

**The ‘miraculous’ emergence of penal mediation in the Netherlands
Restorative justice in the context of Dutch pragmatism and populism**

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I want to discuss with you some aspects of Dutch legal culture, Dutch pragmatism, the role of Dutch criminal justice professionals, and some successful restorative justice schemes. I will also address the cumbersome efforts to introduce penal mediation. Whereas most of our neighbour countries do have penal mediation services, these schemes are still in their infancy in the Netherlands. I shall also offer some explanations for this slow development and I will argue that the aversion to abolitionism is one of the reasons. Additionally, I will argue that – paradoxically – the populist effort to enhance victims’ rights plays a role in the recent resurgence of penal mediation in the Netherlands.

In this short and speedy presentation I hope to show that Dutch developments surrounding restorative justice are deeply ambiguous, and that Dutch culture is not always as tolerant and democratic as is often presumed.

1. Tolerance and pragmatism

The Dutch are famous because of their open-mindedness and tolerance. Libertarian Amsterdam has not lost its magic (Shorto 2013). Whether this status is justified is the question. Due to a long history of colonialism it is difficult to perceive the Netherlands as a model of tolerance. Rather, tolerance is part of a trading nation and it has more connotations with ‘laissez faire’ and permissiveness, than the moral willingness to endure dissent. Maybe a ‘pragmatist nation’ would be a better phrase. The regulation of drugs, prostitution and euthanasia – often classified as Dutch ‘export products’ – has a pragmatist nature. Pragmatism points to ‘problem solving’, preventing harm, and taking account of the interests and needs of stakeholders. For example, the approach to drug use is strongly influenced by a concern with health and harm reduction.

The Dutch like to wheel and deal in seeking consensus. Negotiation and compromise are part of the so called polder model. “The term polder – reclaimed land – refers to the Dutch struggle against the water and the maintenance of dikes” (Van Rossum).

Metaphorically, however, it refers to consensus-building on the basis of negotiation between equal parties. Citizens need to work together to solve problems.

The Dutch like to criticize moral and legal orthodoxies. Firm and rigid beliefs obstruct free negotiations and the creation of local solutions. Pragmatism means: prioritizing problem solving over high ideals and principles. Legal rules should hence only be applied if they serve a goal, and not for their own sake. The dominant line of thought is that rules cannot cover everything. Rules are only used if there are no other options. Agreements have priority.

However, this pragmatist culture has been declining during the last decades. There is a noisy call for more criminal justice solutions and there is a stronger belief that the state should prosecute each criminal offence. The Public prosecution service is operating in legalistic ways and lost much of its pragmatic orientation. Prosecutors have less discretionary freedom at their disposal, for instance to drop cases and close files (this is why - in jargon - the expediency principle lost its dominance). However, pragmatism is still influential in the operational practice of the police, probation workers and many other professionals.

2. Participation and restorative justice schemes

Although the Dutch like problem-solving, they have always been sceptic towards what Americans call grass roots democracy. The election of judges and sheriffs as is common practice in the United States would be inconceivable in the Netherlands. Referendums never gained full support. Even the idea of electing mayors encounters strong resistance. This may explain the long-lasting criticism on lay participation in the justice system. Dutch judges consider themselves to be authorities. But the public also believes that only judges are able to make well-considered decisions and that citizens have too little expertise to deal with criminal cases.

However, this has changed during the last decade: Dutch government embraced a participation society and conferred more powers to local communities. Citizens are invited by municipal authorities to discuss and decide which problems should be solved, in order to

improve the quality of people's environment. Municipalities are more and more willing to facilitate citizens' initiatives which are focussed on improving the quality of life of neighbourhoods. In the Netherlands this is often summed up under the heading of a 'do-it-yourself-democracy'.

One of the most successful outcomes of this new participation philosophy is neighbourhood mediation. Residents and volunteer-mediators are expected to strengthen their neighbourhood themselves. Neighbourhood mediation has been introduced throughout the bigger and middle-sized municipalities in the Netherlands, involving approximately 3000 volunteer mediators. Evaluation studies show that more than 90% of the residents involved are satisfied with the results of mediation. Yearly, there are about 12.000 successful cases accommodated. Another successful scheme that operates in civil society are the 'do it yourself conferences', carried out by the 'eigen kracht'-centrale in the context of recurrent problems with juveniles in families. This scheme is pragmatist in nature: aimed at problem-solving, prevention, and keeping criminal justice at a distance.

Besides these initiatives, restorative justice has also been introduced in the surrounding areas of the criminal justice system. For example, the Halt sanction aims to act as a corrective to young people who have been stopped by the police for committing a minor offence. The Halt sanction is a community service but it also has restorative elements, such as offering an apology to the victim. The Halt office draws up a positive report if juveniles have complied in full, and the case is subsequently dropped by the police. The Halt office processes about 17,000 sanctions a year.

Amongst restorative justice schemes the so-called post-sentencing victim offender conversations have been developing fast. This service – carried out by Victim in Focus (Slachtoffer in Beeld) – primarily aims to contribute to the healing of the victim. Evaluations show that victims experience less anxiety and anger some months after the conference. In 2014 Victim in Focus settled 2000 cases.

3. Penal mediation and populist campaigns

These restorative justice schemes offer a positive picture of the Dutch restorative justice landscape. However, it has proven difficult to implement penal mediation in the Netherlands over the past decades. There have been many pilots, but as of yet we are still waiting for a

national roll-out. As I pointed out, we are lagging behind many other European nations in this regard. But the prospects are not bad. Whereas lawyers, magistrates and other judicial experts were initially sceptical to integrate penal mediation into criminal justice, nowadays they increasingly seem to accept mediation in penal cases. Let me explain this transformation.

Many Dutch magistrates, senior officials and criminal justice scholars were not willing to take into account the role of the victim, nor were they accepting forms of lay participation in the domains of justice. This criminal justice elite also opposed restorative justice.

A typical example of this resistance is the fact that the Ministry of Justice broke off the promising penal mediation project 'Dading', some 15 years ago.

I believe this can partly be explained by the aversion to the abolitionist ideas of Louk Hulsman and Herman Bianchi, originating – it was believed – from utopian, 'other-worldly' academic milieus. Abolitionism squared off magistrates and other justice officials and many of them became infected with a so called 'Louk Hulsman syndrome'. For many years abolitionism was treated as 'bête noir', a curse obstructing an open minded debate about restorative justice initiatives.

Take for example the well known criminologist Jan van Dijk, in the eighties and nineties a key player at the ministry of Justice. He suspected that those promoting RJ in The Netherlands were just paying lip service to the interests of victims and were actually more on the side of the offenders than of the victims. Van Dijk regarded RJ as a distraction and, possibly, even a trap for victims. Victims would be manipulated and possibly mistreated in the course of RJ procedures by overzealous mediators. I think Van Dijk's reluctance originated in his opposition to the then popular abolitionist movement.

In the last decade, the 'Louk Hulsman-syndrome' lost its grip on criminal justice officials, scholars and magistrates. The Ministry of Justice and the judiciary have become more prepared to experiment with penal mediation. How to explain this recent shift? Of course, the Victim Directive of the European Union played a role. As you know, the European Union urges member states to develop new legislation to establish minimum standards on the rights, support and protection of victims of crime. However, I do not believe that this Directive – nor other international regulations and recommendations – have done much to encourage Dutch legislators.

More importantly, and ironically, the criminal justice elite succumbed to the populist campaign to receive judicial recognition for the suffering of victims. Populist politicians promoted stern punishments and self-defence against burglars, but they also claimed greater power for victims in the criminal justice process. Many right-wing politicians, for instance the conservative former Secretary of State Fred Teeven (VVD), are in favour of increased victim's rights and far reaching victim impact statements, including the victim's opinion about the penalty that should be imposed. Admittedly, populism brought a punitive atmosphere, but the interests of victims were expressed forcefully.

In public debate populist politicians attacked the paternalism and rigid views of the criminal justice elites. Eventually, many magistrates and senior officials came around and accepted the role of the victim in criminal justice. Thus, we might conclude that penal mediation was placed on the political agenda through the populist backdoor. Introducing penal mediation through the royal highway of enlightened liberal views proved too difficult to succeed. Ironically, neither the Dutch polder model, nor a spirit of pragmatist reform could introduce penal mediation. The populist pressure to recognize the interests of 'neglected' and 'angry' victims was the overriding factor.

To finish off, what are the prospects of Dutch pragmatism? As pointed out, pragmatism has lost much of its influence, at least in political debates and in the populist media, and also in the public prosecution service. But in many criminal justice institutions and practices, pragmatist 'problem solving' and harm reduction are still viable principles. Many police officers, child welfare and probation workers are sensitive to the interests and needs of both victims and offenders. And especially the Dutch 'do it yourself'-society and the new localism for municipalities is pragmatist in nature. We may therefore conclude that Dutch pragmatism offers a fertile breeding ground to develop further restorative justice schemes.