

\textsuperscript{707} With regard to the position in some other European countries, see PJP Tak, Mediation in strafzaken. Een verkennend rechtsvergelijkend onderzoek naar de wettelijke regeling en de toepassing van Mediation in strafzaken in Duitsland, Oostenrijk en Frankrijk, Nijmegen 2011.

\textsuperscript{708} R van Schijndel, De rol en reikwijdte van vertrouwelijkheid in de context van strafrechtelijke bemiddeling, Ars Aequi januari 2010 p. 62.

\textsuperscript{709} M Hildebrandt, Mediation in strafzaken: afdoening buiten recht? Over de meerwaarde van het juridische DD 33 (2003) p. 353 – 374 argues that instead of mediation being a duel with the criminal law, it should form a duet within the criminal law!
redress to the court.\footnote{This is indeed a requirement of the European Convention on Human Rights – that no alternative dispute program or system may exclude redress to the court. See CPM Cleiren, De andere kant van het gelijk; strafgeding of mediation? JV 2001 (3) citing the ECHR.} Cleiren suggests that a measure of regulation is required and that informal methods may be applicable in some specific instances, whereas other situations may indeed require formal criminal justice procedures. No clarity about these issues has yet emerged in the Netherlands.

5. WAHV (and other administrative processes)

Although the WAHV is not a case of disposal by the prosecutor, it can still be regarded as alternative disposal, since the matter only requires judicial attention in instances where the transgressor protests the fine.\footnote{The conduct, however, remains criminal conduct and the duty to caution the transgressor before questioning the transgressor or taking a statement remains. Hof Leeuwarden 10 januari 2013, LoN BY8163.} Since the Act operates in the sphere of administrative law, the General Administrative Law Act [Algemene Wet Bestuursrecht]\footnote{Introduced in its first stage on 1 January 1994.} applies and its principles and procedures have had a big influence on WAHV procedures. The European Court of Human Rights has ruled that an administrative fine, which has a punitive or deterrent effect is deemed to be a criminal charge under Article 6 and must, therefore, comply with the standards set for the protection of the accused. This has influenced the procedures of the WAHV to increasingly resemble the criminal procedure. A difference between the WAHV procedure and a criminal trial is the requirement that the transgressor provides security before the appeal is heard. Although the Hoge Raad has ruled\footnote{HR 26 oktober 1993, NJB-katern 1994, p. 97.} that it is not a transgression of Article 6 of the European Convention, this may be the reason why so few appeals are made to the judge. The biggest difference between WAHV adjudication and a transaction offer is that the co-operation of the transgressor is not required in the WAHV procedure - by doing nothing the transgressor incurs liability, whereas the transaction is only binding once the transgressor has accepted it. The WAHV “penalty” imposed without the co-operation of the offender, and which becomes final unless the offender take steps to oppose it, has inspired the development of the strafbeschikking which also doesn’t require co-operation and becomes final unless protest is lodged.

The fact that not all traffic offences resort under the WAHV can lead to practical difficulty, where some conduct could be adjudicated administratively, whereas other conduct of similar nature requires criminal law methods. The WAHV-guidelines prescribe that a choice be made between the two possible methods. If it is impossible to deal with the matter by either the one or the other (for example driving under the influence of alcohol which also caused a fatal accident), and both methods are to be applied to the conduct, then the proces-verbaal and decision
[beschikking] must contain cross-references to each other. More difficult, however, is the case where the same conduct could qualify for either administrative or criminal law sanction. The choice of method is then left to the administrative organ (police official) to decide – something that may lead to unequal treatment. On the positive side, however, Wiewel indicates that by using the WAHV, almost every constituted transgression [handeling] is reacted to with a sanction. This is in line with the policy aims of the O.M. (and the wishes of the politicians). In my view, the success of the WAHV process also lies in it being effectively administered by a specialised central judicial collection agency [CIJB], who also collects the fines.

Is it still necessary to retain the WAHV process now that a strafbeschikking could be issued for the same transgressions? I am of the opinion that even though there are indeed aspects which are similar, it would not be a good idea to “return” the Mulder conduct to the realm of the criminal law and to deal with it by way of a strafbeschikking. In the first place it has proven itself to be a method whereby huge numbers of offences are dealt with quickly and effectively. Secondly, the offences involved are seen to be morally “neutral” conduct. Why suddenly throw this in with serious crime? Thirdly, the appeal follows a different route (first to the prosecutor and only then to civil judge, not criminal judge). The content of the appeal is also different: it is not a total trial, and appeal to the court is in any event discouraged by the requirement of paying security beforehand. It was a deliberate choice to remove Mulder conduct from the criminal justice realm. Why change something that works well and once again return huge numbers of offences to the (already) congested criminal track?

**Other administrative adjudication**

As we have seen in chapter two, there have been huge developments regarding an extensive system of administrative adjudication by way of the administrative fines as well as the administrative transactie, which is indeed not the focus of this study. A separate (administrative) criminal justice network has resulted. However, in the last few years (with the introduction of an administrative strafbeschikking, now also possible for transgressions of “nuisance”, as well as the fiscal strafbeschikking there has again been bigger emphasis on criminal prosecution (by way of the

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716 Which was admitted by the Minister in the Memorie van Toelichting wet OM-afdoening, TK 2004-2005,30 101, nr3, p.12.
straftbeschikking) at the cost of developments regarding the administrative fine.\textsuperscript{717}

6. Strafbeschikking

The introduction of the straftbeschikking is again a move away from consensual criminal justice processes – and also represents a harder line taken against crime in general. With sepot, transaction, informal and WAHV processes, prosecution is averted, whereas with the application of the straftbeschikking-method a whole lot more delinquent behaviour will result in prosecution, albeit in the easier, quicker form of a straftbeschikking. In that sense it can indeed not be regarded as just a cosmetic exercise of aligning the various alternative disposal methods, bringing it all under the umbrella of the Wetboek van Strafvordering, and streamlining, and speeding up, the system a little. Crijns is quite correct to call it a significant reform that goes to the core of the justice system.\textsuperscript{718} The advantage brought by the straftbeschikking is that the O.M. can now plan better and that there are shorter time-frames within which steps can/must be taken.\textsuperscript{719} If no opposition is lodged within 14 days, execution may start. Secondly the extended sanctions (including aanwijzingen) allows for a more nuanced and responsive reaction to a particular case, whereas the easy-to-execute fine will be used extensively for standard, uncomplicated and high-volume cases. Similar to the South African plea-and sentence-agreement, the accused knows what he’s in for. It takes away some of the uncertainty of a judicial sentence. The process is quick, there is no (potentially damaging) public trial and the accused still gets his 20% discount on sentence!

Constitutional and Treaty requirements

The question can indeed be asked whether the straftbeschikking complies with the Constitution, and more specifically art 113, eerste lid. In terms of this section the courts, not the prosecution service, is tasked with the adjudication of criminal offences [berechting van strafbare feiten]. Mevis, however, states that the legislator is undermining this by declaring a lot of conduct not to be strafbare feiten anymore, but gedragingen etc. which are dealt with administratively.\textsuperscript{720} Rechtspreken is also the function of the

\textsuperscript{717} WODC-onderzoek Bestuurlijke straftbeschikking en bestuurlijke boete overlast (2012). Between 1 Jan 2009 and 11 Feb 2012 a total of 51.290 administrative straftbeschikkingen were issued and fines imposed by local authorities for nuisance matters ranging from dogs not on leash, drinking in public, incorrect disposal of refuse etc. See also J Crijns, Efficiëntie in het kwadraat: over de lotgevallen van de kleine strafzaak na invoering van de straftbeschikking en het verlofstelsels, Proces 2010 (89) p. 6.

\textsuperscript{718} JJ Crijns, Het wetsvoorstel OM-afdoening: een wolf in schaapskledij, Sancties, afl 4, 2004, p. 225.

\textsuperscript{719} AR Hartman, Buitengerechtelijk strafrecht – straftbeschikking door Openbaar Ministerie, Advocatenblad 15, 10 november 2006, p. 740.

\textsuperscript{720} PAM Mevis, Constitutioneel strafrecht (oratie Rotterdam) Deventer: Gouda Quint, 1998, p. 31.
courts. So what is it that the prosecutor is doing when issuing a *strafbeschikking*? I think the fundamental question is how this section is interpreted. Administrative bodies already have the authority to impose punitive sanctions [*bestraffende sancties*] but this is not regarded as “**berechting**” as meant in the constitution. Crijns argues that the fact that administrative bodies can “punish” is at most an explanation and not a justification to also expand this possibility to punish to the prosecuting authority.\(^{721}\)

The task of the courts is to adjudicate crimes, and not the more limited “imposing of penalties”. Adjudication of cases does not exclude other methods of bringing a matter to an end. If one were to interpret art 113 in a narrow sense, then it in fact means that no other method of dealing with a criminal case is valid if it does not entail presenting it for adjudication to a judge.\(^{722}\) Disposal by the prosecutor cannot be equated to adjudication by the court and is thus not *rechtspreken*. The issuing of a *strafbeschikking* cannot be equated with a judicial function since it in effect leads, unless protested, to a situation where no adjudication [*berechting*] takes place. The argument here is that, once a judge has adjudicated a matter, he/she becomes *functus officio* regarding that matter. This is not the case where the O.M. has issued a *strafbeschikking*. When the *strafbeschikking* is opposed, or its execution is unsuccessful, the prosecutor gets another chance to decide what to do now. By opposing the *strafbeschikking* the accused also withdraws from its consequence, but a suspect cannot withdraw from a judgment by the court.\(^{723}\) Another argument is that lid 3 (of the same art 113) specifies that a sentence of incarceration [*vrijheidsontneming*] may only be imposed by the court [*rechterlijke macht*]. The implication is thus that other sentences may indeed be imposed by others who do not form part of the judiciary.\(^{724}\)

There is a similar dilemma/question whether a *strafbeschikking* complies with the European Convention on Human Rights. Although the European Court for Human Rights has declared administrative fines not to be conflicting section 6 of the Convention (in the Öztürk and Bendenoun cases\(^ {725}\)) for as long as access to the courts is guaranteed, Crijns\(^ {726}\) argues that the *strafbeschikking* is indeed very different from the administrative fine in that the *strafbeschikking* is firstly regarded as an “act of prosecution” and secondly entails the determination of guilt of the accused. A *strafbeschikking* is not only limited to the payment of a fine, but can also


\(^{724}\) It also depends on one’s understanding of the term “vrijheidsontneming”. Is your freedom also impaired when you must do community service, or when your driver’s licence is withdrawn?


include other far-reaching penalties. The fundamental difference is that the one is a (voluntary) agreement to avoid prosecution, and the other amounts to one-sided imposition of punishment which is recorded as a previous conviction. The counter-argument is that nothing prevents the suspect in case of a (conditional waiver, transaction or) strafbeschikking to insist on the matter being brought before a judge. The argument is thus that, by accepting (in case of the first two), or not lodging opposition (in case of a strafbeschikking), the accused is waiving his right to insist on the protection of Sec 6.

**Criticism of the Strafbeschikking**

There are quite a number of controversial aspects to the strafbeschikking. The classic criminal law has at its heart that no penalty may be imposed without the guilt of the accused having been determined. This guilt determination has always been reserved for an independent judge during a public process following pre-determined rules of procedure and the presentation of evidence, whilst also guaranteeing due-process rights to the accused. Dutch lawyers have always stated that a critical function of the criminal (investigation and) trial has been the search for material truth. Attached to that is the onmiddelijkheidsbeginsel, the presumption of innocence etc. All of this is out of the window now. Determining guilt can now be done one-sidedly by the prosecuting authority. It is not a public process. It’s not certain what evidentiary guarantees exist and no right audi alteram partem is constantly applied. The (so determined) guilt and penalty imposed, become final unless the accused opposes it within a very short time-frame. Ironically, in the Memorie van toelichting introducing the strafbeschikking, the minister argues that at present (before the strafbeschikking) many cases are dealt with by the judge in the absence of the accused [bij verstek] which is disappointing mainly because only one side is being heard – “zaak slechts van één kant wordt belicht”. The minister finds this unsatisfactory, but then continues to sing the praises of a system that is even more one-sided and where the judge (usually) doesn’t play a role at all! In the words of Luna and Wade – with a strafbeschikking the prosecutor is not the “judge before the judge” anymore, but the “sole judge of the case”.

The second point of contention relates to the unhealthy accumulation/concentration of power with the O.M.: various (criminal

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justice) tasks and responsibilities are given to the same functionary. The O.M. determines prosecution policy, basically deciding how they are going to react to certain offences. The O.M. then also implements this policy. They lead the investigation into crime and decide themselves when sufficient evidence is gathered. Consequently they prosecute the case by issuing a strafbeschikking wherein they determine the sentence themselves. They also take the steps to execute the sentence. The already powerful position of the O.M. in the justice system is indeed further intensified. Especially in the prosecution phase the Dutch prosecutor must act “magistratelijk” whilst at other times he is regarded as a public official. This dilemma of centralizing of power also plays out in instances of administrative strafbeschikking. The official responsible for enforcement of regulations is suddenly now placed in a position where he must make an independent, impartial magistratelijke determination of guilt.\textsuperscript{732} The O.M., at least, can be regarded as a “justitiële” official. Can the same be said of an administrative functionary in these circumstances? And are there sufficient checks and balances?\textsuperscript{733}

My third concern has to do with confusion. It has been argued that many citizens already perceive a transaction (or administrative fine) as a penalty, so this extension (into the strafbeschikking) should not be regarded as too far-reaching. The distinction between crimes [strafbare feiten] and administrative transgressions [bestuursrechtelijke feiten] isn’t, however, always clear. In fact – the very same conduct can be both crime as well as administrative transgression (eg. fraud with regard to tax etc). Hartmann argues that, where in addition to the new strafbeschikking, various administrative fine processes as well as the WAHV process may still remain, make it confusing, not only for the enforcers of the law, but most certainly for citizens.\textsuperscript{734} How are they supposed to know or appreciate the difference between a strafbeschikking and an administrative beschikking? One is equal to a conviction by court, the other not. Some regulations talk of a “gedraging”, others of an “overtreding”. If opposed, the strafbeschikking leads to a complete trial before a criminal judge, including the leading of evidence, determination of guilt and questions regarding an appropriate sentence. If a (administrative) beschikking is opposed it is dealt with by a civil judge who only restricts his adjudication to the correctness, or not, of the decision. In case of a strafbeschikking the execution of the sentence is suspended when it is being opposed, whereas this isn’t the case with an administrative beschikking. Different rules of evidence and procedure are applied.\textsuperscript{735} This is confusing indeed. But to add

\textsuperscript{732} N Kwakman, Twee nieuwe sanctiestelsels ter bestrijding van overlast in het openbare ruimte op lokaal niveau, \textit{NJB} 09/01/2009, p. 9 who finds that “het beginsel van de scheiding der machten hiermee wel erg gemakkelijk overboord wordt gezet”.


\textsuperscript{734} AR Hartmann, Strafbeschikking en bestuurlijke boete: wildgroei in de handhaving. \textit{Justitiële verkenningen}, jrg. 31, nr. 6 2005, p. 94

\textsuperscript{735} CLGFH Alberts, De Gemeentestem, De Wet OM-afdoening. Nagel aan de kist van de bestuurlijke boete? Gst. 2008, 70 Kluwer online research
even more to the confusion: the *wet O.M.-afdoening* further provides that the authority to impose *strafbeschikkingen* is extended to (certain) administrative bodies. So even they will be put before the decision whether to apply the administrative fine, or the *strafbeschikking* procedure. Hartmann\textsuperscript{736} goes so far as to argue that this confusion could possibly be construed not only as detrimental to the legitimacy of the law, but also as an unlawful obstruction of the right to access to court in terms of Sec 6 of the European Convention on Human Rights.

In the fourth place, it has been said that the *strafbeschikking* will not replace the practice of administrative penalties or fines. Administrative and criminal procedures do indeed have more in common than before, but there are still some distinctions. The administrative process will be utilised when it involves the transgression of an ethically-neutral norm and the facts are easily proven. The criminal process will normally follow the transgression of more serious norms or where there is a need for more demanding punishment or wider-ranging methods of investigation. This, however, makes no sense now that the *strafbeschikking* can be issued (by the local authority) for something as trivial as not having your dog on a leash. The distinction between criminal conduct, and “morally-neutral” conduct is also out the window.

The next discomfort I have, has to do with impartiality.\textsuperscript{737} The O.M. has always been an autonomous public body who took great pride in its independence. “Magistratelijk” was the term often used. The O.M. is fulfilling a quasi-judicial function whilst remaining completely objective in the pursuit of the truth.\textsuperscript{738} Surely they should be trusted with such a prominent function? But we know that by far the majority of *strafbeschikkingen* will not be issued by the officier [prosecutor]. It will be issued by administrative assistants working in the office of the prosecutor, by the police, and the local authority, and the Receiver of Revenue. The receiver is most certainly not impartial, but a process-party to the tax dispute.\textsuperscript{739} Since January 2009 local authorities can also issue an administrative *strafbeschikking* (nuisance). This is used mostly for transgressions such as dogs not on a leash, consuming alcohol in public, urinating in the street, erroneous presentation of refuse etc. It has proven to be hugely popular.\textsuperscript{740} Is it maybe because the local authority receives

\textsuperscript{736} AR Hartmann, Strafbeschikking en bestuurlijke boete: wildgroei in de handhaving. *Justitiële verkenningen*, jrg. 31, nr. 6 2005, p. 94


\textsuperscript{739} P Fortuin, De Strafbeschikking, *Nederlands Tijdschrift voor Fiscaal Recht*, 2011-44.

\textsuperscript{740} In the period 1/1/2009 till 11/2/2012 a total of 51,290 such strafbeschikkingen were presented to the CJIB. WODC onderzoek Bestuurlijke strafbeschikking en bestuurlijke boete overlast, 2012-07-11T11:51:10. Also important are the Richtlijn voor strafvordering bestuurlijke strafbeschikking overlastfeiten as well as Aanwijzing bestuurlijke strafbeschikking overlastfeiten (2010A003). See also Besluit van 5 april 2012, houdende wijzigings van het Besluit OM-afdoening
financial compensation for *processen-verbaal* which are correctly presented to the CIJB? Hardly grounds for the existence of impartiality!

In the sixth place I have concerns regarding the quality of the justice meted out. There is nothing wrong with a quick resolve of criminal cases, as long as there are sufficient safeguards against abuse and/or mistakes. One can imagine that, as expectations on the O.M. increase to dispose of as many matters as possible out-of-court, the quality of prosecution may be put under pressure. More cases mean less time spent per case. Less time may be spent on investigations, and cases that may have required a trial may slip through as *strafbeschikking*. And one can imagine that a lot of the run-of-the-mill *strafbeschikkingen* will actually be issued not by the prosecutor him/herself but by other administrative functionaries at the O.M. This increases the risk of mistakes. There are also those who argue that the O.M. has become so concerned with efficiency and control functions that it has lost its earlier focus on justice and its unique position with regard to the judge. The new accelerated assessment and punishment scheme [ZSM] discussed at the end of chapter 2 illustrates the danger that increased speed may actually lead to less accuracy and less attention for the protection of the process rights of the suspect as well as the interests of victims. Since it is predicted that the bulk of ZSM-cases will be disposed of by way of a *strafbeschikking* which is issued on the spot, questions regarding the supposed “*materiële waarheidsvinding*” can rightly be asked. The determination of a *strafbeschikking* is a decision that should not be taken lightly. It is, after all, a determination of guilt which (unless opposed), has the same weight of a conviction and sentence by court. How often does it not happen that the judge disagrees with the prosecutor’s assessment of the “truth”? How often does the court decline to follow the sentence proposed/requested by the prosecutor? These are the type of difficulties one encounters when you equate a *strafbeschikking* with a judgment and sentence by court. Since there is no external (judicial) control, the internal control will have to be exemplary.

Back to the compliance with Human Rights requirements: A number of writers have expressed opinions that the once-sided determination of the guilt of a person by the prosecuting authority will not fall foul of the European Convention on Human Rights because the path to the judge remains available (see discussion earlier in this chapter). Is this realistic? It requires insight into the nature of the document you find in

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741 T Spronken, The Dutch Exception *NJB* 27 oct 2012.
742 See debate between Schalken and de Wit *NJB* 2 + 13 2006).
743 NJM Kwakman, Snelrecht en de ZSM-aanpak, *DD* 2012/17. See also Factsheet ZSM at www.om.nl/onderwerpen/zsm/158586/factsheet-zsm/
the mail alleging contravention of the criminal law (police or OM-
strafbeschikking) or the traffic laws (WAHV notice), or the tax law
(fiscalestrafbeschikking) or a municipal by-law (overlast strafbeschikking)
etc. Going to court costs money and requires time-off from work. In
addition, when the strafbeschikking is opposed, it can lead to a more
severe penalty being imposed by the court after a complete criminal trial
has taken place. It is not so much that the fine is increased, but that the
discount which the offender would have received for not opposing the
strafbeschikking falls away. The court is, however, not bound by the
penalty request of the prosecutor. “De rechter heeft zijn eigen normen om
de strafmaat te bepalen”.746 Indeed various obstacles in the way of “going
to the judge”.

My final concern deals with the crucial question: Where do you draw the
line? One of the reasons forwarded to justify the “extra-ordinary” procedure
of giving sentencing powers to the O.M. is the “lack of judicial capacity”.747
If capacity were put under even further pressure, would therenot be the
temptation to extend the application of a strafbeschikking to even more
serious offences, warranting more extensive far reaching sentences? Or to
extend the discretion to issue a strafbeschikking to more and more non-
judicial bodies/institutions?748 When is the bridge too far? This is a crucial
question that can hardly be left unanswered. In the context of section 6
ECHR the (European) Court has, more than once, indicated that
administrative penalties imposed by administrative bodies do not
corravene the convention as long as access to independant judicial
adjudication (a trial in court) remains open for the transgressor. The right
to a judicial adjudication does not preclude the fact that there may be
reasonable and justifiable requirements imposed before such right can be
exercised, for example the fact that the transgressor must take the
initiative to oppose the penalty, or to provide security in advance. In this
regard the strafbeschikking will not be in conflict with the Convention.
However, the strafbeschikking is indeed different from mere administrative
penalties in that it amounts to (criminal) prosecution and results in a
(deamed) conviction. Section 6(3)(b) of the Convention also prescribes that
the accused be allowed time and opportunity to prepare his/her defence. Is
the two weeks provided in a strafbeschikking for opposition sufficient and
to what extent is the accused allowed access to the documentation involved?

Strafbeschikking here to stay?

746 DM Drok, Voldoet de strafbeschikking, zoals opgenomen in de Wet OM-afdoening, aan art. 6
747 Kamerstukken II 2004/05 29 849 nr. 3, p. 1.
748 PAM Mevis, Strafbeschikking OM, WAHV en “kleine ergernissen, DD 24, 2004, AR Hartmann,
De strafbeschikking: naar nieuwe grenzen van buitengerechtelijke afdoening binnen het
strafrecht, Tijdschrift voor sanctierecht & compliance. 2 mei 2012, p. 64.
Regardless of the criticism, the strafbeschikking seems to be well on its way to becoming ingrained in the Netherlands. The application thereof is made possible by the extensive infrastructure and processes already used for the transactie. It seems to be effectively implemented and enforced. The Government (at least) is satisfied that the strafbeschikking is not in conflict with the provisions of the European Convention on Human Rights (because the offender retains the right to a complete trial before an independent judge if he so wishes), nor with the Dutch constitution (since a sentence of incarceration is not imposed and there is no berechting by the O.M.).\(^{749}\) The method does, from the view of a common law observer, provide an unusual accumulation of power upon the O.M., something that was the initial concern of Miller right in the beginning. What the strafbeschikking does achieve is to require a more active and alert attitude of the offender, failing which they may end up guilty.\(^{750}\)

However, it is very doubtful if a strafbeschikking can be implemented in South Africa for reasons discussed later in this chapter.

7. Control over prosecutorial discretion

Artikel 12 Sv beklag

The first control mechanism resides in the right of victims to challenge prosecution decisions affecting their cases in terms of article 12Sv. This method applies to all the alternative disposal methods discussed earlier, as well as to decisions to prosecute by way of strafbeschikking instead of by way of the traditional trial. Schalken argues that it should indeed be possible for an aggrieved person to complain directly to the O.M. first before having to go to the length of an Appeal Court application. Such procedure could lead to a much quicker, and less formal, determination of the matter. Only when the O.M. still sticks with the original decision (which was probably taken by the police or an administrative official within the O.M.) will the court process have to be followed.\(^{751}\) It is also argued that a victim who is more closely involved with the prosecution decision of the O.M. is less likely to complain at a later stage.\(^{752}\) The process acknowledges the legitimate interest that a victim has with the decision about the method of criminal prosecution, but the decision remains that of the prosecutor. The prosecution of criminal conduct remains a task within the public realm for which the State should remain

\(^{749}\) DM Drok, Voldoet de strafbeschikking, zoals opgenomen in de Wet OM-afdoening, aan art. 6 EVRM? Tijdschrift voor Formeel Belastingrecht, nr 4 juni 2008. Also Kamerstukken II 2004/05 29 849 nr 7, p..3.

\(^{750}\) J Crijns, Efficiëntie in het kwadraat: over de lotgevallen van de kleine strafzaak na invoering van de strafbeschikking en het verlofstelsels, Proces 2010 (89) p. 6.

\(^{751}\) TM Schalken, De beklagprocedure van artikel 12 Sv en de onderkant van het handhavingsbeleid, Strafblad 2010, p. 173.

The fact that the success rate of complaints is so low indicates that the O.M. is getting it right in the first place which may have to do with the right of victims to give inputs and to be present at the so-called OM-zitting. But the suggestion of Schalken that victims should be afforded the right to make representations to the prosecuting authority first and only be allowed to approach the Court of Appeal if they are still unhappy, is sound.

The section 12 Sv procedure is only applicable where there is a complainant, something which is not necessarily always the case. Where there is no complainant who has a direct interest in the prosecution of the accused (so-called “victim-less” offences), the judicial control over prosecution decisions falls away.

**Political and hierarchical control**

Big changes have taken place in the last few decades regarding the autonomous position the O.M. occupied earlier. From the O.M. being an autonomous ‘magistratelijk’ body with prosecution monopoly, we have seen that the O.M. today is regarded as a functionally autonomous managerial body that shares prosecution powers with administrative bodies, and is highly responsive to political control. Simmelink & Van Geloven indicate that the specific positioning of the O.M. in the system has the result that it operates at arm’s-length from the political authority and with a “judicial attitude”. Wiewel argues that, in a permitting system, control should be both democratic as well as judicial and the exercise of discretion (by the O.M.) should not be removed from the judicial control. There seems to be sufficient checks and balances regarding ministerial interference with prosecuting decisions. However, one cannot ignore the fact that the prosecuting authority has the duty to enforce the laws made by the legislature. So political “meddling” with the work of the O.M. will always be a reality.

**Plea bargaining in the Netherlands?**

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753 MS Groenhuijsen & G Knigge, Het Vooronderzoek in Strafzaken, onderzoekproject strafvordering 2001, tweede interimrapport, Gouda Quint, Deventer, 2001, p. 82-83. See also the earlier discussion of the Art 12 procedure in SJAM van Gend & GJ Visser (eds), Artikel 12 Sv, Prinsengrachtreeks 2004/2 Ars Acqui Libri.

754 In 2011 the court had to deal with 2400 complaints of which 11% were found to be valid, meaning that in only 240 cases were the decision of the prosecutor overturned.


From time to time the question is asked if the Anglo-American type negotiated settlement between the state and the accused could possibly find application in the Dutch legal system. It is then argued that such concept will not fit in the procedural tradition where the presiding officer plays an active role in truth-finding. However, with the application of a strafbeschikking the judge plays no role whatsoever. In the case of a (formal) plea-and-sentence agreement the judge must accept the agreement (in some jurisdictions), and must be convinced of the guilt of the accused. With the strafbeschikking there is no judge involved and the prosecutor determines the guilt. The second argument is that it is not tolerable that an accused should get a reduction in sentence as reward for confessing to the crime. The “bargain” argument. The sentence of a strafbeschikking is, however, usually 20% less than what the prosecutor will request and the court will impose, should the matter proceed to trial. So the accused, by not opposing the strafbeschikking, does indeed receive a ‘bargain’. Recently greater status has being given to the accused as (equal) “volwaardige” process party whose rights must be respected and it is indeed now possible that the O.M. can enter into an agreement (overeenkomst) with state witnesses (kroongetuige).

Does the strafbeschikking really rid the justice system of the (apparent) objectionable “negotiations”? It is not far-fetched to suggest that defence council or accused themselves may still attempt to sway the prosecutor into offering more lenient penalties when a decision is taken to dispose of a matter by way of a strafbeschikking. There is nothing in the act that prohibits the prosecutor from having a discussion/consultation with the accused prior to issuing a strafbeschikking, and in some instances (for suspension of a license or imposition of a community sentence order) it is even compulsory. Some of the advantages are the same: the accused is spared a reputation-damaging public trial. A huge number a cases are disposed without trial – more out of court than in. A prosecutor may offer a strafbeschikking to an accused on a lesser offence in exchange for information about other cases or accused. Nijboer contests that, even if the Minister doesn’t believe it, there are from a legal comparative angle, functional equivalents between the O.M.-disposal and plea-bargaining.

The recent research done by Peters into negotiated sentences

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759 An accused is also now entitled to legal representation earlier in the process (also at the so-called politieverhoor). Unconstitutionally obtained evidence may now be excluded etc.

760 Art. 44a, art. 226g Sv.

[vonnisafspraken] in Italy, France and Germany, confirms that some form of plea-bargaining is indeed not so strange or far-fetched “case-ending” mechanism, even in inquisitorial European systems.\textsuperscript{762}

5.3 Findings - The Netherlands

The Netherlands is an essentially tolerant and stable society. This is to a large part also reflected in their criminal justice system. There is (or at least until the more recent greater emphasis on a tougher approach to crime, was) considerable emphasis on pre-trial liberty, on short (prison) sentences and the preferred use of non-custodial measures. For various reasons (discussed in chapter 2) preference was also given to various alternative disposal methods initiated by the prosecution. The public prosecutor in the Netherlands occupies a considerably more powerful and influential role than prosecutors in many other countries.\textsuperscript{763} The prosecutorial disposal takes place within a structured framework involving known guidelines, judicial control\textsuperscript{764} and a proper system of reviewing the exercise of such discretion.\textsuperscript{765} Through the development of prosecution policy, frameworks and indication lists, the individual discretion and powers of decision-making of individual prosecutors have declined, but this has at the same time led to the development of the O.M. as professional controller of the criminal justice system. The prosecuting authority has transformed from a purely prosecuting organ to a “beleidvoerend” organ. Prosecution policy also makes it possible for the O.M. to decide which offences can be prosecuted with the least trouble and the highest deterrence value. The rights of victims of crime are also protected even when the prosecutor applies an alternative disposal method in that they have the right to be informed of prosecution decisions and also to challenge these in court.

It is evident from the history of the Dutch prosecution policy is that a lot of thought and research has gone into it. It relies on proper and reliable statistics and information and entails very little guesswork. The O.M. knows exactly what it has (in terms of capacity etc.), what it is able to achieve – in terms of man-hours, time spent in trials, time spent in preparation etc. In the end it seems as if Dutch society accepts that the prosecution service can be trusted to do what is best in the public interest. Some commentators suggest that, to vest the same powers (of Dutch prosecutors) in prosecutors not brought up or trained within the career

\textsuperscript{762} LJJ Peters, Onderhandelen op het continent: vonnisafspraken in strafrecht [1] DD 2013 (2).
\textsuperscript{763} M Tonry & C Bijleveld, Crime, Criminal Justice, and Criminology in the Netherlands, in M Tonry & C Bijleveld (eds), Crime and Justice in the Netherlands, Univ of Chicago Press, 2007 p. 25.
\textsuperscript{764} Although the judicial control usually only applies where either the accused, or the sec 12 complainant challenges the decision of the prosecutor.
\textsuperscript{765} LH Leigh & JE Hall Williams, The management of prosecution process in Denmark, Sweden and the Netherlands, James Hall, 1981, p. 77.
judiciary tradition would be inviting trouble. Where there has been a steady move away from criminal prosecution in the past, the availability of the (form of prosecution by way of) strafbeschikking, together with political changes, have resulted in renewed confidence in criminal prosecution. The issue is no longer a matter of whether to prosecute, but rather whether to prosecute in the traditional manner, or by way of a strafbeschikking. Together with Corstens and others I would plead, however, that some consensual elements be retained in the criminal justice system.

5.4 Evaluation of the various alternative disposal methods in South Africa

1. Withdrawal of charge/ stopping of prosecution

A prosecutor can/must withdraw a charge if there is insufficient evidence to support a conviction, but unlike the Dutch sepot there is no requirement that the prosecutor must indicate the reason for the withdrawal, and neither is it registered anywhere but on the (police) case-docket. There is also no duty on the prosecutor to inform victims or to give any explanation for the decision. If the withdrawal is effected before the accused is required to plead to the charge, he is not entitled to a judicial acquittal, and new/further charges may be reintroduced if circumstances change later – eg. where further evidence is gathered or a reluctant or missing witness is found or convinced to testify etc. Only when the prosecuting authority gives an explicit undertaking that no further prosecution will follow, can one presume that the prosecuting authority will be held to such undertaking.

With regard to the policy waiver, the South African prosecutor is, in principle, in the same position as his Dutch counterpart with the sepot, although it is not called a policy waiver but is referred to as “discretionary non-prosecution”. With regard to the discretion of the prosecutor, the first question is whether prosecutors are really exercising it, and do they get adequate guidance in doing so? Middleton argues that, although we

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have, in principle, the concept that prosecution may be waived if it is in the general interest to do so, at least in the lower courts (magistrate’s courts) where the gross of prosecutions takes place, a decision not to prosecute where there is a *prima facie* case is very much the exception. Where the prosecutor is left with the option to prosecute, or not to prosecute, without many other choices, Middleton argues that he will choose the easier way, namely to prosecute and let the court decide the matter. If he decides not to prosecute where there is the reasonable prospect of a conviction, there is often the possibility of a complaint to his superiors or the complainant pursuing a private prosecution. This argument of Middleton is corroborated by Hugo who, already in 1971, indicated that prosecutors should be careful not to allow their discretion, a valuable asset, to lapse by default.

Discretionary non-prosecution is not only authorised by legislation (under the heading “withdrawal/stopping” of prosecution), but also in the prosecution policy determined by the NDPP. Whatever it is called, it is in fact nothing else than waiver for reasons related to public interest. Also – as previously indicated – (policy) waiver/withdrawal is normally without formal conditions attached. There is, however, nothing preventing conditions from being attached. It is also not quite clear what the effect of a (policy) withdrawal will be on the right to institute the same charges at a later stage, or upon the right of a person with a direct interest in the matter to institute private prosecution on the basis of the non-prosecution by the prosecuting authority.

It is my opinion that the situation in South Africa is not satisfactory regarding withdrawal/stopping of prosecution. At present there is no policy regarding, or consistent practice of, conditional withdrawals. There is insufficient guidance regarding discretionary non-prosecution. There is also uncertainty whether further charges may be brought at a later stage once a case has been withdrawn. The position of victims, and specifically their right to challenge discretionary non-prosecution, must also be clarified. No central record is also kept of decisions to withdraw charges.

2 **Admission of guilt fines in terms of Section 57**

An accused may accept this method of finalising the charge, not because he considers himself to be guilty, but because of the petty nature of the charge and the worry, inconvenience and expense attached to attending the trial. However, an admission of guilt is for criminal record purposes regarded as a previous conviction – therefore not simply an administrative

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771 90% of criminal prosecutions are conducted in the district and regional (magistrate’s) courts. L Fernandez, Profile of a vague figure: the South African public prosecutor, *SALJ* 1993 Vol. 10:3, p. 117.

772 JH Hugo, The prosecutor: Cinderella in a black gown, *Codicillus* 1971 12(2) , p.27.

773 N.G.J. Trading Stores (Pty) Ltd. v Guerreiro 1974 (1) SA 51 (O).
process. *S v Ratsoane*\(^{774}\) raises a pertinent issue: the procedure in section 57 does not require verification of the identity of the person paying the fine. It could thus happen that someone else pays the fine without the offender knowing about it. But the effect of the process is that the admission equates a conviction with resulting criminal record! Previously, when the maximum fine for an admission of guilt was very low, Cowling\(^{775}\) could rightly argue that this procedure only applied in respect of relatively trivial offences. Therefore a system was required to allow that the accused could pay the fine and thus have the matter finalized and removed from the system as quickly and effortlessly as possible. The increase in the amount involved in the fine (from R5 000 to R 10 000), no longer limits it to “relatively trivial offences” and the fact remains that the process, as it stands at this moment, leads to a criminal record. When the fine was so low, this method of alternative disposal was of very limited application. The increase of the maximum amount has largely increased its usefulness. Since the whole process is in any event monitored by a judicial officer who must be convinced, albeit very superficially, that the outcome is in accordance with justice,\(^{776}\) the application of this method could be encouraged. What is creating a practical obstruction in the extended application of this method of alternative disposal is that not all offences carry a minimum/maximum or even recommended sentence, so there is seldom any indication, except experience, of what probable sentence the court will consider for a particular offence. It is for this reason that it is often believed that the sec 57 procedure should be restricted to statutory crimes where the legislator has linked the offence to a maximum sentence.

A shortcoming, in my opinion is the fact that the only penalty that may be imposed is a monetary fine. There is also no comprehensive overview of expected/recommended sentences for many offences, which makes it incredibly difficult for the inexperienced prosecutor to decide whether this option can be applied.\(^{777}\) There is also no redress to the courts for a victim of an offence who wishes to see the matter be dealt with by trial instead of through the payment of a fine without appearing in court. Private prosecution is not possible since there is indeed a prosecution which results

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\(^{774}\) *S v Ratsoane* 2003 (1) SACR 644 (T).

\(^{775}\) M Cowling, Recent cases: Criminal Procedure, SACJ (2004), p. 108.

\(^{776}\) Not only must the magistrate check that the correct procedure was followed, that the fine is fair and doesn’t exceed the prescribed limits, but the High Court, on review, may also intervene if it is shown that the procedure contains serious irregularities, has led to a miscarriage of justice, the admission of guilt fine has been paid under duress or as a result of some mistaken belief about the nature of the payment. Only if the court is satisfied that the admission of guilt was probably mistaken or incorrect, and the accused has a satisfactory explanation as to how the mistaken or erroneous admission of guilt came about, will the court intervene to set such admission aside. The accused must also have a reasonable or arguable defence against the charge. *S v Cedras* 1992(2) SACR 530 (C). Also confirmed in *S v Esposito* [2006] ZAWCHC 52.

\(^{777}\) With regard to the sentence of correctional supervision, Terblanche indicates that there is no complete list of crimes for which it can be applied, and also no list of crimes for which it should not be imposed. The prosecutor who must decide whether an admission of guilt fine can be considered is left with the same dilemma. SS Terblanche, A Guide to Sentencing in South Africa, 2\(^{nd}\) edition 2007, p.291.
in a (deemed) conviction. The only possible avenue of complaint will be within the hierarchal structures of the prosecuting authority.

3. **Juvenile justice**

The new dispensation regarding children in trouble with the law took a long time to develop. Maybe this was a good thing, because it allowed time for debate, research, trial-projects, consultation etc. What aspects of the new Child Justice Act can be informative for other developments regarding alternative disposal, even involving adults? For a start we find a changing attitude – namely that prosecution is not always necessary, and that diversion of prosecution can be an acceptable alternative. The new legislative framework regarding child diversion is also sufficiently supported with detailed prosecution guidelines and the development of minimum standards. National instructions have been developed to assist the police in child justice cases.\(^778\) The Act furthermore encourages innovation and community involvement in dealing with criminal cases, creates a register for recording diversion cases and introduces mandatory (early) assessment which must inform further prosecution decisions. Once a matter has been successfully diverted, private prosecution is no longer possible. The long birth process of the Act is also an example of healthy collaboration, not only between government departments, but also with civil society, service providers, academics etc. This has resulted in a common understanding about aims and objects, the sharing of resources and increased community involvement. A process has been developed for accreditation of diversion services as well as service providers. The child offender is only required to “acknowledge” responsibility without a formal admission of guilt. The process (in and out of court) provides for the view of the victim of the offence to be taken into consideration.

And finally, the message is clear that crime is not simply tolerated but offences are indeed met with a judicial response and not an unconditional withdrawal. And all this is achieved whilst still maintaining the Constitutional rights of the offender.

4. **Plea-and sentence-agreements**

Informal plea-bargaining has been used extensively in South Africa for many years. Since 2001 it has also been possible to conclude formal, written plea-and-sentence agreements. Plea-bargaining has always been controversial. The foremost criticism is that it subverts the values of the justice system, circumvents the checks and balances in the system and is not aimed at seeking the truth.\(^779\) A significant part of the criticism seems

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\(^{778}\) National Instruction 2 of 2010 of the Minister of Police re procedures to be followed in child justice cases. GG 33508 of 2 Sept 2010).

\(^{779}\) JMT Labuschagne, Konsensuele strafregpleging: Opmerkinge oor die spanningsveld tussen regsstaatlikheid en doelmatigheid SACJ 1995, p. 158. See also the various articles dealing with
to be against the “bargain” aspect inherent to the procedure. Where an accused pleads guilty in normal circumstances (in the absence of an agreement), his decision is interpreted as a fair reflection of his own preference unaltered by the state’s ability to influence the result of his choice. The moment there is the possibility of a “bargain” being had, the question of the appropriateness or not of any influence upon the accused to follow this particular path, comes to the fore. The South African Law Commission, however, has come to the conclusion that plea negotiations are not inherently discreditable since the exercise of a discretion by the director of prosecutions is an integral part of the criminal justice system, and plea negotiations is a manifestation of such exercise of discretion. Neither does it intrude on any constitutional principle.

This procedure has proven to be highly effective in reducing the time spent on trials. The concern that there is no emphasis on uncovering the truth is only partly true. In the South African version of plea-bargaining, the presiding officer must be convinced about the guilt of the accused. In addition to the confession, the court may also question the accused in order to be positive about guilt. This takes place under judicial control in open court, so there is no lack of “openbaarheid”. The judicial officer must agree with the proposed sentence and can reject it if it is not appropriate to the seriousness of the offence. The agreement is read out in court as part of the plea of the accused. However, plea-and-sentence agreements are usually only concluded immediately before the trial commences – therefore at a very late stage of the proceedings. Would it not be a more effective use of resources to allow such agreements at a much earlier stage, even at the 1st appearance? Another point of concern is that it may in some cases still be possible for an aggrieved person to continue with a private prosecution against co-accused or others who were not included in the agreement with the State.

5. Plea-bargaining and diversion of prosecution


781 Incidentally, the judge in the (fairly new) plea-negotiations in Germany actually takes part in the negotiations (and may even initiate it). JAW Lensing, Vonnisafspraken in strafzaken: Een revolutionnaire ontwikkeling in het Duitse strafprocesrecht (I) Trema nr 7 2008, p 306 – 316.

782 This is similar to what Peters calls “een beperkte, of gerelativeerde rechterlijke waarheidsvinding” which applies to plea-agreements in Italy, France and Germany, LJJ Peters, Onderhandelen op het continent: vonnisafspraken in strafzaken [1] DD 2013/2.
The acceptance, and formal recognition, of the practice of plea-bargaining represents a recognition by the government of a system of criminal justice where economic efficiency is one of the priorities. The court in *S v Solomons*\(^{783}\) observed as follows:

“The plea bargaining regime is a fundamental departure from the adversarial system of our criminal law. On the one hand, the State agrees to compound the offence and, on the other hand, the accused waives several of his or her constitutional rights afforded to him or her in a trial.”

In the case of *S v Esterhuizen & others*\(^{784}\) the court has said: (with reference to formal plea-and-sentence agreements)

“… the Legislature has envisaged that the bargaining mechanism would bring home a result which satisfies the interests of justice. (own emphasis) These would be that where a crime has been committed a conviction has been achieved. The price may be that the sentence which would normally flow from the commission of such a crime is lower that might otherwise have been imposed. This does not mean that justice has not been achieved. As long as the sentence bears an adequate relationship to the crime and the moral blameworthiness content of the crime, given the aforesaid factors the sentence should be found to be ‘just’ for the purpose of s 105A.”

I believe that the same argument will apply to determine whether a penal measure reached during a diversion of a prosecution will be regarded as being adequate.

A plea of guilty entails that the accused incriminates himself and thereby waives his constitutional rights to silence, to be presumed innocent until proven guilty, and the right to challenge the state case. However, if the plea of guilty is done voluntarily, knowingly and intelligently, it is not considered as compelled self-incrimination. Diversion methods differ from plea-and-sentence bargaining in that in the first prosecution is averted, whereas the latter (plea and sentence agreement) procedures, invariably results in conviction of the accused and sentencing by the court (albeit along the lines of the agreed upon sentence). The resulting conviction also becomes part of the criminal record of the accused. A diverted prosecution, on the other hand, does not involve the entire criminal process, does not lead to a conviction and does not result in a criminal record. There are, however, serious practical difficulties with applying both plea-bargaining as well as diversion: By far the greatest majority of accused in criminal trials in South Africa appear without legal representation, many of them

\(^{783}\) *S v Solomons* 2005 (2) SACR 432 (C).

\(^{784}\) *S v Esterhuizen & others* 2005 (1) SACR 490 (T).
also being illiterate.\textsuperscript{785} Formal plea-bargaining may not take place in the case of unrepresented offenders. De Villiers\textsuperscript{786} argues that the formal plea-and-sentence agreement procedure introduced by section 105A is unjustifiably limited to the small minority of defended accused. He argues that, although there may be legitimate fear that the process may be misused against uninformed and indigent accused, the same uninformed and indigent accused are deemed competent to plead guilty (whether as result of an informal agreement, or not) in the conventional manner. The reason for specifically including in the sec 105A agreement the fact that the accused has been warned of his due-process rights also does not make sense since the represented accused in the conventional procedure is not similarly informed.\textsuperscript{787}

Is it indeed ethically acceptable to conduct informal plea-bargaining with unrepresented offenders? If one were to conclude that it’s not, it’s my opinion that the same drawback could be the case in instances of proposed diversion unless judicial supervision can ensure the fairness of the process.

6. Administrative Adjudication of Road Traffic Offences (AARTO)

A new mind-set is definitely required to reduce the carnage on South African roads. The present system of fine collection is not working. There is no conformity regarding fines issued for similar offences, fines are often not paid and little is done about it. Fines issued are often considerably reduced by either the prosecutor or magistrate, or bribes are offered to escape the fine altogether. What South Africa lacks is an effective, coordinated national system of law enforcement/adjudication of both serious, as well as less serious traffic violations. AARTO attempts to change some of this.

The Act refers to administrative adjudication of traffic offences, but is it really “adjudication”? The implementation of AARTO in fact leads to very limited administrative adjudication. The legislation allows for a prescribed fine (with or without demerit points) to be imposed. The issuing officer has little or no discretion in choosing the fine. The administrative adjudication refers to the limited “making of representations” to the Agency which may only be done with regard to minor infringements. The Representation officer/adjudicator has no discretion to reduce the fine/demerit points, but must only allow the representation if reasonable grounds exist, or reject it in the absence of such grounds. This is done by an official who does not

\textsuperscript{785} PM Bekker, Plea-bargaining in the USA and South Africa, 1996 \textit{CILSA}, p. 222.
\textsuperscript{786} WP de Villiers, Plea and sentence agreements in terms of section 105A of the Criminal Procedure Act: A step forward?, \textit{De Jure} 2004, p. 253 – 255.
\textsuperscript{787} See however the discussion of S v Seabi 2003 (1) SACR 620 (T) in SACJ (2004) p. 126 where Michael Cowling correctly questions the judgement of Bosielo J regarding the questioning of the unrepresented accused regarding the voluntary nature of his plea of guilty.
need to have any judicial experience, or even legal training at all.\textsuperscript{788} If the representation is rejected there is no appeal to a higher authority unless the RO recommends that the infringer may elect to be tried in court. There is no provision for any overseeing body. This is unlike the Dutch WAHV, which is initially adjudicated by the prosecutor (hearing witnesses etc.). With the WAHV, when the transgressor is still unhappy, there is further adjudication by the administrative judge although it does not amount to a normal trial. If the transgressor, in terms of AARTO, chooses for a trial from the beginning, there is no administrative adjudication at all and the matter is treated like any other criminal trial.

Points-demerit systems are used successfully in many other countries of the world and have achieved great results regarding driver compliance with the law. The question is, however, if such a system will also live up to the same expectations in South Africa where there is a particularly poor public transport system. Where a person’s job relies on his having a driving license, drivers whose licenses are suspended are far more likely to drive whilst banned, out of necessity. South Africa also has an unacceptable level of corruption, most certainly also with regard to traffic enforcement officials. Where demerit-points can lead to the suspension or even cancellation of a diving license, the incentive for, and opportunity to commit corruption will increase, as well as the willingness of the driver to pay these bribes so as not to lose a license. There are huge numbers of drivers without legal licences. The demerit system will have little effect on changing their behaviour. The part of the legislation dealing with demerit-points is not in operation yet, and I seriously doubt if it can be implemented given the material objections against it.

There are a number of specific problems with regard to the legislation:

- the information system upon which the whole scheme is based, eNatis\textsuperscript{789}, seems to be incorrect and incomplete. If your information system does not work, there will be difficulty regarding notices which must be sent by way of mail;
- the system relies on a complicated array of charge codes. Traffic enforcement officers will have to be extremely well trained in the operation of the more than 2,000 different charge-codes from which they will be required to issue the correct one. Applying an incorrect charge-code can cause serious inconvenience and expense to have it corrected;
- consistent and effective administration is required. The act prescribes that notices must be sent by registered mail, but it is

\textsuperscript{788} The independent Representation Officer must have a 3 year Law degree, or a 3 year qualification in traffic/police management or practice as attorney, advocate, magistrate, prosecutor, traffic officer or police officer for 3 years.

\textsuperscript{789} Electronic National Administration Traffic Information System. According to press report as much as 60% of addresses of motorists incorrect. News24 07/03/2012 “Aarto April launch postponed”. Although it is an offense if an owner of a motor vehicle does not update his address upon changing it, this still happens all too often.
reported that the Johannesburg Metropolitan Police Department simply ignores this and sends out notices by regular mail. Apparently there is nothing that the Agency can do about it. They only receive representations about minor infringements and cannot declare an IN invalid because it was not sent according to the requirements of the law.\textsuperscript{790}

- AARTO fines partly go to a central account and will significantly reduce municipal traffic enforcement capacity, or more specifically, municipal revenue-generating capacity;
- the Representations Officer is labelled as ‘independent’ but is this really the case? The RO is employed and remunerated by the Agency for whom they adjudicate.

As a result of these practical problems complaints have been lodged with Public Protector, but no report has been issued as yet. There is also pending litigation regarding aspects of the Act.\textsuperscript{791}

AARTO is not all gloom and doom. Specific advantages that it holds are:
- huge quantities of traffic violations are (potentially) moved outside the sphere of criminal courts. However, this is only the case where the transgressor does not elect to go to court. It can lead to great easing of the workload for prosecutors, presiding officers as well as the (traffic) police who don’t have to appear as witnesses since every violation no longer automatically results in a trial;
- infringers of less serious violations are not saddled with a criminal record;
- on a national basis there will now be parity of fines. The same fine/demerit points will be imposed regardless of where the violation occurs. The issuing officer no longer has a discretion;
- the system establishes a greatly improved fine collection procedure, more convenient ways to pay fines and incentives for the quick payments of fines. At the same time it establishes effective penalties for not paying – cancellation of a driver’s license, refusal to re-register a vehicle, listing on a (credit) blacklist etc.;
- all in all, effective enforcement of the infringement notices will send out the message to road-users that they can no longer “get away with” traffic violations.

By far the majority of traffic prosecution in South Africa is for speed violations. Will AARTO adequately address these? If the system can improve collection of the fines issued, it will certainly already be a huge improvement. However, the Act has not been implemented nationally yet, despite the pilot projects already operational since 2008. The points-demerit system is likely to lead to more abuse or corruption. There are too

\textsuperscript{790} Beeld 20/08/2012 “Net hûlle mag jou profiel op eNatis blok”.
\textsuperscript{791} Beeld 15/02/2013 “VF+ hof toe oor Aarto-stap”.

many drivers on the road who do not have licenses anyway, so the threat of losing your license is no real deterrent. AARTO also applies to pedestrians and non-motorised transport. Obviously demerit points do not apply here. One will have to see how effective this proves to be. Is the purpose to improve road safety or simply to ease collection of fines for traffic violations?

AARTO is a step in the right direction. Similar to the Dutch WAHV, transgressors incurs liability if they do not take steps either to oppose the IN, or to pay the fine. However, the system can only be successful if it is based on correct and complete information, effective administration takes place and if it operates in a corruption-free environment. These are the issues that must be addressed before national roll-out can be considered. I have better hope for the fine-collection part of the Act being a success than the point-demerit part. The mere fact that the Act, which was promulgated 15 years ago, and with pilot projects already (partially) operational for almost five years, seems to be no closer to national application, indicates the extent of its drawbacks.

7. Negotiation and mediation

The problems with negotiation, mediation, ADR, restorative justice etc. in South Africa is the same as those discussed with regard to the position in the Netherlands. Who takes part in the negotiations? Who should be involved as mediators? Do you use probation officers, independent lawyers/mediators or non-traditional staff (NICRO etc.)? There is also the question whether, once mediation has properly met the interests of both the victim and offender, it also meets the requirements of justice. This is not necessarily the case. Should there, in the end, still be some overview of the process by either the prosecuting authority or the court itself? The criminal law developed in order to prevent private revenge by aggrieved victims of crime and to guarantee equal protection of all before the law. Gurwirth & de Hert argue that moralism, paternalism, inequality, irrationality arbitrariness and discrimination are always subconsciously present in these forms of informal conflict resolution institutions.792

Bestowing too much emphasis on satisfying a vindictive victim may allow private revenge a new footing or the rise in kangaroo courts or vigilantism. No clear, consistent method of incorporating informal processes into the criminal justice system has yet emerged in South Africa.

8. Restorative justice and Ubuntu

Of late a lot has been said and written about restorative justice as useful measure in a criminal justice setup. There are a number of legal issues

relating to the implementation of restorative justice as a system of criminal justice which can be raised. Restorative justice is a shift away from a highly impersonal procedural system to one that enables more human interaction and participation in, (often) informal and personalised responses. Restorative processes have the potential to be more responsive to cultural diversity in the administration of justice than is the traditional system of criminal justice. However, as Terblanche points out, restorative justice must be balanced with the constitutional considerations that punishment should be proportional to the offence, and the need for consistency as dictated by the right to equality. Like the comments about negotiation/mediation, a lot depends on what the role of restorative justice is supposed to be and where exactly it fits into the process, if at all. Community-based responses are often, from an abolitionist’s viewpoint, not seen as merely alternatives to traditional sanctions, but as procedural alternatives to the traditional concept of a criminal trial. As Albrecht points out, the traditional and alternative should not necessarily be mutually exclusive, and could find a way of successful co-existence. This can be done by integrating restorative ideas into existing justice procedures, or by setting up (and funding) restorative programs that operate side-by-side with regular procedures. Informal methods of social control and problem solving are thus used in support of the punitive/remedial sanctions of the state.

Restorative justice and ubuntu focus on restoring an imbalance created by someone’s conduct, and on building peace within communities. Both achieve this through co-operative efforts. Ubuntu and restorative justice underscore the importance of consensus and agreement and reconciliation. Involving communities in addressing disputes is central to both restorative justice and ubuntu. One must, however, take heed that communities may also sometimes engage in retributive action. The process of involving communities must therefore be carefully managed and monitored. Skelton & Frank also give a word of warning about the practical application of some restorative practices:

“African models of conflict resolution worked well in homogenous societies where there was substantial equality between the parties.

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795 The 1990 Amsterdam mediation (“dading”) experiment is a good example of such voluntary mediation process existing alongside the regular justice procedure. See Wiewel (ed): Dading in plaats van strafrecht, Gouda Quint, 1993
797 C Badenhorst & H Conradie, Diversion: the present position and proposed future provisions, Acta Criminologica, 17(2) 2004, p. 121.
Restitution and compensation was often linked to the payment of goats or cattle and ordinary people could afford to make these payments. Colonization and apartheid have left a legacy of gross inequalities .... [ .... poverty is one of the major causes of crime in South Africa, and many crimes are committed by extremely poor people. Conversely, many victims of crime are wealthy. Bringing these people from very different social situations together in a conference to ensure that the poverty-stricken offender should be held accountable and make restitution to the wealthy victim, requires a carefully thought through process, very special management and highly developed skills in a co-coordinator”.  

Particular attention must, therefore, be given to protect against possible power imbalances between the parties in an informal setting and mechanisms to protect the rights of the participants must be developed. Skelton argues that the continued existence of African traditional conflict resolution processes, alongside mainstream (civil and criminal) justice systems indicate a broad acceptance, amongst communities, for different ways of doing justice.

Can restorative justice find any application in a country with exceptionally high rates of violent crime? In the Thabete case the Supreme Court of Appeal cautioned against the use of restorative justice as sentence for serious offences which evoke profound feelings of outrage and revulsion amongst members of society. The problem of unequal results remains problematic. It is also uncertain where exactly restorative justice should be applied. It is indeed an international trend, and a specific requirement for sentences in terms of the Child Justice Act. It also contains many positive features. But clarity must be obtained as to how it is to be incorporated into the formal justice system.

I am less optimistic about the application of ubuntu. Although the ubuntu values of respect, dignity, compassion and the desire for consensus are laudable ideals, in a multi-cultural society with huge power and financial imbalances as well as various ethnic and socio-cultural differences, it is very difficult to envisage the practical, consistent application of ubuntu principles.

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800 G Mousourakis, Restorative justice: some reflections on contemporary theory and practice, JRS 2004(1) p.5.
802 DPP v Thabete (619/10) [2011] ZASCA 186 (30 September 2011) where the High Court imposed an essentially restorative justice sentence for a conviction of rape, which sentence was overturned by the SCA as being inappropriate to the seriousness of the offence.
9. Prosecution Policy

The Prosecution Policy adopted by the NPA attempts to obtain uniformity in the exercise of prosecution discretion and to set out, with due regard to the law, the way in which the Prosecuting Authority and individual prosecutors should exercise their discretion. The policy prescribes the criteria governing the decision to prosecute and the factors that should also be considered when deciding whether to prosecute or not. This document, however, contains vague and general policy statements rather than directives providing actual, case-specific guidance. It seems as if, once the policy had been formulated more than a decade ago, the NPA left it at that.

To be fair, specific directives have been developed with regard to Plea-and-sentence agreements, prosecution of Sexual Offences, prosecution in terms of the Child Justice Act etc. These directives indeed give case-specific guidance regarding prosecution decisions, for example when a matter must be referred to the Senior Public Prosecutor for review of a decision to prosecute or not, or whether to divert a matter from prosecution, or when negotiated pleas of guilty (Section 105A CPA) may be considered and when not, and when a matter may be withdraw etc. However, these directives are not normally public documents and only deal with those specific matters for which the directive was developed. The general Prosecution Policy, which is a public document, is outdated and contains insufficient detail.

10. Control over prosecuting decisions

Other control mechanisms

Prosecution decisions are normally not subject to judicial oversight. In the case of S v Magayela the court, in dealing with the question whether a presiding officer has a general duty to make inquiries about decisions of prosecutors to close the state’s case, said: “the court is not a policeman to the prosecutor”. In an accusatorial process one would not want the court to be too closely involved with the process parties, but the question then is: how should courts deal with lazy, corrupt or incompetent prosecutors? The court will only bar/interdict prosecution or strike a matter off the roll in highly exceptional circumstances. Neither will the court compel the prosecuting authority to institute prosecution against a suspect, although a decision to discontinue a specific prosecution may be subject to a rule of

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804 Morkel & Labuschagne expressed the opinion that the control mechanisms over the execution of discretion by the prosecutor are insufficient. DW Morkel & JMT Labuschagne, Die diskresie van die prokureur-generaal, SACJ (1980), Vol. 4 P 166. However, the question is whether, 30 years and a constitutional change later, the control mechanisms remain inadequate?
805 S v Magayela 2004 (1) SACR 5 (T).
law review. Administrative review (by the High Court) is also possible in limited circumstances where the prosecutorial discretion is exercised improperly – hopefully sorting out the “lazy, corrupt or incompetent prosecutor” scenario.

In addition to the possibility of judicial control, the question is whether there is political control over prosecutorial discretion, or whether such political control is indeed desirable? As indicated in chapter 4, the prosecuting authority resorts under the final authority of the Minister of Justice, but the Minister does not, unlike his Dutch counterpart, have the authority to interfere with or intervene with prosecutorial decisions. The head of the prosecuting authority is appointed by the President and can be, and has, in the past, been a political appointment. However, the Constitution and National Prosecuting Authority Act specify that every member of the prosecuting authority must, under oath or affirmation, swear to serve “impartially, and exercise, carry out or perform his or her powers, duties and functions in good faith and without fear, favour or prejudice, subject only to the Constitution and the law”. International standards require that a prosecution authority must be able to provide neutral, non-political, non-arbitrary decision making. The jury is still out whether the NPA can comply with this requirement.

The third method available to a person who is unhappy with a decision of the prosecutor is to make representations to a higher authority within the NPA. This is available both for the accused person, as well as victims of crime. The National Director may intervene in any prosecution process and may review any decision to prosecute or not to prosecute. This may also be done by (provincial) directors as well as senior prosecutors with regard to decisions within their jurisdiction.

Private prosecution

The purpose of private prosecutions is not to reduce the workload of the public prosecutor, but it is to serve as a safety valve where victims are unhappy with the decision of the prosecutor not to proceed with charges in a particular case. In Singh v Minister of Justice and Constitutional Development the court held that the director of public prosecutions is

808 Section 179(4) Constitution.
811 Section 22(2)(b) National Prosecuting Authority Act.
813 2009 (1) 2009 SACR 87 (N).
only obliged to provide a *nolle prosequi* certificate to persons who have a substantial and peculiar interest in the matter. What this means, in effect, is that the prosecutor acts as gate-keeper towards private prosecutions. Not only does he decide whether or not to prosecute, but after having decided not to, he must further determine whether or not the proposed private prosecutor satisfies the requirements.

An aspect of concern is that there may be instances where the prosecuting authority declines prosecution in matters where there is no individual “victim” who qualifies in terms of the requirements (substantial and peculiar interest) for private prosecution, or in political cases.\(^{814}\) Since there is no similar procedure to the Dutch art 12 Sv. *beklag*, and sometimes no direct victim who can challenge the decision and institute private prosecution, this may prove to be problematic. With private prosecution there is a definite partiality or bias on the side of the prosecutor who has a direct interest in the matter. Whereas members of the prosecuting authority are required to swear an oath to serve impartially and to perform their duties in good faith and without fear, favour and subject only to the constitution and the law,\(^{815}\) private prosecutors do not swear such an oath.

### 5.5 Findings - South Africa

In South Africa, like in the Netherlands, the prosecuting authority is regarded as the professional controller of the criminal justice system.\(^{816}\) There are two trains of thought regarding prosecution discretion: the approach of a central policy which guides consistent decision-making, or individualised decision-making. The first option relies on strong hierarchical structures. In the latter the discretion may still be tempered by leaving important decisions to more senior personnel. South Africa must choose the way forward since it is my opinion that we are sitting somewhere in between – (central) prosecution policy exists, but it is not nearly as comprehensive as it should/could be. This study has illustrated the various alternative disposal methods available at present. However, these current methods of alternative disposal discussed have one thing in common – the decision regarding alternative disposal is largely dependent on the individual nature of the case or the circumstances of the accused. There is a lack of holistic approach towards crime control. With this I mean: There is inadequate prioritization, inadequate planning, cooperation and joint decision-making by all the structures involved in the justice chain, and inadequate guidance to individual prosecutors – especially regarding the possible use of alternative disposal methods. Where

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\(^{815}\) Section 32 of the National Prosecuting Authority Act 32 of 1998.

\(^{816}\) DS de Villiers, *Nolle Prosequi van ’n prima facie-saak beoordeel teen die lig van die onafhanklikheid en vervolgingsdiskresie van die staatsaanklaer*, *TSAR* 2006 – 1, p. 177.
diversion of prosecution is applied, it is not always considered in deserving cases and is also not applied in any uniform manner. There has not, until the introduction of the Prosecution Policy, been any specific legislation or regulations with regard to ensuring uniform diversion of standard cases. And the policy directive (part 7) is not very informative or comprehensive and has been found by the Constitutional Court to be an internal policy document which constitutes mere guidelines. The law, including the criminal law (and also the concept of “justice”) is not static. Labuschagne also indicates that the concept “fair trial” has also seen dynamic evolution in South Africa. Prosecution policy, therefore, must also be treated as a continuous and dynamic process.

I believe the problem is not so much the lack of sufficient alternative disposal methods available, as it is a case of not utilising the existing methods to its fullest capacity! Reasons that are forwarded for the lack of effective alternative disposal methods include:

- The turmoil and uncertainty regarding the head of the prosecuting authority, as well as the lack of experience and high staff turn-over experienced by the NPA. This not only results in low morale and inconsistency, but also challenges the development of the NPA from a purely prosecuting body to a professional controller of the criminal justice system, like its Dutch counterpart.
- High levels of corruption (unfortunately also involving the police and prosecution service). Where the integrity of individual prosecutors are not above suspicion, increasing their discretion may increase the opportunity for abuse. This matter is indeed high on the NPA agenda.
- Some alternative disposal methods result in a conviction. With the great importance of having or not having a criminal record, many persons may resist for example admitting guilt (and paying a fine in terms of Sec 57) and would rather hope to “take their chances” with the court. There is a lack of sufficient “justitiële” information about suspects. In South Africa there is only one category: either you have a criminal record [strafblad] or you don’t. If a case is dismissed for whatever reason, this is not necessarily recorded, meaning that the accused is left with a clean record.
- South Africa (still) experiences high levels of illiteracy. Whenever documents are sent to a person there is no proof that the person has read or understood it.
- The vast majority of accused in South African courts are also not legally represented and often ignorant of their rights. (State) legal

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817 S v Shaik and others 2008 (1) SACR 1 (CC).
aid is only available to persons accused of serious crimes. Alternatives which require legal representation may therefore be problematic.

- The dire financial position of many accused as result of high levels of unemployment, often makes the imposition of a fine impossible. Alternatives which provide for community service or other non-monetary penalties must be explored.

- The justice system is served by three separate ministries - police, justice and correctional services - which often result in a lack of coordination. Greater co-ordination between the various institutions involved in the justice system may allow for greater effectiveness, avoiding duplication and for greater accountability.

- The Dutch prosecutor is very ably assisted, not only by internal administrative staff, but also within the dedicated judicial collection agency with extensive experience in sending out, administering, checking-up on and executing conditional waivers, WAHV-fines, transacties and, strafbeschikkingen. The South African prosecutor does not have this administrative support, or an efficient debt collecting section. I believe that this is one aspect where additional capacity will have great effect.

**Strafbeschikking for South Africa?**

There are numerous reasons why I believe a method similar to the Dutch strafbeschikking cannot be introduced in South Africa. In addition to the concerns I raised earlier in this chapter, the South African reality of illiterate persons make a (written) method that is equated to a conviction by court very questionable. The unreliability of mail delivery is also a serious problem. I also believe that the one-sided determination of guilt (outside of public and/or judicial scrutiny) by a prosecutor is something our sense of justice is not ready to accept. Race and societal status (and wealth) are hot issues and I believe that only an objective and independent judicial officer should be allowed to pronounce on guilt or innocence of a suspect. A voluntary process, like the transactie which requires the consent of the suspect, is a totally different matter and I would be the first to support its introduction.

**5.6 Recommendations**

**Introduction**

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820 This has indeed been recognized as an inefficiency and the 2008 Criminal Justice System Review process (which is still ongoing) has as aim better co-ordination between the departments involved (Justice, Corrections, Police and Social Services) by concluding specific delivery agreements.

821 This was incidentally also recommended by Middleton 20 years ago. Ad Middleton, Prosecution and Alternatives in L Glanz (ed.) Managing Crime in the New South Africa: Selected readings, HSRC 1993, p. 180.
In this section a number of general recommendations are made, followed by recommendations regarding the alternative disposal methods presented earlier.

1. There should (normally) be legal consequences for unlawful conduct. These consequences need not necessarily be a traditional trial, conviction and sentence by court. What is required is what Middleton called “a radical change in attitude”. He suggested that we must reconsider the philosophy underlying the decision to prosecute and that prosecution should be the last resort when no suitable alternatives present themselves.\(^{822}\)

2. There should be proper guidance to prosecutors on ground-level as to which option to apply when. Extensive prosecution policy needs to be developed regarding case intake, case screening, pre-trial diversion, case review, trial preparation and sentence recommendations.\(^{823}\) It calls for rational prioritisation. The principle of differentiation and consistency should be followed: legal responses to less serious offences may be different from the response to more serious crime. But, once differentiated, legal responses should be consistent and uniform in its application and execution, unless reasonable grounds exist for deviation which is properly motivated.

3. I suggest the following requirements for the policy: it must be transparent and verifiable, must be applied consistently, should remain flexible enough to serve local interests without forfeiting legal certainty and uniformity and it must be possible for the courts to test the policy.

4. One possible way to achieve this will be to introduce a Commission on Prosecution Policy as a subdivision of the NPA to develop (and maintain) a framework similar to the Dutch POLARIS guideline. (Project development of national guidelines for criminal procedure). As discussed earlier – a number of detailed prosecution guidelines have already been developed. It is suggested that specific guidelines be developed for all offences.

5. These policy considerations must also be as transparent as possible since lack of transparency leads to lack of confidence. Alternative disposal programs should be subject to public and press reaction which could be hostile if offenders are perceived to be “getting away with it”. Although there is a perception that alternative disposal methods are “soft options”, it may actually be more onerous than punishment imposed by the court.

6. Legal certainty is required as well as predictable outcomes.

7. In the absence of a legislative framework, prosecution guidelines similar to the one created for prosecution in terms of the Child Justice


Act can be created to deal with trial alternatives for adult offenders. Guidelines and directives should be published - not only in Government Gazette, but where ordinary citizens can become aware of it. Maybe we do not really need a “legislative framework” so much, although I do suggest some (minor) changes to existing legislation. Detailed policy and specific guidelines can achieve most of the changes I suggest.

8. Where possible and applicable, the system could try to be innovative and involve the community. Schönteich indicates that, given the vibrancy of South African civil society and NGO sector, it’s not unlikely that many useful and innovative diversion programs and services can be created, thereby reducing the costs of such programs to the state. One must be careful that this doesn’t result in unequal outcomes.

9. There should be judicial control/oversight, especially where severe penalties are meted out. A “conviction” should only be the consequence of a process where the courts, or at least a judicial officer, was involved. Any disposal by the prosecutor which is not subjected to judicial oversight/review ought not to be regarded as a criminal conviction.

10. Record should be kept of all alternative disposal cases. If a matter is withdrawn, the reason for the withdrawal must be recorded. For this purpose it will be necessary to establish a comprehensive data-base and the scope of current record-keeping must be extended to include every prosecution decision. The grounds for withdrawal of a case must be standardised.

11. The dire financial position of many accused, as result of high levels of unemployment, often makes the imposition of a fine impossible. Alternatives which provide for community service or other non-monetary penalties must be explored.

12. Where an alternative disposal method is chosen, it must have the effect of bringing the matter to an end (ne bis in idem). Private prosecution should be ruled out in such cases.

13. The decision regarding the manner in which a particular case will be dealt with should be taken at the earliest possible moment when all relevant information required is available. The earlier a determination can be made regarding the possibility of alternative disposal, the more effective will it be in conserving valuable (trial) resources. Is a compulsory pre-trial conference/procedure for criminal cases useful? In child justice there is the compulsory preliminary enquiry (after the assessment). This is a formal step prior to trial where alternative disposal may be aired. There is also the tradition of acquiring a pre-sentence report compiled by a probation officer if community service, correctional supervision or compensation to a victim is considered as a sentence. If such report can be obtained at an earlier stage in the

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proceedings, the information it contains can be indicative whether alternative disposal is possible.

14. Prosecutors should also obtain access to the case dockets earlier than the day of the trial if decisions regarding alternatives need to be considered.

15. Alternatively it might be feasible to create a central office at court with one prosecutor responsible for all decisions regarding alternatives. Is this possibly a function for the Control-prosecutor?

16. Legal aid/assistance for conditional withdrawals and plea-and-sentence agreements should be given preference.

17. Although there might be sufficient communication between the various criminal justice functionaries on a high level, I suggest that regular, local consultation be made compulsory similar to the Dutch triangular consultation. The record/minutes of such minutes, which are forwarded to a central office, can assist in acquiring the necessary information to continue to develop and maintain the prosecution policy.

With regard to the following specific alternative disposal methods I recommend:

**Conditional withdrawal (policy sepot)**

The Law Commission suggested a legislative change to allow for conditional withdrawal of charges as an out-of-court settlement. Nothing happened following their report. They also suggested that Section 6 (1)(c) CPA be put into operation. Sec 6(1)(c) CPA provides the prosecutor with the power to suspend court proceedings and placement of the accused under correctional supervision. It creates a disposal method where, upon a written admission by the accused, the prosecutor may suspend the court proceedings and place the accused under correctional supervision. A report of a probation officer is necessary. Some consultation with the Commissioner of Correctional Services and the police investigating officer is also required. This method has, however, never come into operation (and, is not expected to be either). Even if this section were to be put into operation, the application thereof would be severely limited, since the only condition for suspension of the trial is the placement under correctional supervision.

The question is: what can the NPA do by way of policy directives in the absence of any legislative change? As already pointed out, there is nothing preventing the conditional withdrawal of a case. What is, however, necessary is for the NPA to introduce clear and comprehensive

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825 Contained in Section 36 of the Correctional Services and Supervision Matters Amendment Act, 122 of 1991.
policy to guide prosecutor by way of workable guidelines. The following should be considered:

There must be a clear prescribed procedure which deals with issues such as:

- Who makes the decision to withdraw the matter? Is this decision subject to approval of a senior?
- What types/categories of offences will it apply to? It is suggested that conditional withdrawal only be used for routine matters where the sentence, upon conviction, will not be imprisonment, or imprisonment not exceeding one year. I also suggest that it is applied only with regard to relatively low-level offenders.
- When in the process is the decision made?

In addition to the prescribed procedure, there must also be clear guidelines regarding the formalities required. I suggest that, similar to the requirements of sec 105A, there must be a written settlement/agreement signed by the prosecutor as well as defence. If legal assistance is extended to cases of possible (conditional) withdrawal, the lawyer can assist the illiterate or indigent accused in this regard. In the document there must be a clear indication that the accused enters into this agreement voluntarily and without being influenced improperly.

The next aspect that must be prescribed is the one regarding the conditions which may be contained in a conditional withdrawal. Conditions which can be considered, include the payment of a fine, appropriate compensation to the victim, community service, attendance of treatment or other programs, and refraining from further offences. Participation in a Restorative Justice program should also be a possible condition, as well as the possibility that the penalties may be suspended for a period not exceeding two years. Conditions that are degrading, humiliating or negatively impacts on the dignity of the offender, will not be allowed.\(^\text{826}\) Conditions may also not infringe upon any of an offender’s constitutional rights, e.g. being compelled to attend religious services (in violation of his right of freedom of religion) or be compelled to join a particular society (in violation of the freedom of association). Confiscation of property, forfeiture or the imposition of civil disabilities like the cancellation of a license or permit, are complex issues, and should ideally not form part of the conditional withdrawal. The forfeiture of an item or loss of a permit may in itself, or in combination with another sentence, establish a grossly disproportionate punishment.\(^\text{827}\)

There need to be clarity regarding the consequences of the accused abiding with the conditions, as well as in instances where they do not. I

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suggest that compliance with the conditions should safeguard the accused, not only from further prosecution, but also from private prosecution. If the accused does not comply with all the conditions, prosecution on the same facts can be considered. The conditional withdrawal should not be equated to a conviction, but should be recorded in an appropriate data-base. The accused who does not wish to accept the proposal, should always be entirely free to ignore or refuse the offer without negative consequences to such a decision. With regard to appeal or review, there are two possible avenues: the first is to create a simple review procedure by the judicial officer at that court upon request,\(^\text{528}\) to ensure equal treatment of accused and to prevent possible corruption or abuse of the system. The second possibility is to introduce a “complaint” procedure similar to section 12 Sv. More on this later.

**Admission of guilt fine**

With regard to this alternative, I believe that there are two possible options. The first would be to keep it essentially as it is, but to possibly extend the penalties that may be imposed. The recent increase in the probable fine that must guide the individual prosecutor to decide in favour of this method, has hugely increased its usefulness. However, I suggest that the NPA give serious consideration to give more preference to this method and to give detailed guidelines to their staff in this regard. If the admission of guilt is recorded as a previous conviction, I would argue that the identity of the person admitting guilt is crucial.

The second option is to change the nature of the procedure and to develop it as a proper out-of-court alternative similar to the Dutch *transactie*. If payment of an admission of guilt fine is not taken as a conviction and sentence (although at present it is), then there is no need for a judicial officer to be involved and the finalisation of the matter can be an administrative process. This process will entail a written offer, as it presently is, which the accused accepts without having to admit guilt. Compliance with the penalty brings the matter to an end and it is not regarded as a previous conviction, but record should be kept of fines/penalties etc. The history and development of the *transactie* serve as a good example of what will be necessary to create this new out-of-court disposal option. *Transactie* was initially restricted to misdemeanours and the only penalty possible was the payment of a fine. Over time, and as experience with the process grew, and the necessary infra-structure necessary to administer the system was in place, the application was extended until “high and exceptional” *transacties* were possible.

**Child justice**

\(^{528}\) The Law Commission suggests that the right to request the review should be limited to victims, the accused and the police investigating officer.
It is necessary that a criminal justice system treat young offenders different from adult offenders. The Child Justice Act achieves just that and is a good example where restorative justice and the ideals of ubuntu are given prominence. An elaborate legislative framework for diversion of prosecution is created. When adult diversion or the development of other alternative disposal methods are examined, I believe it is not necessary to reinvent the wheel, but to build upon these existing strengths, capacities, programs and procedures that have been created by the Child Justice Act. A lacuna is pointed out by Louw & Van Oosten,829 namely that the new child justice process only focuses on providing a formal structure to facilitate diversion after a child has been apprehended by the police for an alleged wrongdoing, and that the possibility of caution and release by the police is not specifically addressed. If clear and limited discretionary powers to this effect are given to police officers (similar to their Dutch counterpart), it may lead to speedy and consistent finalisation of many really petty matters where child-offenders are involved.

**Plea-and-sentence agreements**

The formal plea-and-sentence agreement procedure seems to be functioning well, even if it is not being used as extensively as it could have. Criticism of the plea-and-sentence agreements is that it is only available to persons who are legally represented, the decision to conclude such agreement is usually taken at a very late stage when both parties have spent a lot of time and effort in preparation for trial, and that it does not protect other parties (for example co-accused) who are not included in the agreement from private prosecution. The first and last matters fall outside the scope of authority of the prosecuting authority, but there is no reason why decisions regarding acceptance of plea-and-sentence agreements cannot be taken at an earlier stage of the procedure. It is recommended that the prosecuting authority actively promote the use of plea-and-sentence agreements where appropriate, and also to attempt to take decisions regarding such agreements at the earliest possible time.

**Administrative adjudication/Decriminilisation**

There is nothing wrong with the principle of administrative adjudication of offences (as the efficient working of the WAHV proves) but such system requires factors which are not in place at present in South Africa – sufficient (criminal/administrative) debt collecting infra-structure, a correct and comprehensive data-base of licensed vehicles, addresses of offenders etc. Administrative enforcement also works better in a

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829 A Louw & F van Oosten, Diverting children from the criminal courts: some proposals, 1998 (61) THRHR p 127.
corruption-free environment. The adjudication done in terms of AARTO is indeed very limited, since it is applied only in the case of minor infringements. It is recommended that the making of representations also be allowed for major infringements. The adjudicator must also have a legal background or training. I further recommend that, where representations are turned down, there should either be further redress to an Appeals Body, or it must be possible for the transgressor to elect to go to the regular criminal court (which is presently limited to minor transgressions and with the permission of the adjudicator). In the event of an additional Appeals Body being created, it is suggested that the presiding officer should be a judicial officer (judge or magistrate) and that, similar to the Dutch WHAV review, it does not have to entail a full criminal trial.

The (administrative) criminal law in the Netherlands developed over time and is in line with similar developments elsewhere.\textsuperscript{830} However, as I have also indicated, one must be extremely careful that alternative administrative procedures, which exist side-by-side with similar criminal processes, do not end up confusing the issues. But, it is not foreseen that developments on the same scale as in the Netherlands will happen in South Africa in the immediate future.

**Negotiation/mediation/ADR**

A system where all deviant acts or criminal offences have to be dealt with by the criminal courts is neither an economically feasible, nor workable option.\textsuperscript{831} Besides the formal criminal justice system, there should be informal mechanisms that take care of a certain proportion of criminal offences.\textsuperscript{832} Informal methods should only be applied for really minor transgressions. Hargovan suggests that a case-flow process should be designed to identify those cases that are appropriate for informal and/or restorative intervention. A central intake unit, operating under established guidelines, who directs cases to either the formal or informal route, should be established.\textsuperscript{833} This is very similar to the recommendations Palmer already made years ago. One should also be heedful of the possible hurdles Weijers warns of, namely pressure on the victim (to participate), lack of voluntary participation of the suspect, and

\textsuperscript{830} Recommendations of the Council of Europe: The simplification of criminal justice, R (87) 18 Strasbourg 1988 (p. 27).


\textsuperscript{832} The 2010 Performance Overview Report of the National Prosecuting Authority indicates that a total of 48 395 cases of informal mediation (by the prosecutor) were dealt with in that year. A problem, however, with informal mediation is that the Department of Correctional Services cannot monitor the compliance with the conditions of diversion. See also Restorative Justice – the road to healing, Department of Justice and Constitutional Development, undated.

\textsuperscript{833} H Hargovan, A Balancing Act for the Prosecutor: restorative justice, criminal justice and access to justice, SA Crime Quarterly No 42 Dec 2012, p. 19.
infringing on vertrouwelijkheid. Informal agreements can, however, play a vital role when deciding upon the conditional withdrawal of charges against an offender. Any party to informal methods should, however, at all times have the right to withdraw from the process and to seek redress in court.

Informal methods and restorative justice can also lead to disproportionate sanctions since different victims place different demands on offenders who have committed similar offences. But the traditional processes have also not successfully eliminated this problem. Courts are also taking subjective factors into consideration when considering sentence. Guidelines and rules can be developed to limit the likelihood of unduly harsh sanctions to be imposed by, for example, providing a range of alternative sanctions to a typical offence. The courts can also be given an oversight role (on appeal, if needs be) to assure that no great disparities in sanctions results from the informal processes. Participation must be voluntary, the provisions of the agreement should not be disproportionate to the harm caused and must be culturally appropriate to the parties involved.

As Tshehla points out, the challenge for the state is to ensure that this enthusiasm for restorative justice is properly harnessed in recognized, approved and supervised programs run along the lines of comprehensive guidelines. Restorative justice means many different things to many different people. If it is to be of any sustainable use, there must be guidelines for practice and uniform use to demonstrate that it is more than good rhetoric and idealism.

Alternative disposal by the Police

Unless very clear and detailed (and public) guidelines are drawn up and cautiously introduced, it may be advisable not to extend the discretion to dispose of criminal cases to police (or other non-prosecutorial organs). There will have to be satisfactory guarantees against the danger of corruption or improper influence. Maybe, if the alternative method of disposal of traffic offences proves to be successful and the necessary support structures (like a CJIB-type central collection agency) are established, a limited extension of disposal power to the police may be considered. It is not recommended at this stage.

Control over prosecutorial discretion

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834 I Weijers, Het slachtoffer-dader gesprek als volwaardige mediation, NJB 2012/1518.
836 At a inter-departmental Restorative Justice Conference in South Africa in 2002 it appeared that there were as many ideas about what restorative justice means as there were participating institutions! See B Tsheshla, The restorative justice bug bites the South African criminal justice system, SACJ (2004) p.1.
The hierarchical control function of allowing representations within the 
prosecuting authority is a valuable safeguard and must be retained. Since 
prosecution decisions may be subject to internal “appeal” to successively 
higher levels within the NPA, and may even be subjected to judicial 
review, I believe it is important to continue with the tradition that such 
representations must be in writing.

There are concerns regarding political meddling with prosecution in 
South Africa. This is something that the NPA must guard against 
fiercely. The safety-net of public prosecution is not adequate here.

The procedure of private prosecution is a strange concept and I believe it 
is not really fair to expect of a victim of crime to undertake the 
burdensome and expensive process of prosecuting a case where the NPA 
decides not to. The art 12 beklag procedure seems to be a more 
comprehensive method of dealing with dissatisfied victims of crime than 
private prosecution. The victim does not have to take on the prosecution 
itself (like in the case of private prosecution), but must convince the court 
to order the prosecution by the prosecuting authority. The art 12 
procedure is also available in all instances where the case does not result 
in a (traditional) trial and not limited only to decisions not to prosecute. 
As the Dutch example has shown, as long as the prosecuting authority 
takes proper decisions in the first place, few of these are eventually 
overturned by the courts. I therefore recommend the scrapping of the 
procedure of private prosecution and to rather introduce a procedure 
similar to art 12 Sv. which is available (to victims) with regard to all 
prosecution decisions and not only limited to those decisions regarding 
alternative disposal of cases.

5.7 Final words

The Netherlands has a centrally-driven prosecution policy with detailed 
guidelines for dealing with specific matters in a particular manner. 
Although the South African prosecuting authority is organised on similar 
(hierarchical) lines, we lack comprehensive, detailed, uniform prosecution 
policy. Where policy does exist in South Africa, it is often ad-hoc or vague 
and open to different interpretation. There is also no practice of regular 
consultation/meetings similar to the Dutch triangular consultation where 
policy and policy guidelines can be given local and practical application.

Should it be left to the prosecutor alone to determine how the demands of 
justice and the public interest in crime be met? I agree with Miller that 
this is not ideal. However, alternative disposal options exercised by the

837 ME Bennun, Negotiated pleas: policy and purpose, SACJ 2007 p.36 
838 ML Miller, Domination and Dissatisfaction: Prosecutors as Sentencers, Stanford Law Review, 
prosecuting authority do indeed extend the measure of discretion which can be exercised by prosecutors. Sec 105A Criminal Procedure Act and the directives regarding plea-and-sentence agreements give the South African prosecutor a much greater role in determining a “just” sentence, unlike the situation prior to that where sentencing was pretty much left to the court to decide. The challenge, in my opinion, is to develop a system that is efficient and affordable whilst still retaining procedural guarantees of justice, fundamental freedom and liberty. To use the words of Lord Bingham: “Since the time of Plato’s Republic, and perhaps even earlier, philosophers, lawyers and politicians have discussed the true meaning of justice. We can have no doubt that when our descendants approach the fourth millennium the topic will still be under active discussion”.\textsuperscript{839} I believe that “reasonably just decisions in individual cases”\textsuperscript{840} (in other words “justice”) can also be achieved by way of the correct and timeous application of suitable alternative methods to dispose of criminal cases.

\textsuperscript{839} T Bingham, Justice and Injustice: The Business of Judging. Selective Essays and Speeches, Oxford Scholarship Online: March 2012.

\textsuperscript{840} To use the phrase of Marc Miller.