

Dutch developments: restorative justice in legislation and in practice *

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1. Introduction

Although restorative justice began to develop more rapidly in the 1990s in countries such as the United States, New Zealand, the United Kingdom and Belgium, its emergence in the Netherlands was slower to come about. Experiments, however, did occur through bottom-up initiatives by progressive individuals and organisations, especially in the field of juvenile justice and at the police level. Many of these often positively evaluated initiatives disappeared when funding stopped and other justice priorities were identified by municipalities or the government.

A different trend has taken shape in recent years, although restorative justice in the Netherlands has faced several obstacles. Several new NGOs and other stakeholders have become increasingly active in the field of restorative justice. These include the expertise and innovation centre Restorative Justice Nederland (RJN) (2010), the association for mediators in penal cases (*Nederlandse Vereniging van Mediators in Strafzaken: VMSZ*) (2015) and the active family group conferencing organisation Eigen Kracht Centrale (2000), in addition to several schools for applied sciences and universities. In July 2016, the first special professorship on restorative justice initiated by the (Herman Thomas) Bianchi Foundation was implemented at the Free University in Amsterdam, with Katrien Lauwaert currently holding the position. Since 1 April 2017, Dick Allewijn has a special professorship on mediation at the same university.

Legislation, projects and pilots have been started and implemented; the government, justice organisations, NGOs and restorative justice experts are increasingly collaborating, and restorative justice is being progressively developed in many areas. Three main domains can be distinguished here: restorative practices within civil society, restorative justice in penal cases and restorative detention.

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1.1 Restorative practices within civil society

Restorative practices within Dutch civil society (neighbourhoods, schools, youth care etc.) are increasingly flourishing. In almost 300 cities in the country, neighbourhood mediation is now being delivered as a voluntary service by trained volunteers.¹ In schools also restorative programmes are growing. Peer mediation is integrated into many primary (16 per cent of all schools are working with material of The Peaceful School²) and secondary schools where young people learn to deal with conflicts by using or becoming a peer mediator. Peer mediators are children who volunteer to take up this task and receive a training to do so. Another development is the initiative of so-called ECHO schools, schools of all levels that have restorative practices at the core of their work. The ECHO school relates to the Peaceful School Programme – a democratic and participatory citizenship programme addressing the problematic behaviour of youth in primary, secondary and high school education – practiced by other schools.

In youth care, family group plans are a common feature and family conferencing has developed into a structural possibility imbedded in law. It entails conferences whereby people from the social network of the young person together look for possibilities to cope with escalated home situations.³ There is growing attention within society in general towards victims, initiatives in neighbourhoods and civil participation. There remain, however, enough barriers in bringing restorative practices within civil society to a higher level, such as a lack of clear policies that creates ad hoc local practices, financial restraints and quality issues.

This Note will, however, mainly address restorative justice that takes place within the criminal justice system, in the phase of police, prosecution and courts as well as in the execution phase, especially when suspects receive a prison sentence—restorative detention.

1.2 Restorative justice in penal cases

In the 1990s, inspired by experiences in other countries, several local restorative justice initiatives dealing with criminal behaviour were launched in different parts of the Netherlands, especially within the police and youth care. The mediation practice in Maastricht/Limburg, for example, already existed in 1999 (Claessen et al., 2015; Claessen & Zeles, 2013). Despite the positive evaluations of existing pilots, many did not survive because there was no legal basis, no clear policy and insufficient funding (Steketee et al., 2006; Wolthuis, 2012).

In 2012, a new article was included in the Dutch Code of Criminal Procedure (Article 51h) that created a legal base for restorative justice in penal cases for the first time. The article provides an obligation for the police and the public prosecutor to inform victims and offenders about the possibility of mediation. The article, furthermore, states that any agreement reached should be taken into consid-

1 Retrieved from: www.buurtbemiddeling.nl (last accessed 6 November 2018).

2 For more information, see Pauw (2018).

3 Retrieved from: www.eigenkrachtcentrale.nl (last accessed 6 November 2018).

eration by the judge when imposing a sanction or measure.⁴ Although this was a legislative milestone, in practice, not much appeared to change at first and only a few cases were referred. Around the same time the Ministry of Justice asked several organisations for advice on how to proceed with restorative justice. Restorative Justice Nederland was asked to make an inventory of restorative justice initiatives and projects in the Netherlands and beyond from 1980 to 2010 and to develop policy recommendations. This inventory led to the realisation that the Ministry of Justice must develop a clear policy on restorative justice, a finding that was echoed by the Council for Criminal Law and Youth Protection (*Raad voor Strafrechtstoepassing en Jeugdbescherming*)⁵. The Ministry indeed started developing, in consultation with several stakeholders, a draft policy on mediation in penal cases. This draft was tested and implemented from 2014 to 2016 by executing several pilots. These developments will be described in more detail in section 2.

On 11 July 2018 the Minister of Legal Protection wrote a letter, titled ‘Extra-judicial Dispute Resolution and Restorative Justice’, to the Second Chamber (of the Parliament), wherein he stressed the importance of the use of such interventions and the need to expand especially the use of mediation and wherein he specified action points such as more and better information sharing about the possibilities, establishing neutral institutions, providing quality standards and additional attention and funding for juveniles.⁶ Structural funding for mediation in penal cases was allocated in September 2018 when the national budget was presented: one million EUR per year and an additional amount of 300,000 EUR for cases with juveniles.

An initiative on a draft legislation proposal by Restorative Justice Nederland together with Maastricht University led to questions by members of the Dutch Parliament to the Minister for Legal Protection seeking his reaction on the proposal. We will go into further detail later on in this Note.

1.3 Restorative detention

In recent years, the Dutch prison sector has invested in encouraging restorative practices within prisons known as restorative detention. The programme ‘Modernisation of Detention’ (*Modernisering Gevangeniswezen*), although mainly inten-

4 Article 51h of the Dutch Code of Criminal Procedure reads as follows: ‘1. The Public Prosecutor’s Office shall promote notification by the Police, at the earliest opportunity, of the possibilities of mediation to the victim and the accused. 2. If mediation between the victim and the accused has led to an agreement, the court is to take this into account in imposing punishment or a measure. 3. Upon having established that the victim has consented to mediation, the Public Prosecutor’s Office shall encourage such mediation between the victim and the convicted person. 4. Further rules relating to mediation between the victim and the accused or between the victim and the convicted person shall be regulated by General Administrative Order’.

5 Also, The Decision Victims of Penal Cases of 24 August 2016 (*Het Besluit slachtoffers van strafbare feiten*) is based on Article 51h of the Code of Criminal Procedure and gives additional conditions for the use of restorative justice services.

6 34 775 VI, Nr. 115 Vaststelling van de begrotingsstaten van het Ministerie van Justitie en Veiligheid (VI) voor het jaar 2018, Brief van de minister voor Rechtsbescherming, Aan de Voorzitter van de Tweede Kamer der Staten-Generaal Den Haag, 11 juli 2018.

ded to be a cost reduction operation, focused on safe human detention from 2009, thus aiming to contribute to safety within the society and promoting reintegration of ex-prisoners. The central goal was a person-oriented approach towards inmates based on a life course approach—working with interventions and activities that are most likely to reduce the recidivism risk for an individual inmate. Support starts before detention and continues as much as possible during and after detention.

A victim-oriented and restorative approach interlinked with this programme was even more stimulated through the pilot ‘Victim Focused Approach’ (*Slachtoffergericht Werken*) within the prison sector (2013-2016). The pilot was part of a vision of the Department of Justice in 2013 called ‘Doing Justice for Victims’ (*Recht doen aan Slachtoffers*). At the same time, the ‘Prison Master Plan’ (*Masterplan Gevangeniswezen*) 2013-2018 was published, which aimed at optimising security, lowering costs and increasing self-reliance for inmates combined with promoting proper care and/or treatment. Optimising security included taking into account the societal impact of a crime and the position of victims and survivors. Even though this Master Plan was not entirely restorative, the different programmes together created space for restorative justice initiatives to grow. Promising good practices within detention will be described in section 3.

2. Development of restorative justice in penal cases

HALT, also referred to as The Alternative, represents one programme in juvenile justice with restorative characteristics that was already integrated into law and policy as early as the 1980s. Originally, children and adolescents between the ages fourteen and eighteen were offered a community service at an early stage, which prevented them from building up a criminal record. In recent years, the intervention has been revised following evaluations, resulting in more attention for restorative aspects. A staff member of HALT uses a restorative conversation in cases where more parties are involved, such as group disputes or bullying. During such a conversation, all parties, such as the offender, the victim, family members, neighbours and a teacher, can participate. The idea is that the victim can tell his/her story and can see who did this to him/her. The young person is also able to understand how his/her behaviour can impact others. During such a session, the parties discuss damages, consider apologies and may participate in a learning or work programme (HALT, 2013). In 2017, 17,000 juveniles took part in HALT.⁷

Other initiatives with victim-offender mediation and family group conferencing started in the 1990s. For a long time, restorative justice practices embodied a rather diverse landscape of initiatives at the local levels, led by motivated citizens, organisations or the police. These practices were often only financed short term and through local funding. Most pilots were focused on juvenile offenders and their victims. Evaluations indicated that participants were happy and their feeling

7 Retrieved from www.halt.nl/media/1235/highlights-van-halt-2017.pdf (last accessed 5 November 2018).

of justice had improved. More important for politicians was the fact that it often resulted in lower recidivism rates (Claessen et al., 2015; Steketee et al., 2006; Wolthuis, 2012). After an experimental stage, victim-offender conversations outside of the criminal justice system were given most attention because of political reasons. An organisation called Victim in Focus (*Slachtoffer in Beeld*)⁸, which now carries out more than 2,000 conversations per year, was established. This trend, however, has changed recently as the organisation is now also involved in organising mediation in penal cases at the court level. In 2016, it handled more than 13,000 applications.⁹

Article 51h of the Code of Criminal Procedure and the concept policy paper that were mentioned in the introduction gave room to new developments that were also influenced by the EU Victims' Directive of 2012,¹⁰ which includes articles on restorative justice as an important tool for victims.

In the last few years the government has supported pilots that have been initiated by courts, the prosecution or the police and during probation. In 2013, the Ministry of Security and Justice asked various actors to submit proposals for pilot projects on mediation in penal cases. The following five projects were selected:

- Two pilots in the police phase (i.e. *Politiepijlot Spijkensisse* and *Vreedzame Wijk Utrecht*), in which mediation was conceived as an alternative to criminal proceedings
- One pilot in the prosecutorial/trial phase (i.e. *Openbaar Ministerie, OM/Zittende Magistratuur, ZM pilot*), in which mediation was part of the criminal proceedings
- Two pilots in the post-sentencing phase (i.e. *Locatie en Contactverbod* and *Eigen Kracht Centrale*), in which mediation was complementary to the criminal proceedings (Cleven et al., 2015)

The pilots were not always successful in obtaining cases. Many cases, however, were referred to the police project in Utrecht and the pilot in the prosecutorial/trial phase. Those were examined more closely in the evaluation carried out by INTERVICT/ Tilburg University, and we will explain those in more detail.

The police play a vital role within restorative justice in these pilots. At the national level, they are building up expertise, but there is not yet a clear national policy and many people within the police are not aware of the existence of restorative justice. At the local level, interesting initiatives have been carried out. Utrecht, the fourth largest Dutch city, is actively involved in the Peaceful Neigh-

8 In 2017 they changed the name into: 'Perspective on victim-offender mediation': *Perspectief Herstelbemiddeling*.

9 Retrieved from: www.perspectiefherstelbemiddeling.nl/Meta-Navigatie/Nieuws/10-jaar-SiB-herstelbemiddeling/ (last accessed 5 November 2018).

10 Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime and replacing Council Framework Decision 2001/220/JHA.

bourhood Programme.¹¹ The programme involves organisations within the neighbourhood, members of the community and stakeholders to adopt peaceful attitudes in daily life, including a mindset that addresses conflicts by resolving them through joining forces. Together with the Peaceful School Programme, the initiative forms the so-called Utrecht Model for Mediation (*Utrechts Mediation Model*). Both citizens and professionals are empowered to enhance their 'peaceful skills' and skills for conflict resolution. Citizens and professionals are being trained to develop this mindset. Volunteer mediators are being trained and formed to help citizens, students, organisations and professionals in case of problems and tensions between groups. Professional mediators intervene in case of escalated conflicts and penal cases. The police in Utrecht incorporated this way of working effectively into many neighbourhoods (Dierx & Verhoeff, 2013).

The evaluation showed that in almost all of these cases a report to the police was made. These cases need to entail sufficient evidence for (successful) prosecution of the alleged perpetrator. In the cases involved, the police assessed that the legal procedure would not solve the underlying problem due to the fact that the parties involved in the report lived near each other and/or that there was a high probability that they would encounter each other regularly. Of the 54 registered cases, 44 were (at that stage) completed and a majority resulted in a successful mediation (Cleven et al., 2016).

The largest pilot was carried out in the prosecutorial and trial phase – in total 716 cases were completed in six courts (Amsterdam, Noord-Holland, Den Haag, Rotterdam, Brabant-Oost and Breda/Middelburg). It entailed collaboration between the Public Prosecutor's Office, the judiciary, the mediators selected by the court (*Mediatorsfederatie Nederland*) and Victim in Focus (*Slachtoffer in Beeld*). Cases were referred to the mediation offices of the courts by public prosecutors and judges. Subsequently, cases were alternately carried out by registered mediators selected by the courts. Until 1 March 2015, a total of 766 cases were referred to mediation in penal cases. Most cases (55 per cent) were referred via the so-called ZSM-procedure, which is a national programme getting together relevant partners in the justice chain to deal with often occurring criminal behaviour in a fast, effective and efficient way. Of the 716 completed cases, 367 cases (51 per cent) resulted in mediation. More than three-quarters of these cases were successful, meaning that mediation either resulted in a settlement agreement or, as in a few cases, the mediation was viewed as successful by the parties involved (Cleven et al., 2016).

The research illustrated the added value of mediation in criminal law. Over 70 per cent of participants (victims and offenders) regarded their participation as positive, especially regarding procedural justice and the mediators. In most cases, it appeared unlikely that an alternative would have resulted in a better solution. Some participants did, however, report unsatisfactory experiences. Furthermore, each pilot took longer than expected to reach the anticipated numbers and issues

11 Retrieved from: <https://hetccv.nl/onderwerpen/veiligheidsbeleving/praktijkvoorbeelden/alle-praktijkvoorbeelden/vreedzame-wijk/> (last accessed on 5 November 2018).

remain regarding the legal framework, the organisational structure and the financing of mediation in criminal law (Cleven et al., 2016).

The national pilots at the prosecutorial and trial phase and at the police level (which were the most successful) almost came to an end in 2016 when the Minister of Security and Justice failed to allocate funding. However, after an intense lobby by politicians, NGOs, mediators and legal scholars, budget was made available. As of 2017, all courts offer mediation in penal cases.¹² Public prosecutors and judges can suspend the case and refer the case to mediation before the final decision. The precondition is that the suspect admits (at least part of) the criminal offence and agrees to participate in mediation. The victim also must agree. After a referral, the coordinator of the mediation bureau of the court contacts the parties and a registered mediator. The coordinator checks whether the case is indeed suitable for mediation and whether the mediators are able to bring the parties together. In case of minors, there is also a parent involved. In September 2018 the funding became a structural item on the state budget and mediation in penal matters became available nationwide (Claessen, 2018; Van Gool, 2018).

The 'Information Sheet on Mediation in Penal Cases', published by the Ministry of Security and Justice in 2017, indicates that mediation is considered 'useful and meaningful'.¹³ After mediation, victims and offenders report that they often do not feel the need to continue with the criminal procedure. Independently from the agreements, the decision to sanction or stop the case after a successful mediation remains a decision of the public prosecutor and the judge.

The information sheets that followed contain updated figures, background information and interviews with mediators, public prosecutors and other professionals involved. The number of referrals in 2017 was related to 946 court cases. In 76 per cent of the cases where the parties started a mediation, the case ended with an agreement. The figures are increasing. In 2018, 1,424 cases were referred, of which 797 started by the mediator and 754 of those finalised by 17 December 2018. In 83 per cent an agreement was made. About half of those cases involve abuse or violence, followed by cases related to threats, damage to goods, theft and traffic violations or road offences. Mediation in penal cases generally takes about 2 weeks and a maximum of 6 weeks.¹⁴

3. Restorative detention

While there have been many developments within the area of restorative detention, we will mention some of the most significant policies and practices here.

12 Retrieved from: www.rechtspraak.nl/Organisatie-en-contact/Organisatie/Raad-voor-de-rechtspraak/Nieuws/Paginas/Mediation-in-strafzaken-nu-in-hele-land.aspx (last accessed 5 November 2018).

13 Infoblad 1, Mediation in strafzaken, 05/2017. Retrieved from: www.rechtspraak.nl/SiteCollectionDocuments/infoblad-mediation-in-strafzaken-1.pdf (last accessed 5 November 2018).

14 Retrieved from: Informatiebrochure 3, via: www.rechtspraak.nl/ (last accessed 6 November 2018).

3.1 Restorative justice action plans and restorative justice maturity grid

The Department of Judicial Institutions of the Ministry of Security and Justice ordered in 2016 that every detention centre should develop a restorative justice action plan by the end of 2017. In this way, restorative practices can become more imbedded within the whole organisation. A format for such yearly action plans was developed at the request of the Ministry by Restorative Justice Nederland in collaboration with the restorative consultants within prisons. The draft format was tested in 2016 in a pilot at four prisons. The final format is a guideline for prisons to develop a tailored action plan in such a way that it has a base within the organisation. The drafting process should entail a collective collaboration among representatives of the prison staff and the management.

The innovative character of restorative justice action plans in detention centres led to the Ministry allocating resources to this endeavour in order to support organisations. A vast majority of the Dutch prisons hired Restorative Justice Nederland staff to facilitate the process of developing such action plans and providing additional training and professional development. The format and structure of the restorative justice action plan is based upon the Restorative Justice Maturity Grid developed by Restorative Justice Nederland in 2013.¹⁵ This grid distinguishes five organisational levels where restorative practices in detention centres can be (more or less) implemented: (1) organisational vision and policy, (2) working methodology, (3) culture, (4) professional expertise and (5) cooperation with external partners. Next, we will describe some promising developments within Dutch detention centres at these different levels.

3.2 Restorative working methodologies

Within Dutch detention centres, restorative consultants – currently active in three prisons in the Netherlands – play a fundamental role in implementing restorative practices. Their activities include working with inmates on awareness and being the first to address issues concerning restoration, feelings of guilt and shame and referral to mediation between victims and offenders. In individual and group work, restorative consultants are stimulating detainees to become aware and take active responsibility of the consequences of their crime. The long-term goal is to assign restorative consultants to all detention centres, although, currently, budget restraints are preventing greater reach.

Prison chaplains or other spiritual caregivers traditionally play an important role in restorative detention. This service of spiritual support forms a specific and independent ‘sanctuary’ within prisons and provides a restorative approach through group and individual counselling. Prison chaplains play an important role in referring cases to restorative justice services.

Another key player is the triangle of ‘case manager – prison warden or mentor – and the inmate’ that in some prisons is actively used within a restorative approach. In Reintegration Centres, inmates work on different levels of reintegra-

15 The maturity grid is a tool for self-assessment and dialogue that can be used to improve restorative practices in prisons. The RJN maturity grid is available in English and can be ordered at: info@restorativejustice.nl

tion and return and various organisations and services offer support to inmates to work on four different layers of restoration: self-restoration, restoration with their family members, restoration with their victim(s) and with society.

The family members of inmates form an explicit group within restorative detention. Both prisons themselves (Family Approach in the northern part of the Netherlands) and external partners like Exodus and Prison Fellowship The Netherlands (*Gevangenezorg Nederland*) have developed programmes enabling inmates and their families to meet. These programmes comprise family programmes, parent-child days, transport of children to and from prisons, reading projects (taping of parents reading a book to their children) and accompanied visits.

3.3 Culture and awareness

Several activities are conducted in prisons – both ad hoc and more structural initiatives – in order to raise awareness about restorative justice among both inmates and prison staff.

In 2014, the Dutch prison organisation started a restorative justice promotion tour (*Herstelestaffette*) within all prisons. The promotion tour consisted of testimonies from inside and outside the prison of prison personnel, ex-inmates, victims and relatives of victims of murder. The tour ultimately reached 5,000 people.

Prison Fellowship The Netherlands currently organises so-called SOS courses around three main topics: guilt, shame and victims. Victims and the families of murdered victims take part in these courses. Prison Fellowship The Netherlands is also experimenting with an approach based upon the internationally recognised Sycamore Tree Project, called Building Bridges (Brennan & Johnstone, forthcoming 2019). In this project, victims, relatives of murdered victims and offenders work together on restoration and recovery, although these parties were not involved in the same offence.

Training and courses within prisons include topics such as victim awareness and taking responsibility for the criminal facts and the harm done (awareness programmes like ‘Choose to Change’ (*Kiezen voor Verandering*) and ‘Cleaning Up’ (*Puin Ruimen*). In the latter, a victim or survivor is invited as a speaker as a regular part of the programme. In youth detention centres, the programme ‘Brave’ (*DAPPER*) has been implemented, where young inmates are prepared for their return into society, which may include a meeting with the victim.

Many of these programmes also show inmates the possibility of making amends to the victim, for example, through a letter or during a victim-offender mediation. Some detention centres may also allow for the possibility of managing conflicts between inmates and prison staff.

Within juvenile detention centres, ‘Young in Prison’ offers the COPOSO approach (Contributing Positively to Society). Through creativity and sports, juveniles work on self-restoration, self-esteem, talent development and a future perspective. The programme works with role models inspiring juveniles. A leadership programme within the COPOSO approach trains juveniles to work as role models and teachers of the workshop.

Within prisons, increasingly, so-called experience experts (victims, ex-inmates) are successfully participating in activities to share their stories with inmates and create awareness on restoration and recovery.

3.4 Enhancing professional expertise

In 2013, many training and educational activities on the topic of restorative detention were commissioned by the Department of Judicial Institutions, carried out by restorative consultants working in some prisons, Restorative Justice Nederland and the organisation involved in carrying out victim-offender conversations and mediation (*Perspectief Herstelbemiddeling*). These individuals and organisations participated in twenty courses emphasising victim-oriented and restorative practices that were executed by the Educational Institute of the Ministry.

Restorative Justice Nederland has additionally provided over 50 master classes on restorative detention and restorative justice in 2014-2019 reaching over 500 professionals working in detention centres (case managers, prison wardens, prison chaplains, managers and directors, selection officers and other staff members).

3.4 Cooperation with external partners

Restorative Justice Nederland, together with 30 organisations, initiated a project called 'House of Restoration' in detention, pre- and post-release. The project consisted of five sessions to produce an overview of all activities of these organisations in the field of restorative practices. The project resulted in a report and a restorative detention social card that includes the main players in the field and what they do. Most importantly, through this collaboration process, partners learnt about each other's work and were able to cooperate more effectively. As a spin off, some partners are currently trying to create regional houses of restoration to improve collaboration in several districts of the Netherlands. A next step is to organise a European conference on small-scale restorative detention facilities together with a Belgian institute called VZW De Huizen and other NGOs from the Netherlands, Belgium, Portugal and France. The conference 'RESCALED: Towards Small-Scaled Detention' is planned for 10 April 2019 and to be hosted by the Free University of Brussels.

A particularly promising experiment is currently running in the detention centre of Krimpen aan den IJssel, co-financed by a private fund. This unique project, which was initiated by Prison Fellowship the Netherlands, consists of trained volunteers in one section of the prison (De Compagnie) who, in collaboration with the prison wardens, take an innovative approach to prisoners in thirty of the total number of 468 cells. Inmates are referred to as 'companions' and work for four days in this separate part of the prison, which provides them also with the opportunity to come into contact with employers outside and prepares them for work after detention. The evening and weekend programmes are fully managed by the (trained) volunteers of Prison Fellowship the Netherlands, supported by professionals. The many restorative challenges at four levels (self, family, victim, society) form the central elements of this programme.

Another progressive development is taking place in a detention centre in Almelo, in the east of the country, where the prison renamed and reopened their reintegration centre in May 2018 as the 'Centre for Restoration and Reintegration', providing more attention to the four levels of restoration and better assistance and possibilities – by addressing administrative issues, work and housing over time – to the detainees to work towards a solid return. An even more challenging idea has been funded in 2019 by the Ministry of Justice and Security: in Almelo, a House of Restoration will be created. An old building next to the prison will be made available for a group of detainees who need special attention and assistance, and close cooperation will be established with various external partners and local businesses to make reintegration efforts for this group more successful. The facility will also include services and activities for victims and members of the community.

4. A legislative proposal to incorporate restorative justice into criminal law

During the years 2016-2018, a working group drafted a legislative proposal for incorporating restorative justice practices, in the form of victim-offender mediation and group conferences, into the (new)¹⁶ Dutch Code of Criminal Procedure (Claessen et al., 2018). The working group consisted of Jacques Claessen (Maastricht University) and John Blad (Erasmus University Rotterdam), and four persons connected to Restorative Justice Nederland: Gert Jan Slump, Anneke van Hoek, Annemieke Wolthuis and Theo de Roos (chair). The working group members collaborated with a think tank consisting of approximately eighty restorative justice experts, criminal justice professionals and restorative justice practitioners, such as mediators, lawyers, judges, prosecutors, police officers and prison workers, all of whom apply restorative justice to some degree or the other. Although in the Netherlands citizens' initiatives (*burgerinitiatieven*) and private member's bills (*initiatiefwetsvoorstellen*) do exist, the format was quite unique, because at that time no legislative proposals had yet been submitted by citizens. After solid consultations with practitioners the legislative proposal was presented to Members of Parliament and the Minister for Legal Protection in June 2018. The latter responded with a letter on 17 October 2018.¹⁷ He stressed the importance of restorative justice work and consultations with partners in the field and that he would continue to seek incorporation of the Legislation Proposal in the consultation on the new Dutch Code of Criminal Procedure. In October 2018, an English version of the law proposal was released in order to share the experience internationally as well.

16 A new Dutch Code of Criminal Procedure is expected in 2022 to replace the current Code, which dates from 1926.

17 Directie Wetgeving en Juridische Zaken Sector Straf- en Sanctierecht, 17 oktober 2018, Reactie op de proeve van wetgeving "Herstelgerichte afdoening via bemiddeling in strafzaken", kenmerk 2369599.

At present, the Dutch Code of Criminal Procedure contains only one article on restorative justice: Article 51h, which came into force in 2011.¹⁸ It is a very open-ended and vague article and may be interpreted either broadly or quite narrowly. The working group, therefore, decided to draft a legislative proposal, for which Article 51h merely served as a starting point – nothing more and nothing less. The idea behind the legislative proposal is to ensure more legal certainty and legal equality throughout the Netherlands – from Maastricht to Amsterdam and from Middelburg to Groningen. Especially at a time when several mediation pilots and other restorative justice practices have sprung up all over the country, ‘law in action’ needs to be based on written law. Introduction should, however, occur in a measured way; the working group does not wish to force the thriving and ever-expanding Dutch restorative justice practices into a straitjacket.

The legislative proposal consists of seven articles to be incorporated into the (new) Dutch Code of Criminal Procedure plus two articles to be added to the penitential law governing adults and minors, respectively. The seven articles will jointly form a new title of the (new) Dutch Code of Criminal Procedure, called ‘Restorative Justice Services’. Since it can be useful for other experts and countries to see how we formulated this, we will explain the main content of the articles.

The First Chapter and Article I contain the ‘Police Instruction Standard’, meaning a duty to provide information: the police will inform the victim and the accused, at the earliest opportunity, of the possibility of restorative justice services, which at a minimum consist of facilitated conflict resolution, mediation and group conferencing. They will provide the victim and the accused with information about the restorative justice services. The ‘Explanatory Memorandum’ provides definitions of restorative justice services, mediation, group conference and so on.

The Second Chapter and Article II govern ‘Mediation Prior to the Stage at Which the Police May Decide to Forward the Criminal Case File to the Public Prosecutor’s Office’: the victim who lodges an accusation with the police and the accused against whom the accusation has been lodged are entitled to request an investigation into the possibility of mediation. The police will inform both parties of this right and provide them with information about the mediation process.

The Third Chapter deals with ‘Mediation in Criminal Cases at the Stage Following the Forwarding of the Criminal Case File by the Police to the Public Prosecutor’s Office: the Preliminary Judicial Investigation by the Court’.

Article III contains a duty to handle a ‘Judicial Instruction Standard’: the Public Prosecutor’s Office or the court will investigate *ex officio* whether mediation is possible. At all times, they may suggest to the victim and the accused to consider invoking their right pursuant to Article IV to request an investigation into the possibility of mediation.

Article IV is about ‘The Right to Request an Investigation into the Possibility of Mediation’: both the victim and the accused are entitled to request an investigation into the possibility of mediation. Such a request made by either the victim

18 See footnote 5 for the full text of this article.

or the accused, or jointly, will be denied on serious grounds only. Such a denial must be reasoned and will be communicated to the victim and the accused in writing.

At the preliminary judicial investigation stage, the Public Prosecutor's Office will decide on the request and at the stage of the investigation by the court, the court will decide on the request. If the request is granted, the case will be referred to the Mediation Office.

Article V covers 'The Mediation Process': if a request to investigate the possibility of mediation is granted, the relevant procedural documents will be placed at the disposal of the Mediation Office, which will investigate whether mediation is possible. The Mediation Office will treat all data received by it confidentially. The victim's personal data and the personal data of the accused will not be disclosed to the accused or the victim, respectively, unless the accused and the victim give their permission to do so. The mediator is held to secrecy. During mediation, the victim and the accused are entitled to assistance from one or several supporters. The victim and the offender have a right to counsel during the mediation process. They also have a right to an interpreter, if necessary.

Article VI comprises 'The Mediation Outcome': at the earliest opportunity, the mediator will send an outcome report, through the Mediation Office, to the Public Prosecutor's Office or the court. The outcome report will state the mediation outcome or that mediation has proved impossible. If the mediation between the victim and the accused has resulted in their reaching an agreement, it will be laid down in a contract, which will be attached to the outcome report.

It is clearly written here that an unsuccessful mediation does not provide a legal basis for selecting a more severe form of disposition of the case in criminal proceedings or for demanding or imposing more severe punishment.

The Fourth Chapter and Article VII contain 'Special Provisions with Regard to Juveniles (Employment of Mediation and Group Conferences)': where an accusation concerns an accused who had not yet reached the age of eighteen at the time the criminal offence was committed (and up to 23 when the adolescent law is applied), the Child Care and Protection Board will investigate, prior to the decision by the Public Prosecutor's Office on whether to prosecute, whether there are grounds to give priority to employing mediation or group conferencing. The Child Care and Protection Board will advise the Public Prosecutor's Office on the employment of mediation or group conferencing.

In cases involving juveniles the Public Prosecutor's Office or, as the case may be, the court will ex officio investigate the possibility of either mediation or group conferencing. The mediator assigned to the case will investigate whether mediation or a group conference is the most appropriate form of restorative justice.

It is also stated that, in the event of a successful outcome of mediation or a successful group conference, a custodial sentence may only be imposed if the gravity of the offence, the character of the accused or the circumstances attendant upon the commission of the offence demand it. In its judgment, the court will specifically state the reasons that have led to its decision.

Some other articles are introduced, too—for example, the option to use mediation in objection proceedings related to decisions not to prosecute and the option that courts of appeal can also refer to mediation.

In addition, the proposal contains several articles of penitential law governing adults, minors and persons placed in detention or under treatment orders, respectively. The first article defines ‘Facilitated Conflict Resolution’: a process that enables persons involved in a conflict that has ensued as a result of a criminal offence to voluntarily hold discussions, under the guidance of a facilitator, in order to jointly arrive at a resolution of the conflict, with emotional healing and relational repair as the primary objectives. The second article states that the staff of the penitentiary institution will inform the detainee, at the earliest opportunity, of the possibility of facilitated conflict resolution. They will provide the detainee with information about the facilitated conflict resolution process and refer the detainee to an appropriate form of facilitated conflict resolution if he or she so requests.

5. Strategic analysis of the Dutch developments, challenges and opportunities

The following developments have created opportunities for the further improvement of restorative justice in the Netherlands.

In the 1990s, restorative justice was implemented on a very ad hoc basis. A legal basis for restorative justice in penal cases was, however, created in 2012 and a policy framework has been developed by the Ministry of Security and Justice since then. National implementation of mediation in penal matters started in 2018 on the basis of the insights gained from evaluated pilots. For this reason, restorative justice in penal matters now has a strong foundation. This progress creates opportunities for developing ad hoc practices into more structural programmes.

The restorative justice social movement has become a lot stronger in the past few years. Restorative Justice Nederland has played an important role in bringing together practitioners, academics, policymakers and other stakeholders and in strengthening the network. For example, an association was formed for mediators in criminal cases.

The level of expertise in the field of restorative justice has increased. Restorative Justice Nederland has proactively developed and implemented research and training programmes and managed to secure international and national funding for restorative justice projects. In this way, the knowledge of practitioners was increased, new tools and educational materials were developed and research data was collected and distributed.

A large private fund has given restorative justice and, more generally, the humanisation of the criminal justice system priority in its funding policy since 2015. This has facilitated several pilots and other relevant projects in the restorative justice field that did not receive the required attention and funding from the government.

The Netherlands has also witnessed a unique citizens' initiative to create a legislative proposal to incorporate restorative justice into the new Code of Criminal Procedure. This programme was possible because of the existence of a national expertise centre, several legal experts who are actively involved in the field of restorative justice and a strong Dutch social movement. In addition, the fact that there was a private fund that wanted to finance this process and the modernisation of the Dutch Code of Criminal Procedure, which dates back to 1926, included consultation rounds contributed to this end.

The following two main challenges, however, need to be addressed.

The national implementation of restorative justice in penal cases nearly came to a halt because of a decision of the Ministry of Security and Justice not to create a budget to enable this implementation. After a massive protest from civil society and criminal justice organisations and professionals, this decision was altered. In September 2018 the funding of one million EUR per year was made structural for mediation in penal cases and an additional 300,000 EUR for youth cases. This budget provides room for around 800 referrals countrywide per year. This figure is still marginal compared to the total number of criminal cases and the number of referrals could well increase if there was more budget. For this reason, the challenge is to increase funding in the coming years. Furthermore, barriers such as the current underpayment of mediators and the fact that lawyers earn less if they refer cases to a mediator, which is a demotivating factor, must be investigated and overcome.

On the one hand, the development of legislation and national policy has been positive; on the other hand, there is a risk of 'McDonaldization' of restorative justice (Umbreit, 1999). The current tendency of the Dutch Ministry of Justice and Security is to focus on one kind of restorative justice – mediation in criminal matters – and to appoint one organisation with the mandate and public resources to deal with these cases, facilitating top-down management. Such a monopoly can, however, deteriorate the current diverse practices and weaken tailored and effective local approaches. Greater attention should be paid to other restorative methodologies such as conferencing and circles (see Claessen, 2018).

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