

ALTERNATIVE MEASURES TO REDUCE TRIAL CASES, PRIVATE AUTONOMY AND “PUBLIC INTEREST”: SOME OBSERVATIONS WITH SPECIFIC REFERENCE TO PLEA BARGAINING AND ECONOMIC CRIMES

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1 The commission of crime, cost-benefit analysis, and the possibility of alternative measures as factors in rational choice

This note addresses the following question: is it in the public interest to allow for, or encourage, alternative measures (in particular plea bargaining) to reduce trial cases with specific reference to economic crimes? The assumption that causes some unease about the proposition that alternative measures should be encouraged can be summarised with reference to the following observation:

“It is assumed that people are utility maximisers. People decide to undertake an activity, including the commission of a crime, if one essential criterion is met. An activity will be performed if the perceived or expected potential net benefits from time spent in that activity outweigh the expected net benefit from time spent in any of the perceived available alternatives. In the same set of circumstances, different people will make different decisions depending upon a multitude of factors such as attributes, skills and experience. The decision to offend is not unlike an economic labour supply problem involving a time-allocation decision. *Is it rational to spend time committing this offence rather than doing something else?*”¹

This contribution is a qualitative evaluation; it does not primarily apply or work with quantitative method. However, it is acknowledged that some of the normative observations about rational choice and the economics of crime have a basis in quantitative research. Ultimately, this contribution makes some normative observations in response to the question about the desirability of alternative measures in the context of economic crimes.

2 Economic crime: Demarcating a somewhat fluid term

It is not self-evident what is meant by economic crime. Certainly, it can be argued that all crime has an impact on the economy – even if it does not cause obvious, direct economic loss (as would be true of crimes like arson),²

¹ G Farrell, S Chamard, K Clark & K Pease “Towards an Economic Approach to Crime and Prevention” in NG Fielding, A Clarke & R Witt (eds) *The Economic Dimensions of Crime* (2000) 123 (emphasis added)

² G Kemp, S Walker, R Palmer, D Baqwa, C Gevers, B Leslie & A Steynberg *Criminal Law in South Africa* (2012) 401-402; J Burchell *Principles of Criminal Law* 4 ed (2013) 740-743

or theft,³ or fraud).⁴ Crime (of whatever nature) is a cost factor with respect to the public purse, since the state will presumably spend at least some resources on the investigation and possible prosecution of the crime. There are also secondary economic consequences: negative perceptions about violent crime in a certain area or jurisdiction may lead to less economic activity and even divestment. For purposes of this contribution, however, a narrower concept of economic crime is employed. It has to be said that the term “financial crime” is also sometimes used in literature. I will primarily use the term “economic crime”. I will not use the term “white collar crime”, although this term is often used in literature and in popular media.

A useful definition of economic crime is the following:

“By ‘economic crime’ is meant crime committed to gain profit within an otherwise legal business. The crime may damage private citizens, business and/or the public sector. The definition thus includes tax evasion as well as various forms of fraud and embezzlement in otherwise legal corporations. We disregard crime in organizations that have a criminal motive and are illegal throughout, for instance illegal trade of drugs.”⁵

Economic crime is, arguably, the ultimate category of criminal offences where a rational, economic analysis, can be discovered. This is not to say other crimes – like sexual offences, or assault, do not involve, or could not involve, a cost-benefit analysis as well. But economic crimes are obviously quite suitable for an economic analysis, precisely because these types of crimes involve motivations of what could best be described as relating to *profit*, or *material gain*. The preliminary point to make is this: If the possibility of institutionalised alternative measures to reduce trial cases, including the possibility of plea bargaining, becomes part of a rational, economic analysis by the would-be offender, then one should at least interrogate the perceived benefits of the relevant system from a public interest point of view. As we will see, alternative measures are often presented as beneficial, not least of all from an *economic* or utilitarian point of view. This, in turn, brings us to the limits of individual autonomy in a criminal justice system where negotiation, and economic calculation, can indeed become part of a cost-benefit narrative so cynical as to undermine the very foundations of the criminal justice system – a system supposedly designed to protect the public interest, without fear, or, indeed, favour.

3 The criminal justice system as protector of the public interest

Criminal law – and the criminal process – is primarily concerned with the public interest.⁶ That is to say, the state (on behalf of the public) is the legislator of criminal norms, the investigator of criminal conduct, the adjudicator of criminal liability, and the administrator of punishment. This goes back to the

³ Kemp et al *Criminal Law in South Africa* 374-380; Burchell *Principles of Criminal Law* 673-687

⁴ Kemp et al *Criminal Law in South Africa* 403-408; Burchell *Principles of Criminal Law* 721-732

⁵ H Sjögren & G Skogh (eds) *New Perspectives on Economic Crime* (2004) 1-2

⁶ A Ashworth *The Criminal Process – An Evaluative Study* 2 ed (1998) 18. Although victims of crime often play a prominent role at the start of the criminal process (notably during the initial phases of investigation of crime) other interests (broadly under the rubric of “public interest”) may override the more particular interests of victims

very foundation of criminal justice as part of an “ancient contract between the people and the state – namely, the provision of security in exchange for allegiance”.⁷ The prominent, some would say hegemonic,⁸ role of the state in criminal justice can easily disguise the dynamics of individual/personal interaction and participation in the system of criminal justice. These individual actors are, most prominently, the prosecutor, the accused, the judge, and the victim (if there is an identifiable victim). There are other individual role-players as well: investigators, witnesses, jailors, and so on. Criminal justice practice is not an abstract exercise of state power – it is, in fact, very much a process determined by individual dynamics, discretion, and decisions.

This contribution is concerned with alternatives to the typical prosecutorial model of criminal justice, whereby the prosecutor – on behalf of the state – prosecutes an individual accused person, *via* a full trial process of criminal litigation in an open court and according to highly formalised rules and procedures. I will not exhaustively discuss all possible modalities that could qualify as “alternative measures to reduce trial cases”. The choice falls on one modality, so-called “plea bargaining”. Plea-bargaining is *par excellence* a modality premised on individual autonomy and consent.⁹

4 Plea bargaining is not the same as out-of-court settlement

As mentioned above, this note focuses on plea bargaining as an alternative to prosecution in a criminal trial. This modality should not be confused with out-of-court settlements in criminal cases. An *out-of-court settlement* (which can be viewed as a progressive and still very novel option in the South African criminal justice system) is defined in the South African Law Reform Commission’s *Sixth Interim Report on Simplification of Criminal Procedure*, as follows:

“An out-of-court settlement is defined as an agreement between the prosecution and the defence in terms of which the accused undertakes to comply with conditions as agreed upon between the parties, in exchange for the prosecutor discontinuing the particular prosecution. Such conditional discontinuation of prosecution results in the diversion of the matter from the trial process. An out-of-court settlement needs to be distinguished from other pre-trial procedures and agreements. It is distinct from *sentence* and *plea agreements* in that these follow upon a decision by the prosecutor to institute a prosecution. The agreement may affect the offences for which the accused is finally charged, but it invariably results in the conviction and sentence of the offender. Therefore, such offender will have been put through the entire criminal process and will end up with a criminal record. An out-of-court settlement does not involve the entire criminal process, does not lead to a conviction and does not result in a criminal record.”¹⁰

⁷ A James & J Raine *The New Politics of Criminal Justice* (1998) 117

⁸ See the critical observations by K Beckett & T Sasson “The War on Crime as Hegemonic Strategy: A Neo-Marxian Theory of the New Punitiveness in US Criminal Justice Policy” in S Simpson (ed) *Of Crime & Criminality: The Use of Theory in Everyday Life* (2000) 61-84. One of the basic arguments is that the powerful role of the state (and criminal justice responses to crime) is actually to keep intact certain class structures

⁹ See, in general, FH Easterbrook “Plea Bargaining as Compromise” (1992) 101 *Yale LJ* 1969 1978; T Fisher “The Boundaries of Plea Bargaining: Negotiating the Standard of Proof” (2007) 97 *J Crim L & Criminology* 943 945

¹⁰ South African Law Reform Commission *Sixth Interim Report on Simplification of Criminal Procedure* (2002) xii

An example of diversion as an out-of-court settlement in the South African criminal justice system is the framework provided for in Chapter 8 of the Child Justice Act 75 of 2008. The objectives of this framework include the following: to deal with the child offender outside the formal criminal justice system in appropriate cases;¹¹ to promote reconciliation between the child and the person or community affected by the harm caused by the child;¹² to reduce the potential for re-offending;¹³ and to prevent the child from having a criminal record.¹⁴

5 Economic crime, criminalisation, and the nature of the criminal process

The essence of the criminal process is succinctly described in *Minister of Justice v Additional Magistrate, Cape Town*¹⁵ as follows:

“In a criminal matter, the *lis* between the State and the accused is whether or not he or she is guilty of the crime of which he or she is accused.”¹⁶

The determination of guilt or innocence is, of course, not the only feature of the criminal process. Guilt or innocence of the accused is, however, the keystone of criminal litigation; leading to an acquittal or the possibility of punishment and/or reparation.

With respect to economic crime, some commentators are of the opinion that, because of technical, practical, procedural and institutional aspects of the criminal justice system that causes it to be a rather inefficient device in combating economic crime, certain types of economic crime should be decriminalised altogether.¹⁷ A prime example is the decriminalisation of the Companies Act 71 of 2008.¹⁸ The old Companies Act 61 of 1973, which was repealed by Act 71 of 2008, contained more than 120 criminal offences. The number was much higher if one were to take into account all the specified contraventions, listed under the various criminalisation provisions.¹⁹

While certain types of economic crime certainly are susceptible to decriminalisation (as we have seen with the decriminalisation of much of the Companies Act), other types of offences are less susceptible to decriminalisation. Criminalisation, and the concomitant criminal sanction, is not only premised on notions of effectiveness. There are other considerations

¹¹ S 51(a) of the Child Justice Act

¹² S 51(g)

¹³ S 51(i)

¹⁴ S 51(j)

¹⁵ 2001 2 SACR 49 (C)

¹⁶ Para 62

¹⁷ JJ Henning “Companies and Close Corporations, Deregulation and Specialised Commercial Litigation” in JJ Henning (ed) *Economic Crime in South Africa* (1996) 39 47

¹⁸ See in general, R Stevens “Crimes under the Companies Act 71 of 2008” in G Kemp, S Walker, R Palmer, D Baqwa, C Gevers, B Leslie & A Steynberg *Criminal Law in South Africa* (2012) 503 503-510

¹⁹ Henning “Companies and Close Corporations, Deregulation and Specialised Commercial Litigation” in *Economic Crime in South Africa* 47

as well, notably harm, and the broader protected interests of public welfare, the integrity of the financial system, the environment, and so on.²⁰

It falls beyond the scope of this contribution to analyse the underlying rationales for the criminalisation of the various forms of economic crime. The point is that not all economic crimes can be decriminalised. It stands to reason that certain forms of economic crimes are by their very nature harmful and against the protected interests of society. Tax evasion, theft, fraud, embezzlement, corruption – to name but a few – are common-law and statutory crimes rooted in societal aversion of the type of conduct that harms individuals, and/or the public good.

If we accept, then, that economic crime is here to stay (despite some decriminalisation), the question is how best to answer to the charge that the criminal process is not very efficient in combating economic crime, and that alternatives to prosecution might prove to be better in dealing with economic crime. We now turn to plea bargaining as an example of an alternative to criminal litigation *via* a trial process.

6 Plea bargaining: pragmatism, practices, and concerns

Plea bargaining (“plea and sentence agreements”) in South Africa is currently governed by section 105A of the Criminal Procedure Act 51 of 1977. Plea agreements, without agreement on sentencing, are still governed by the common-law principles as set out in case law.²¹ In the most general terms, plea bargaining in South Africa was defined by Msimang J in *S v Armugga*²² as follows:

“In the present context plea bargaining can be defined as the procedure whereby the accused person relinquishes his right to go to trial in exchange for a reduction in sentence. As the term itself connotes, the system involves bargaining on both sides, the accused bargaining away his right to go to trial, in exchange for a reduced sentence and the prosecutor bargaining away the possibility of a conviction, in exchange for a punishment which he or she feels would be retributively just and cost the least in terms of the allocation of resources. In the process of bargaining, numerous assumptions are made and mistakes are bound to happen.”²³

Although plea bargaining (in its informal or common-law forms) has been part of South African criminal justice practice for some time,²⁴ there can be no doubt that the formalisation of the rules and practices as set out in section 105A of the Criminal Procedure Act²⁵ provided prosecutors with more

²⁰ In general, HL Packer *The Limits of the Criminal Sanction* (1968); MA Rabie & SA Strauss *Punishment: An Introduction to Principles* 5 ed (1994) 103-104, 140

²¹ E Snyman & S du Toit “Defining and Evaluating Plea Bargaining” (2000) 13 *SACJ* 190-199; MB Rogers “The Development and Operation of Negotiated Justice in the South African Criminal Justice System” (2010) 23 *SACJ* 239-262

²² 2005 2 SACR 259 (N)

²³ 265a-b

²⁴ See, for instance, the judgment in *North Western Dense Concrete v Director of Public Prosecutions (Western Cape)* 1999 2 SACR 669 (C); also, PM Bekker “Plea Bargaining in the United States of America and South Africa” (1996) 29 *CILSA* 168; A Allen “Plea Negotiations” (1987) 8 *Obiter* 46

²⁵ S 105A entered into force on 14 December 2001 See *GG 22933* of 14-12-2001

structure²⁶ (and motivation) to explore the pre-eminent “alternative dispute resolution”²⁷ feature of the criminal justice system in South Africa.

A number of reasons can be advanced as to why prosecutors would want to negotiate the key issue of liability for a particular crime, as well as any related matters, notably punishment. The compilation of possible reasons provides insight into the underlying rationale and dynamics of the practice of plea bargaining.

The casual observer’s most probable conclusion as to the primary reason for the existence of plea bargaining in a legal system could very well be that of *pragmatism*. The casual observer will probably note that there does not seem to be any fundamental normative reason or underlying value for the existence or promotion of the practice. So, what would this supposed pragmatism entail? Data signifying incidences of crime, and the concomitant case load flowing from criminal prosecutions, are often presented as reasons for alternative measures as a strategy to reduce the number of cases going to trial.²⁸ Indeed, in some jurisdictions, out-of-court settlement of criminal cases plus alternatives to prosecution (notably plea bargaining) have reached such levels that one can say these are the predominant methods of resolving criminal cases.²⁹

In its comparative study on the simplification of criminal procedure, a report³⁰ by the South African Law Reform Commission contains the following (with reference to selected jurisdictions in Europe):

“All these [European] jurisdictions obviously try to develop mechanisms that enable criminal justice systems to cope with the growing caseloads and the increasingly complex criminal cases (especially economic crimes) and to improve the performance of the systems in the attainment of objects. However, whereas in the [1960s] and [1970s] the focus of the objects pursued by procedures for settlement out of court was definitely on reducing stigmatization and recidivism, the last decade has seen the dominance of cost arguments and the economic rationale. But the last two decades [1981-2001] have also seen the victim of the crime again becoming a central figure in the criminal process. In like measure, mediation and compensation have been given considerable attention with a view to justifying conditional dismissals by making mediation and compensation an important argument in policy debates on settlements out of court.”³¹

It was pointed out above that out-of-court settlement and plea bargaining are not the same modalities. However, they do share the same underlying rationale (as explained by the legal comparative report presented to the South African Law Reform Commission). Efficiency or economic arguments seem to be the key rationales for the advancement of either or both out-of-court settlements and plea bargaining.

A consequence of the increased practice of out-of-court settlement of criminal matters in Europe is the enhanced role of the prosecutor in the

²⁶ M Watney “Judicial Scrutiny of Plea and Sentence Agreements” (2006) *TSAR* 224-230

²⁷ E du Toit, F de Jager, A Paizes, A Skeen & SE van der Merwe *Commentary on the Criminal Procedure Act* (2013) 15-17

²⁸ M Kerscher *Plea Bargaining in South Africa and Germany* LLM thesis Stellenbosch University (2012) 7

²⁹ 7

³⁰ South African Law Reform Commission *Simplification of Criminal Procedure: Settlements Out of Court – A Comparative Study of European Criminal Justice Systems Project 73 Research Paper 19* (2001)

³¹ 50

criminal justice system. And in the United States – a jurisdiction which can rightly be called the home of plea bargaining – district attorneys are often powerful individuals with political ambitions beyond the criminal justice system. They also happen to be powerful for systemic reasons, notably their ability to initiate and conclude negotiated justice. Of course they are elected by the people, so they can claim some political and institutional legitimacy in the eyes of the public that elect them.

The public roles of prosecutors in various jurisdictions differ, of course. The *procureur des Konings* in Belgium,³² for instance, or the prosecutor or state advocate in South Africa, have distinct constitutional and legal roles. They are part of bureaucratic and hierarchical systems with less independence than the elected district attorneys of the United States. Bureaucratic processes and guidelines play a far greater role and may very well impact on the fact that even in a system like South Africa (which is heavily influenced by Anglo-American procedural law and doctrine) plea bargaining still does not play the same prominent role as is the case in the United States. The historically powerful role of the district attorney in the United States, combined with what some would identify as a libertarian bent,³³ probably helped to put the United States at the forefront of the practice of plea bargaining. The practice is so ingrained in the American criminal justice system precisely because there seems to be little doubt about the legitimate (and mandated) role of the American district attorney to negotiate about justice and thus represent the public interest. In a sense, the American district attorney can claim some degree of original legitimacy because of his or her elected status.

But, regardless of the particular constitutional, political, and social context in which prosecutors operate, it can be said that if they have the formal or informal roles of decision makers, policy makers, indeed – “judges before the courts”³⁴ – then one must ask: where does this leave the public in general, and the individual accused in particular?

A comparative look at the tendencies in a number of European jurisdictions is that out-of-court settlements (as opposed to plea bargaining) are aimed primarily at minor offences and “moderately serious crimes”.³⁵ At the same time, plea bargaining has been developed and implemented to respond to “cases of serious crime, particularly complex cases of economic crime”.³⁶ The comparative study of selected European jurisdictions³⁷ also revealed a number of concerns regarding both modalities – settlements out of court and plea bargaining. These concerns can be listed as follows:

³² For the role and function of the *procureur des Konings* in the Belgian criminal justice system, see C van den Wyngaert *Strafrecht en Strafprocesrecht* 8 ed (2011) 605-606. The role of the *procureur des Konings* is described as that of the “motor” of the criminal process. They form a council of *procureurs des Konings* that directly reports to the Minister of Justice.

³³ E Luna “Traces of Libertarian Theories of Punishment” (2007) 91 *Marquette L Rev* 263-294.

³⁴ South African Law Reform Commission *Simplification of Criminal Procedure* 50.

³⁵ For the position in the Netherlands, see N Jörg, C Kelk & AH Klip *Strafrecht met mate* (2012) 10.

³⁶ 54.

³⁷ 55-56.

- Concerns about equal treatment: This aspect is especially problematic if there are no clear prosecution guidelines or policy briefs to guide prosecutors in the exercise of their discretionary and negotiating powers.
- Division of powers: This concern is based on the perceived and real increase in the powers of prosecutors to negotiate justice and even to dismiss criminal cases (conditionally or unconditionally). The problem – from a constitutional or policy perspective at least – is that there is a danger that the courts and the judiciary might become marginalised.
- The risk of abuse of power: There is a concern that out-of-court settlements (and even court sanctioned settlements like plea agreements) lack the transparency of a full public trial. There are also concerns about control over the process, especially in so far as the interests of certain parties (like victims of crime) are concerned.
- Systems that are based on inquisitorial procedural models find plea bargaining to be culturally incompatible with the basic aims of the inquisitorial system; truth finding; and the interests of victims of crime.³⁸
- The risk of rights violations and the risk of coercion: Out-of-court settlements and other alternatives to prosecution (including plea bargaining) are based on the notion of consent. But comparative studies show that there are real concerns about the risk that real or perceived coercive extra-curial processes leading to settlements *or* plea bargains might not be based on free will and informed consent.³⁹ This, in turn, violates one of the most fundamental principles in criminal justice, namely the presumption of innocence.

In South Africa, the formalised system of plea and sentence agreements in terms of section 105A of the Criminal Procedure Act is an attempt to address some of the typical concerns mentioned above. For instance, in *S v De Goede*,⁴⁰ the court noted the following:

“The mandatory provisions contained in section 105A provide protection to the accused person who has, by virtue of entering into a plea and sentence agreement, waived his or her rights in terms of section 35(3) of the Constitution to a public trial before an ordinary court and to be presumed innocent in return for agreeing to both plea and sentence. Consequently adherence to the provisions of section 105A provides an appropriate check and balance against the abuse of the plea bargain process in the context of the waiver of the accused’s constitutional rights.”⁴¹

On the whole, it can be said that the formalised system of plea and sentence agreements in terms of section 105A of the Criminal Procedure Act contains enough safeguards and the element of transparency⁴² is provided by the role of the judiciary as final arbiters of what an “appropriate” sentence is. There

³⁸ J Jackson *Crime, Procedure and Evidence in a Comparative and International Context* (2008) 39

³⁹ See, for instance, criticism by Van den Wyngaert *Strafrecht en Strafprocesrecht* 556; B de Smet “De versnelling van de strafrechtspleging met instemming van de verdachte: is de invoering van een ‘guilty plea’ naar Angelsaksisch model wenselijk?” (1994) 2 *Panopticon* 397-420 A central critique seems to be the “consensualisering” of the criminal process; that is, quite literally, negotiated justice; justice by agreement

⁴⁰ WCC 30-11-2012 case no 121151

⁴¹ Para 12

⁴² *S v Solomons* 2005 2 SACR 432 (C) para 7

is also formalised equality of arms, since plea and sentence agreements in terms of section 105A can only be concluded if the accused is represented by a lawyer. Despite all the formalities and the element of judicial control, formal plea bargaining in terms of section 105A is still to be regarded as an alternative to “a full-blown criminal trial”.⁴³ The judicial view is that this system is necessary “to speed up criminal trials in a woefully congested criminal justice system”.⁴⁴

7 Plea bargaining and economic crime in South Africa

It is difficult to put plea bargaining for economic crime in the proper statistical or empirical context. There is no comprehensive data in South Africa on this. There is a further complicating and contextual factor: Kerscher correctly observed that statistics do not reveal the circumstances of each agreement.⁴⁵

The quantitative data from the NPA annual reports suggest that plea bargaining in South Africa has not reached the levels of plea bargaining in the United States.⁴⁶ In terms of formal agreements (under section 105A of the Criminal Procedure Act) and what the NPA would collectively label “alternative dispute resolutions”, the official numbers reflected in the annual reports confirm the general conclusion that plea bargaining/alternative dispute resolution mechanisms are still relatively low in number (and as a percentage of the total number of criminal cases that the NPA is pursuing).⁴⁷ The most recent report (for the year ended 31 March 2013) asserts, in narrative form, that “[t]he number of criminal cases finalised [including alternative dispute resolution], one of the key output indicators for the NPA, increased by 4% bringing the total to 18 007 more cases finalised compared to [2011/2012]...A focused approach on alternative measures to reduce trial cases has resulted in a 8.1% improvement in the number of cases finalised through [alternative dispute resolution mechanisms] compared to the total of 132 695 cases finalised during the previous financial year”.⁴⁸

The best available quantitative data in South Africa, observed through the lens of the NPA strategy to use alternative dispute resolution and plea bargaining to reduce trial cases, confirm the assumption that plea bargaining is (still) regarded – first and foremost – as a pragmatic strategy in response to the existence of case load pressure. The most recent NPA Annual Report (2012/2013) states that, in terms of the NPA Service Delivery Improvement Plan, the main service that the NPA provides is to deal with criminal cases *efficiently* and *economically*. The relevant indicator is the actual number

⁴³ Bertelsmann and Preller JJ in *S v Yengeni* 2006 1 SACR 405 (T) para 65

⁴⁴ Para 65

⁴⁵ Kerscher *Plea Bargaining in South Africa and Germany* 12

⁴⁶ 11 In *North Western Dense Concrete CC v Director of Public Prosecutions (Western Cape)* 1999 2 SACR 669 (C) the court stated that a plea negotiation and agreement “takes place probably daily, at every level of the criminal justice system” (674e)

⁴⁷ National Prosecuting Authority *Annual Report* (31-03-2013) <<http://www.npa.gov.za/UploadedFiles/Annual%20Report%202012%202013.pdf>> (accessed 03-09-2014)

⁴⁸ 10

of criminal court cases finalised – including alternative dispute resolution mechanisms.⁴⁹

It was mentioned above that a breakdown of the numbers and trends reveals little about the circumstances of each plea bargain or other form of alternative dispute resolution mechanism. Some commentators classified the known (formal) plea agreements with reference to the principal criminal conduct. By this measure, it seems that economic and property crimes account (collectively) for about 55% of plea bargains in South Africa. The percentage can vary on an annual basis, but given the medium to long-term prosecutorial strategies as reflected in the various annual reports of the last few years, it is safe to assume that plea bargains for economic and property cases will stay in the region of 50% and probably not account for more than 60% any time soon. The problem here is that economic crimes are thrown in with property crimes for statistical purposes. This is not satisfactory if we want to draw meaningful statistical conclusions with specific reference to economic crime. Thus, the best we can do with these statistics is to conclude (a) that economic crime and property crime (collectively) account for the majority of formal plea bargains in South Africa, and (b) the National Prosecuting Authority views plea bargains and other forms of alternative dispute mechanisms as essential in the strategy and aims to reduce case load pressure that negatively affects the functioning of the criminal justice system in South Africa.

8 Concluding observations

Is it in the public interest to allow for, or encourage, alternative measures to reduce trial cases for economic crimes? The answer to this question is a bit more nuanced than a simple yes or no.

The primary reason for the existence of alternative measures, including plea bargaining, seems to be pragmatism, and more specifically pragmatism driven by case load pressure. Comparative studies, various reports by the South African Law Reform Commission, judicial pronouncements on the underlying rationale of statutory frameworks like section 105A of the Criminal Procedure Act (plea and sentence agreements), annual reports of the National Prosecuting Authority, and academic commentary all advance the basic idea that alternative measures, including plea bargaining, are components of a strategy aimed at a more efficient criminal justice system. It seems that *efficient* in this context means fewer cases before the courts.

Plea bargaining – arguably the best known form of alternative dispute resolution in the criminal justice context – is premised on individual autonomy and (informed) consent – as illustrated by the considerable comparative (especially American) jurisprudence, as well as a growing South African jurisprudence on this subject. Comparative studies also illuminate some warnings, but formalised plea bargaining in South Africa – *via* section 105A of the Criminal Procedure Act – seems to address most if not all of the important concerns about alternative measures. Of course, formalised (statutory) plea

⁴⁹ 18

bargain is not the only form of plea bargain in South Africa. Common-law forms of plea bargain are still available, and the National Prosecuting Authority evidently pursues multiple forms of alternative dispute resolutions and alternative measures to reduce trial cases. Given the formalised structure provided for in section 105A (and the mandatory role for lawyers in this form of plea bargain), anecdotal evidence from various reported and unreported cases, as well as the breakdown of data gleaned from NPA annual reports, it seems that statutory plea bargaining in South Africa is the first and foremost form of alternative measures.

The fact that alternative measures – notably formalised plea bargaining – are now firmly institutionalised in the South African criminal justice system, and given the general conclusion that plea bargaining (at least in its formalised form) provides enough safeguards to ensure (mainly through judicial control as well as prosecutorial directives) fairness towards the accused and the victims of crime, it is necessary to turn to the question of economic crime in particular.

It was pointed out that, although some data as to the incidences of formal plea agreements for economic crime exist, the data is not very useful. First, it is limited to formal plea agreements. Second, economic crime is lumped with property crime. Third, and most important for present purposes, is the fact that we do not know the circumstances of each agreement. This fact underscores the fundamental unease about the practice and policy of alternative measures to reduce trial cases, including for economic crime. In fact economic crime, as was argued by way of introduction, concerns calculation. These are not crimes of passion. And herein lies the risk. The strategy of alternative measures to reduce trial cases relies not only on the prosecution's desire to make the criminal justice system more effective; it also accommodates, indeed, requires the participation of autonomous individuals who negotiate and participate as equals in a process akin to commercial deal making. Yes, there is – in the case of formal plea bargains at least – judicial control. But essentially, alternative dispute resolution and plea bargaining in the criminal justice system are expressive of free will and individual autonomy. And individuals or corporations planning to commit economic crime can build this into the cost-benefit equation for purposes of decision making, and ultimately commission of the crime. To compound matters, it needs to be pointed out that the assumed profile of a perpetrator of economic crime implies more access to the kind of resources and knowledge that would make for easier and more forceful negotiation in, for instance, a plea bargaining process. This is of course not a problem *per se* (at least not from the perspective of individual justice and fairness to the accused). From a societal point of view it may become a structural problem if certain types of offenders get to have more and easier access to alternative measures – a fact at least superficially borne out by the annual reports of the National Prosecuting Authority.

A final observation regarding the institution of alternative measures to reduce cases going to trial, concerns the *inherent and public value of the criminal trial*. This aspect was not explored in this note, but needs to be mentioned as a final *caveat* with respect to the general acceptance of

alternative measures, including plea bargains, as strategies to make the criminal justice system more efficient. Case load pressure should never be the sole determinant of whether the prosecution will pursue alternative measures. The full, public criminal trial serves many purposes, most important of which is the determination of culpability, as pointed out under part 5 above. There is another dimension here: Trials have didactic value – and the more serious, controversial or complex a matter, the more potential it has as a didactic tool. Trials tell a story and become part of the public record and conversation. The notion of trials as didactic tools came to the fore in the context of serious crimes under international law (such as war crimes, genocide and crimes against humanity). Such trials not only address individual culpability, but also history and collective memory.⁵⁰ It is true that not all, or even most, criminal matters are serious or complex enough to have historic or memorial value. But one can very well imagine instances of economic crime – for instance massive corruption, or financial crime that causes a financial crisis⁵¹ – that would make a trial, as opposed to an alternative measure such as plea bargaining – correct and appropriate. A trial would then be more appropriate not only in terms of the framework of the law and procedure, but also in terms of public interest, and historic record. *Effectiveness* is important as an outcome – but *justice* – in the broadest sense of the word – must also be served.

SUMMARY

This note considers alternative measures to reduce trial cases as a strategy to enhance the effectiveness of the criminal justice system. The emphasis falls on economic crime. It is noted that alternative measures, particularly formal and informal plea bargaining, can be beneficial and are also manifestations of individual autonomy. It is, however, warned that insofar as institutionalised alternative measures become part of a cost-benefit, economic analysis (which seems to be a real risk in the context of economic crime) and insofar as criminal trials for major or complex crimes serve public, didactic roles, alternative measures should not be opted for without careful consideration of the public interest in the broadest sense.

⁵⁰ L Douglas “The Didactic Trial: Filtering History and Memory into the Courtroom” (2006) 4 *European Review* 513-522

⁵¹ See, for instance the consequences of financial misconduct and financial crimes in the Enron, Worldcom, Parmalat and other matters, and the implications of these in terms of financial crises that followed; DS Gherai & DE Balaciu “From Creative Accounting Practices and Enron Phenomenon to the Current Financial Crisis” (2011) 13 *Annales Universitatis Apulensis Series Oeconomica* 34 34-41