



Alternative Disposal of Criminal Cases by the Prosecutor: Comparing the Netherlands and South Africa

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**ALTERNATIVE DISPOSAL OF CRIMINAL CASES BY THE
PROSECUTOR:**

COMPARING THE NETHERLANDS AND SOUTH AFRICA

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SUMMARY

The constitution of South Africa guarantees persons accused of crime various rights, including the right to a prompt, fair and public trial before an ordinary court. Similar protection is found in the European Convention on Human Rights. The separation of power between legislative, executive and judicial bodies is also constitutionally guaranteed creating important checks and balances against the danger of one institution arrogating too much power, or encroaching on the functions of others. It is against this background that the tendency of granting the prosecuting authority greater power within the prosecution process is examined. This move towards “alternative” disposal of criminal cases, where prosecutors are vested with greater authority to dispose of, or independently adjudicate, criminal cases, is an international phenomenon. The punishment of people, who have committed crime, is increasingly taken out of the hands of judges and instead we find augmented prosecutorial discretion to reach “case-ending” solutions without the intervention of judicial officers. This development is often ascribed to rising crime and the need to reduce criminal case loads, the need for more efficient solutions, and also for financial considerations. This is achieved by allocating responsibilities which have traditionally belonged to judicial officers, to the prosecuting service. The Netherlands is an example of a country where efforts have been made to reduce pressure on the criminal courts by channelling certain matters to the authority of the prosecuting service at an early stage. A range of alternative disposal methods have resulted. This study investigates whether this Dutch development can be of value to a South African criminal justice system that is under severe pressure. The choice to undertake a comparison of these two countries is evident. Both legal systems show, notwithstanding big differences, also significant similarities. There are historical justifications for this: very noticeable is the considerable degree of respect for the adherence to constitutional rights in both systems. To a similar measure is the observance of the fundamental principle of *trias politica* (ala Montesquieu).

Therefore, after making a few introductory remarks about the research questions and methods, this study illustrates how these alternative procedures manifests itself in the Netherlands as well as South Africa. A central theme in this thesis is the question whether this new trend of alternative methods of disposing of criminal matters is in harmony with the minimum due process requirements laid down in the South African Constitution and the European Convention on Human Rights. South Africa is a young democracy which is in the process of re-evaluating its legal system to align with a new constitutional order. The Netherlands, on the other hand, is a stable democracy but which must comply with

European human rights requirements. Another important issue to consider is whether there are sufficient control mechanisms over prosecutorial decisions (both hierarchical as well as political), especially when alternative methods are used wherein the usual judicial control is reduced, or absent altogether. The same applies to the question of what recourse is available to an accused which is unhappy with the manner in which the prosecutor exercised his/her discretion.

Chapter 2 underlines the developments that have taken place within the Dutch criminal justice system and the prosecuting authority which has led to numerous alternative adjudication methods being available to the prosecutor. The principle of expediency essentially allows the Dutch prosecuting authority the discretion to decline prosecution of a particular case if such is not in the public interest. In addition to declining prosecution a variety of “case-ending” mechanisms were developed whereby offending behaviour can be finalised by the OM, in some instances without the interference of the courts. Over time detailed prosecution policy has developed which provides guidance for individual prosecutorial decisions. Some time is spent on explaining the way in which prosecution policy is developed, how it applies, who is responsible for it, as well the essential role of the triangular consultation between prosecution service, civil authority and the police in implementation of prosecution policy.

In chapter 3 the various Dutch alternative methods are presented. The first method is the *sepot* - or waiver of prosecution (both technical as well as policy waiver) which can be either unconditionally, or subject to the accused complying with some condition decided by the prosecutor. Another frequently used method of disposal is the *transactie* which resembles a formalised conditional waiver. The *transactie* was first introduced in 1921 and initially had limited application but subsequent legislative amendments have greatly increased the usability and effectiveness of this method to dispose of a variety of criminal cases speedily, without the need to go to court. In essence a *transactie* is a written offer to the accused to comply with the proposed conditions (payment of a fine, compensation to the victim, community service) in which case no further prosecution will follow. The *transactie* offer usually amounts to 20% less of what the suggested sentence would be if the matter goes to trial. Where the accused chooses not to accept the *transactie*, summons would be issued and the matter would go to court. *Transactie* has also been extended to other areas of the law (administrative law, tax law etc.) and even the police were authorised to offer the accused a *transactie*. Another way to finalise cases is found in the *voeging ad informandum* practice. The prosecutor “adds” some (similar) charges to the charge-sheet and, if the accused

acknowledges it (there is no plea of guilty in the Dutch system), the prosecutor will request the judge to take these “acknowledged” charges into account for purposes of sentencing. If this is done, no further prosecution can result on those charges. In the Netherlands there has been huge developments regarding administrative law, creating in essence a separate administrative criminal law. Administrative fines, later often replaced with administrative *transacties*, took the place of criminal prosecution. This, as well as the administrative adjudication of traffic offences legislation (WAHV) is also discussed. A novel concept which the WAHV introduced entails that the offender is not only given a notice of a “suggested” penalty, like in the case of a *transactie*, or conditional *sepot*, but the transgression notice actually indicates that the offender is deemed to be guilty of the offence unless (s)he takes timely steps to protest the matter (to court). The fine itself must first be paid before the case is heard. Jurisprudence from both the (Dutch) Supreme Court of Appeal, as well as the European Court of Human Rights, have ruled that such procedures are not an infringement of the accused’s right to a fair trial since the choice remains for the person to contest the matter in court. Informal methods of dealing with criminal conduct, such as mediation, negotiation, restorative justice etc. are also a continuous issue.

Since the success (or not) of these alternative disposal methods depended on the cooperation of the alleged offender and the out-of-court efforts of the prosecutor could easily be frustrated by the offender simply ignoring it, it was deemed necessary to establish the most recent development in alternative disposal by the prosecutor namely the *strafbeschikking* – punishment order. The *strafbeschikking* is intended to replace the *transactie* and is rather contentious since the prosecutor not only suggests a possible penalty which the offender can decide to accept or not, but the *strafbeschikking* in fact amounts to an act of prosecution which becomes final, and is equated to a conviction and sentence by court, if the offender does not timely oppose the matter by insisting to be tried before a judge. Prior to the *strafbeschikking* the alternative methods were indeed a way to avoid prosecution and relied on consensus, whereas the *strafbeschikking* is regarded as an act of prosecution which does not require consensus. There is, however, considerable political enthusiasm for this development and *strafbeschikkingen* can also be imposed by bodies other than the prosecuting authority. In the final chapter a number of concerns are expressed regarding this new method and why it would not find application in South Africa.

In chapter 4 the South African position is discussed. South African prosecutors have always been entrusted with prosecutorial discretion, meaning they can refrain from prosecution if valid reasons exist. Methods

of disposing of a case without a complete judicial trial in South Africa are more limited than in the Netherlands, but some do indeed exist, including withdrawal/stopping of prosecution (usually without any condition attached) and the determination of an admission of guilt and payment of a fine without appearing in court. Reference is also made to the fairly recent administrative adjudication of road traffic offences which is still in its experimental phase. Various informal efforts to resolve criminal matters such as mediation, negotiation, restorative justice as well as the African concept of *Ubuntu*, have made its way into the criminal justice realm. The Juvenile Justice Act formalises diversion and out-of-court settlement as methods to finalise criminal cases against young offenders without the necessity of the traditional trial. There has also been significant development regarding (formal as well as informal) plea-and-sentence bargaining as “case-ending” method where the judicial officer plays a limited or reduced role and more authority is vested in the prosecutor.

In the final chapter the various (Dutch and South African) disposal methods were assessed and criticised, where applicable. The question here is not only whether the more extensive Dutch methods can be of value in the South African context, but also whether the important constitutional rights and guarantees are sufficiently protected in circumstances where judicial oversight is limited, or even lacking altogether. Alternative disposal methods are often criticised for the lack of, or limited, openness. Unhealthy concentration of power in the institution of the prosecuting authority is also a concern. As earlier alluded to, there are also some important differences between the two justice systems. In the Netherlands alternative disposal is used extensively but the decision whether to apply the alternative method, and which method to apply, takes place within well-defined parameters prescribed by the prosecution policy. The South African prosecutor is not guided to the same extent in the exercise of his/her discretion regarding alternative disposal methods. There is indeed a need to increase the use (and the range of) alternative disposal methods in South Africa and in this regard the evaluation of the various Dutch methods is very helpful. However, better (central) guidance and the development of a more comprehensive prosecution policy are proposed. A number of recommendations in this regard are made. With regard to specific alternative disposal methods some changes are also recommended, however the requirement that such methods retain sufficient procedural guarantees of justice and fundamental freedom is non-negotiable.