

RESPONSE

Late start, but on the way to a leading position? Comments from a German neighbour

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Although the debate over whether restorative justice should be considered a theory, a philosophy, an approach or a criminal policy strategy still continues, the 'career' of restorative justice can be regarded as a success story. Important transnational organisations such as the United Nations (UN), the Council of Europe (2018) and the European Union (EU) strongly support restorative justice and its aims, values and principles. Most important is probably the EU Directive 2012/29 because it is the first legally binding instrument in this context. By 2015, all member states were obliged to implement specific legislation improving the situation of victims, including the offer of restorative justice (Article 12).

The 'Dutch developments' described refer to three fields in which restorative justice is and should be implemented: restorative practices within civil society, restorative justice in penal cases and restorative detention. Furthermore, a remarkable legislative proposal is presented.

1. Restorative practices within civil society

Whereas the main focus of the Notes and this comment is on the justice system, the most impressive accomplishment seems to be the application within civil society. The International Institute for Restorative Practices has helped to create some restorative cities. In Hull (UK) more than 5,000 citizens were trained to offer restorative intervention in everyday life. It is really impressive that more than 240 cities in a relatively small country like The Netherlands are running restorative justice schemes aimed at resolving neighbourhood disputes,¹ school conflicts and family-related problematic situations. Many of these achievements are closely linked with the organisation *Eigen Kracht Centrale* and its director Rob van Pagée, who has had a significant impact on initiatives and programmes in the family support and youth welfare field. Many German professionals look to The Netherlands as a model in this specific field of restorative justice application. In 2017, German and Austrian restorative justice activists founded the non-governmental organisation (NGO) *Netzwerkkonferenzen e.V.* – a forum for the promo-

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1 In Germany, only very few restorative justice projects (Bremen, Berlin and Hamburg) deal with neighbourhood conflicts; but in most federal states arbitration proceedings exist.

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tion of conferencing. Although Family Group Conferencing and Family Group Decision Making exist also in Scandinavia, Hungary, Ireland, England and Wales and many other countries, the Netherlands could probably be regarded as the European precursor with the broadest impact countrywide. Other than relatively widespread restorative justice practices in schools (e.g. Hopkins, 2004; RJC, 2005 for the UK) in Germany, neither many ordinary service users nor professionals seem to trust the abilities of lifeworld people in their networks to find tailored solutions to problems.

2. Restorative justice in penal cases

The second realm of Dutch developments deals with pre-sentence restorative justice in criminal matters (at the police level or during the investigation phase until trial, when the court might suspend the proceedings for an attempt to settle the conflict via mediation), which is more or less routine in Germany. There, it was first introduced in the juvenile criminal law in 1990 (Articles 10, 45, 47 – and as a condition of probation) following pilot projects since 1982; positive experiences led to its implementation in the general criminal law in 1994 (Article 46 a). While in Germany no such institution as HALT (*Het Alternatief*) exists, on the communal level, youth welfare offices and NGOs can guide juvenile offenders in restoring social peace through charitable work. These duties of the delinquents are accompanied by restorative conversations, leading to awareness of the negative impacts of their deeds and acknowledgement of responsibility for them. Restorative conversation is probably even more important in dealing with the victims, for example, in their contacts with authorities but also in settings like women shelters where recent traumatic experience, overcrowding, narrowness and involuntary living together with unknown survivors of a similar fate lead to stress. The non-violent communication of Rosenberg (2003), in particular, has gained recognition from many professionals and volunteers in victim support and counselling. Wolthuis, Claessen, Slump & van Hoek rightly use the term victim-offender conversations (see Stutzman Amstutz, 2009 for Victim-Offender-Dialog; Toews, 2006) instead of VOM (Victim Offender Mediation) or VORP (Victim Offender Reconciliation Program) because the dialogues between victims and offenders are not always about the search for an agreement, a solution to a problematic situation or an attempt at reconciliation. Often, expressing one's anger or informing about the consequences from the victims' side and explaining why one is seeking a dialogue is already a major step towards restoration of social peace, and impacts on future behaviour. These dialogues could happen outside of the criminal justice system and might lead to higher self-referrals in subsequent criminal victimisations. Who initiates restorative justice? In Germany, offenders request restorative justice significantly less frequently than system actors: in 2.4 per cent and 2.6 per cent of the cases registered in 2013 and 2014, respectively, in the national VOM statistics, the accused took the initiative. Only in 0.9 per cent of the cases in both years have victims taken the initiative (based on 5,573 cases in 2013 and 7,393 cases in 2014) (Hartmann, Schmidt, Ede & Kerner, 2016: 18ff).

3. Restorative detention

A central part of the overview in The Netherlands deals with restorative justice in detention. Mace explains:

We might start from a premise that a prisoner has the capacity to function as an accountable person, capable of good as well as bad actions and able to use an opportunity in prison to offer redress or make amends for past harm or damage done, whether that be to individual victims or the community (2002: 2).²

The idea of rethinking the prison system in a restorative way is seen as a third way beyond retribution and treatment, and hence not as a variant of re-socialisation (Vanfraechem, 2003: 313f). However, Van Garsse (2015) warns against attempts by the system to co-opt restorative justice. Fellegi and Szegő (2015) stress the difficulties of implementing a logic that runs contradictory to the traditional prison system.

There was a strong discourse about restorative prisons in the early 2000s, and practical steps towards implementation have been taken in Belgium and the United Kingdom (Edgar & Newell, 2006; Liebmann, 2007; Mariën, 2010). Especially in Belgium, the nationwide programme on restorative detention was a very ambitious approach involving a 'restorative justice consultant' in each prison and trying to change the culture of the prison system. In England, only a few prisons participated. Although these attempts have been successful in certain respects, they have not succeeded in changing the institution fundamentally (see Mathiesen, 1989). We are now facing a new attempt, and the Dutch approach looks promising in a certain way. Compared with the seemingly top-down and unexpected decision in 2008 to abolish the Belgian function of restorative consultants in the prisons and to assign general management tasks to them (Aertsen, 2012), Wolthuis et al. describe a somewhat more prudent approach where every prison has to work out an action plan first (this differs from existing action plans in the UK, which are issued on a governmental level for the whole country). However, it is not quite clear whether all stakeholders, including victims, prisoners, their respective lobby organisations and prison staff, are involved in a bottom-up strategy. The limited success in Belgium was attributed partly to the lack of support from prison officers (Bastiansen & Vercruyssen, 2002). As in Belgium, the Dutch (decision makers) also use restorative consultants in some prisons, who are involved in designing the action plans. This will, hopefully, be done in a more participatory and sustainable manner, without making these new functions vulnerable to sudden one-sided policy decisions. The German prison governor, Koop

2 I greatly appreciate that Wolthuis et al. explicitly point to the four different layers of restoration for prisoners: self-restoration, restoration with their family members, restoration with their victim(s) and with society because it gives palpable 'set screws' for single measures (see Hagemann, 2004).

(2018), has described a successful participatory change process in a prison as a learning organisation.

In order to support, protect and assess restorative developments in a restorative justice- unfriendly environment such as a prison (see Coyle, 2008; Hagemann, 2003), the so-called maturity grids developed in The Netherlands might help. Maturity points to the degree of proper implementation, which McCold and Wachtel (2002) once called 'fully restorative'. The grid is a six-by-six table that consists of five dimensions of activities and five implementation stages. Thus, we have 25 scenarios to individually describe each prison's status, and it will be easy to acknowledge the strengths and deficits of each institution on its way to complying with restorative justice philosophy and principles. The longer I thought about it, the more I was convinced that they offer a very useful tool for practical implementation and continuous monitoring of restorative practices in prisons.

In Germany, two recent approaches point to a restorative direction (see Hagemann, 2018). First, several federal states are discussing a victim-oriented detention system (e.g. Gelber & Walter, 2013 for North-Rhine-Westphalia; Kilchling, 2017 for Baden-Württemberg; Wulf, 1985, 2013;). Second, another initiative refers to 'family-friendly detention', which focuses on the consequences of imprisonment of a parent or partner for the children and other family members. The aim is to strengthen existing relationships, to enable children and their parents to keep contact despite a parent's incarceration, to develop or strengthen among inmates a sense of responsibility for people depending on them. At least indirectly, there is hope that these contacts may prevent recidivism through more intense informal social control of people via their personal network. It is evident that accompanying measures (e.g. counselling, material help) are needed to further support these families. A holistic, encompassing approach of through-the-gate care seems to be needed both for inmates and for their caring others.

In Schleswig-Holstein, the current focus is on the children (see COPING project). The Danish 'Familiehuset Engelsborg' is often referred to as the best model in this respect (Molbech & Enghoff, 2014). The latter is centred on a child or several children, whose needs are best served by ensuring that they grow up with both parents (despite one parent having to serve a prison sentence). If the inmate has qualified for the project, the whole family, including the prisoner, lives together in the family house, which offers various programmes. The imprisoned parent is not allowed to leave, whereas the children and the non-sentenced parent enjoy full freedom of movement. This approach can be subsumed under restorative justice because it focuses mainly on healing. Dialogue with victims (and healing for them) can be a part but, obviously, the family-friendly detention might be only partly restorative if this dimension is not addressed, whereas the victim-focused detention system always involves victims. In reality, this does not necessarily mean having to organise a direct dialogue (see Buntinx, 2015). In Lower Saxony, it means, primarily, that victims can turn to specific victim contact and counselling centres that operate in close contact with the prisons and deliver all kinds of information and guidance requested and granted under victim protection laws (e.g. information on whether a prisoner will be released or about his

place of residence). There seems to be some room for improvement as far as direct contact and conciliation is concerned.

Examples from other countries might offer inspiration as well. In Hawaii, Walker and Greening (2013) developed Huikahi restorative circles, where relatives and friends gather together with the inmate, a facilitator and one or more professionals of the prison system to draw up a plan for the re-entry phase, which addresses all foreseeable issues (including restoration of burdened relationships). Another example of a kind of lifeworld transition management process is the Christian Unit of the Rimutaki prison in New Zealand, where members of the Wellington Christian community help to maintain and run a specific privileged section of the prison to prepare prisoners for release and to keep close contact with them afterwards in their community, including the provision of work and housing. However, this restorative approach was restricted to Christians only and relied heavily on faith (Workman, 2007).

Contributing Positively to Society (COPOSO) resembles an initiative of the English Inside Out Trust. Mace (2000) reports that prisoners engage willingly and industriously with work opportunities that involve repairing damaged articles like wheelchairs and bicycles or renovating equipment that might otherwise be written off or wasted (including maintenance of public park equipment). Also, turning juvenile delinquents into role models has a tradition and was practised in anti-violence training courses in Schleswig-Holstein, where former participants could qualify for serving as assistants in later courses as a first step towards a formal trainer qualification.

In the examples mentioned in the previous paragraphs, developing innovative practices in a prison context according to restorative justice principles is not self-evident. Change management is an important challenge for systems with a long tradition and persistency. Often, there is resistance against every innovation regardless of the content. Thus, the restorative justice promotion tour in The Netherlands that reached 5,000 people might attract attention and generate curiosity. Most people currently working in prisons – and citizens in general – are not familiar with the ideas and principles of restorative justice.

Finally, the House of Restoration in The Netherlands means transition houses, which is an attractive term but whose focus is still punishment/inflicting pain. It is a small-scale detention facility where every inmate has his or her personal planning coach. It should be placed in the community in order to offer close relationship and opportunities for various groups to relate to one other. Contrary to an older idea of transition houses in Germany, where prisoners only spend the last months of their sentence, and contrary to institutions where former prisoners are accommodated after release because they cannot find affordable housing on the 'free' market, the new idea implies serving one's sentence from the first day in a relatively small institution close to one's place of residence. As in smaller Scandinavian institutions, living conditions will be better (Hagemann, 2008). These new detention houses should be centred on the needs of the inmates and be built on restorative principles.

4. Appreciation of the legislative proposal and conclusion

My overall impression is that The Netherlands have entered the field of restorative justice rather late. This may be partly due to an old Dutch civil law procedure called 'dading' ('transaction') (Groenhuijsen, 1998: 43), which is not mentioned here and which offered the possibility for parties in a conflict to come to a financial settlement. Be that as it may, several other countries have taken earlier initiatives to mainstream restorative justice in the field of criminal justice. It might have been wise for The Netherlands to wait and build on the experiences of others.

Although I greatly appreciate the described legislative efforts, I am not too happy with some rather bureaucratic access and suitability assessment (Article II): it is still a professional decision by judges and prosecutors whether someone qualifies for restorative justice. This is in contradiction to the ownership idea that laypersons might request it themselves. Furthermore, I doubt whether any missing agreement necessarily implies that the mediation process has failed (Article VI). There are many examples of participants and the community having gained something or that healing needs a while and might occur despite a non-agreement outcome. Recommendation CM Rec (2018) 8 (Hagemann, 2018) forbids the imposition of harsher punishment if a party does not participate in mediation. Monitoring of the agreement should be directly enforceable and must be done finally by the prosecutor. In my view, the right of mediators to refuse to testify in court (Article V) constitutes the chief highlight of the proposal. This should be a model for other countries too.

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