

MEDIATION IN THE NETHERLANDS: PAST - PRESENT - FUTURE

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1 Introduction: modern mediation and its predecessors

The subject of this report, mediation, has been addressed before at conferences of the International Academy of Comparative Law, most recently at the 10th International Congress, held in Budapest in 1978. The Dutch national reporter at that time, Judge Elders, had confined his report to [] the use of conciliation for dispute settlement *in* civil procedure (emphasis added).¹ The scope of the present report is wider, and not without reason. Recent mediation developments largely unfolded outside the courts, although the emerging mediation schemes are linked to the courts and the law of procedure in various ways.

The Anglo-American term []mediation[] first surfaced in the Netherlands in the early 1990s and has become part of Dutch (legal) language since. This does not mean that mediation as a mode of dispute resolution was hitherto unknown in the Netherlands. Mediation, as a process of third party assisted bargaining, had existed for several centuries, albeit under different Dutch names, such as *bemiddeling*, *verzoening*, *conciliatie* or (sometimes) *comparitie*. These methods of dispute resolution were commonly practised as a side-activity by judges, mayors, or yet other functionaries, using their intuition, experience of life, or mere authority.

Here lies an essential difference with the []modern[] mediation. What is so []modern[] about modern mediation? In modern mediation, the techniques have been systematised and refined on the basis of experimental, predominantly American research.² The benefits of []principled bargaining[] - focussing on interests - have been analysed and practical insights have been accumulated. On this basis, mediation has changed into a professional activity: mediators have to demonstrate they master the new body of expert knowledge, they must be certified, and they are assumed to know how to navigate on the basis of their expertise. They must be associated with professional bodies that monitor quality and guarantee status. Another novelty is the institutional place of mediation. Modern mediation is propagated by specialised mediation agencies, which are increasingly annexed to the courts.

Before discussing modern mediation in detail, at least some examples of historical mediation, and present day (quasi-)arbitration, must be given to allow a proper understanding of Dutch legal culture.³

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1. Elders J.L.M. The use of conciliation for dispute settlement in civil procedure, in *Netherlands Reports to the Tenth International Congress of Comparative Law*, Deventer 1978.

2. Golann D *Mediating Legal Disputes* (1996, Little Brown, New York); Goldberg S B et al *Dispute Resolution* (1985, Little Brown, New York).

3. The sociologist of law Blankenburg has characterized Dutch legal culture as pragmatic, aimed at filtering out disputes. Blankenburg E. The Netherlands Zuckerman A. *Civil Justice in Crisis* (Oxford, 1999). It could also be argued that a taboo rests on disputing. An interesting linguistic example: dispute review boards are termed *Raden van Deskundigen* (Councils of Experts) in Dutch.

Historical evidence of mediation goes back for many centuries. An interesting, well documented mediation practice was that of the 16th century *Leidse Vredemakers* (Leyden Peacemakers). Voltaire familiarised his French readers with this institution and the lawmakers of the French revolution era re-introduced the peacemakers as *Bureaux de Paix*, and subsequently *Juges de Paix* in France and the Netherlands; a fascinating example of a legal transplant.⁴ As from the introduction of *Juges de Paix* (in Dutch: *Vrederechters*, and later *Kantonrechters*) it was not uncommon to find judges acting as mediators in the courtroom.⁵ This in-court mediation used to be practised in family disputes, particularly divorce cases, often with the aim to save the marriage.⁶ In the Netherlands and various other jurisdictions on the European continent, the codes of civil procedure dictated a judicial attempt at mediating a case, often prior to a full hearing in court. Such [preliminary conciliations] however, were abolished almost everywhere in Europe in the 1950s and 1960s.

Mediation also used to be practised outside the courts. Industrial relations and labour disputes constitute an illustrative area here. First traces of labour dispute settlement outside the courts appeared in the second half of the 19th century, originally as private initiatives. In this newly emerging area of law, conciliation, mediation and arbitration, for some time, even became the regular modes of dispute resolution with, however, varying degrees of success. Success appeared to correlate positively with the voluntary character of these 19th century institutions. As soon as their proceedings became compulsory, their success was on the wane.

In 1923 the Dutch government introduced the institution of the *Rijksbemiddelaar* (Government Mediator), which not retained after World War II. It was not embedded in the emerging consultation schemes between employers and unions and therefore met little acceptance.⁷

Other forms of [alternative] dispute resolution proliferated throughout the Netherlands during the period 1950-1990. In commercial disputes, arbitration became a popular, institutionalised option, for reasons of expertise, confidentiality and the opportunities for international enforcement of arbitral awards.

In the new area of consumer law a trend of settling disputes through so-called *Geschillencommissies* (Disputes Committees) emerged.⁸ In the Netherlands, the activities of these bodies are characterised as *quasi rechtspraak* (quasi adjudication).⁹ Generally, they are composed of an independent-lawyer, acting as chairperson,

4. Raa ten C M G *De oorsprong van de kantonrechter* (Kluwer, Deventer 1970); Professor Chris ten Raa was one of the pioneers of historical-comparative research into mediation; his research group at Erasmus University produced a large number of publications on the subject.

5. Raa ten C M G 1970, above.

6. Bóné von E K E *Le juge de paix* (Centre d'Histoire Judiciaire, Lille, 1995).

7. De Roo A J and Jagtenberg R W *Settling Labour disputes in Europe* (Kluwer Law and Taxation, Deventer/Boston 1994).

8. Jacobs W A *ADR en Consument: een rechtsvergelijkend studie naar de mogelijkheden van alternatieve geschillenbeslechting* (Kluwer, Deventer 1998).

9. If Disputes Committees meet the requirements of impartiality, equal representation of the interested organisations and proper information on the working of their procedures, they may look for financial support to the government. At present, there are 28 Disputes Committees which meet

who will be assisted by a representative of a consumer organisation and a representative of the particular branch of industry concerned. Overall, these committees practise the method of *bindend advies* (binding advice), considered attractive because of the informality of the process.

In the 1970s and 1980s, Dutch citizens became increasingly dissatisfied with the operation of the law due to inaccessibility of the courts, overcrowded dockets, increased formalism, long delays and high costs.¹⁰ These factors were strong incentives to consider other modes of dispute resolution. In addition, it was felt that courts were often not well equipped to address the nucleus of the problem, and to really solve the dispute submitted. Only a handful of academics and practising lawyers sought inspiration in the modern mediation techniques in the US. An early advocate of mediation was the Rotterdam professor of family law, Peter Hoefnagels, who combines the practice and academic study of mediation since 1974.¹¹

All these examples may have created a fertile soil for the upcoming [modern] mediation.

As indicated, the rise of modern mediation began in the US, where schemes emerged in a variety of areas in the late 1970s. The American enthusiasm for professional, institutionalised mediation spread to Europe, in the late 1980s and early 1990s. In the Netherlands, initially, it were particularly representatives of the private sector that became interested and involved in ADR, inspired by US and UK developments.¹²

2 Private initiative

1992 is an important year in the recent history of modern Dutch mediation. For the first time a group of people, mainly legal professionals, came together to discuss the promise and prospects of mediation. Some of these early fighters for mediation, basing themselves on their personal and professional experiences, had become dissatisfied with the outcomes of legal solutions, often ignoring the particular needs of parties.

From the very beginning contact was sought with the government, which resulted in a lively exchange of ideas and views. The governmental participation would appear to be mainly directed at initiating and financing experiments.

In 1993 the *Nederlands Mediation Instituut* (Netherlands Mediation Institute) NMI was formally established as a foundation, with the main purpose of informing the people at large about mediation and stimulating and furthering the practise and quality of mediation.

In the early stage of its formation, NMI was inspired by the American Center

these requirements.

10. Bruinsma F & Welbergen R *Hoge Raad van Onderen* (Tjeenk Willink, Deventer 1988; 2nd edition 1999); Brenninkmeijer A F M *Burgerlijk procesrecht als publiekrecht* (Tjeenk Willink, Deventer 1993). In these publications the excesses of Dutch court proceedings were highlighted. The findings are rather shocking.
11. Hoefnagels G P *Handboek scheidingsbemiddeling* (Tjeenk Willink, Deventer, 2000).
12. Jagtenberg R & De Roo A The [New] Mediation: Flower of the East in a Harvard Bouquet (2001) *Asia Pacific law Review* Vol 9 No 1, pp 63-82.

for Public Resources and the British Centre for Dispute Resolution. The pioneers of these institutions had been the American and British business communities. Unlike CPR and CEDR, however, NMI wishes to serve all branches in society with an interest in mediation.

NMI maintains a register of accredited NMI-mediators and liaises with other institutions and government departments. To be registered as a NMI-mediator one must have attended (with success) one of the NMI-accredited mediation training courses. In addition, there is an annual contribution of approximately 200 EURO due. NMI has its own mediation and disciplinary rules, code of conduct, and complaint procedure, which the NMI-mediator has to comply with.¹³ Considering its activities, NMI can be regarded as an umbrella organisation.

The establishment of NMI was the first sign of institutionalisation of mediation in the Netherlands. To date, there are more than 2000 NMI-mediators and there are more mediators to come. It is surprising that most mediation training programmes are - still - fully booked. The number is exorbitant, when compared to the total number of mediations concluded.¹⁴ Between 1996-2001, 1222 mediations were initiated through NMI. This number implies that on average one mediator handles half a mediation annually! This (over)supply of mediators is not well balanced with the demand for mediation: *the frustration of Dutch mediators.*

3 Government interest

The foundation of NMI was an impetus for the government, in particular the Ministry of Justice, to engage in mediation. One of the first actions of the Ministry of Justice was the installation of the so-called *Platform ADR* in August 1996. Its main task was to investigate the prospects for mediation in court proceedings. The composition of the committee was wide. There were representatives of the judiciary, legal profession, academic community, and the ministry itself. The major findings and recommendations of the platform were laid down in its final report *Conflictbemiddeling* (Conflictmediation).¹⁵ Under the auspices of the Platform ADR two court annexed mediation pilot projects were undertaken. An important finding was that the referral to mediation by judges and legal aid bureaus was problematic.¹⁶

A major recommendation by the *Platform ADR* was to continue experiments with court annexed mediation.

Following the final report of the Platform ADR, the so-called *Meer Wegen naar het Recht Beleidsbrief ADR 2000-2002* (More Ways to Justice ADR Policy Letter 2000-2002) was prepared by the Ministry of Justice and presented to parliament.¹⁷ For the time being, this letter is the basis for the intending involvement by the government in the development of ADR. It must be said, however, that the direction of this envisaged governmental involvement is vague.

13. These rules are all published on the bilingual NMI-website: <http://www.nmi-mediation.nl>.

14. The total number of mediators has easily passed that of judges, being 1600.

15. Platform ADR *Conflictbemiddeling* (1998).

16. Kocken C L B & Van Manen N F *Weg van het Recht* Paul Scholten Instituut University of Amsterdam August 1998.

17. Ministry of Justice *Meer wegen naar het recht Beleidsbrief ADR 2000-2002*.

In the policy letter *dejuridiseren* and *juridiseren* are the central, opposing themes. Unfortunately, there is no apt translation fully reflecting the Dutch meaning. In short, they encompass how Dutch citizens think about, deal with and eventually make use of the law. The policy letter states that Dutch people have become more litigious. This statement, however, is not backed by figures. According to the policy letter, the tendency towards litigiousness, must not be regarded as undesirable, since this is unavoidable in an emancipated, individualised, and internationalised society. It is an irreversible development. Nevertheless, the present government states that an attempt should be made at resolving disputes through other means than court proceedings. It is essential that people assume responsibility for the resolution of their conflicts. This view fits well the strive for privatisation by the Dutch government generally. In the light of this, the government is interested in the opportunities of mediation preceding, or during a court procedure. The expectation is that mediation may contribute to reducing the workload of the courts, which themselves are in a process of modernisation. Modernisation of the judiciary has become a major target of the present cabinet. It focuses on improvement of the administration of justice by *inter alia* reducing the length of court proceedings and improving access to court.¹⁸

4 Experimental research

Following the ADR Policy Letter, the overall project *Alternatieve geschilafdoening en mediation* (Alternative dispute resolution and mediation) was initiated. It encompasses two specific projects: *Mediation naast rechtspraak* (Court Encouraged Mediation) and *Mediation Gefinancierde Rechtsbijstand* (Mediation and Legal Aid). The general project runs from 2000 to 2003 and is headed by the national coordinator Machteld Pel, vice-president of the court of appeal in Arnhem. The organisation and implementation fully resides with the judiciary. A national bureau specially appointed for the duration of the project assists Mrs. Pel. In September 2001 the first interim report was published.¹⁹ The overall purpose of the project is to advise the Government on the desirability of court annexed mediation.

In the Court Encouraged Mediation project, mediation is provided as an extra service during a court procedure. At the hearing, the judge handling the case may refer the parties to a mediator. If such mediation appears unsuccessful, the court procedure will be resumed. The judge is not informed of the negotiations during the mediation in the event that the court case is resumed. The mediation procedure is free of charge for the parties. The mediator, however, receives a fixed fee, which is directly paid by the Ministry of Justice.

Next to Court encouraged mediation, there is the project *Mediation in de Gefinancierde Rechtsbijstand* (Mediation within the Legal Aid Scheme), which only started in May 2001. The main goal of this project is to resolve disputes by mediation, before a court procedure is initiated. The emphasis is on prevention. A

18. Ministry of Justice *Rechtspraak in de 21e eeuw Contourennota modernisering rechterlijke organisatie December 1998*; Ministry of Justice *Recht van spreken Interdepartementaal Beleidsonderzoek Bedrijfsvoering Rechtspraak July 1999*.

19. Landelijk project mediation naast rechtspraak *Tussentijdse Rapportage* (2001).

major requirement is that at least one of the parties is entitled to legal aid. This is determined on the basis of the income of the parties. If both parties are entitled to legal aid, they both pay a fee based on their income akin to the fee for a court procedure.²⁰ If a procedure is initiated following mediation, this fee does not have to be paid again. If one of the parties is not entitled to legal aid, half of the costs of the mediator will be borne by that party.

In both these two projects, the parties are asked to participate on a voluntary basis.²¹ Apart from these major projects, there are experiments with mediation in divorce and parental access disputes.

5 Professional publications

With the rise and interest in modern mediation, also the need for more information and exchange increased. In 1997 the *Tijdschrift voor Mediation* (Journal for Mediation) appeared as the first journal purely focussing on mediation. An important purpose of this quarterly is to serve as a forum for mediators and all others who have an interest in the practice and academic study of mediation. There is a great demand for exchange of experiences with (other) mediation professionals. Consequently, there is a strong input from the mediation-practitioner.

The Journal for Mediation has four categories of contributions. The first category encompasses in-depth contributions dealing with mediation from an analytical angle, followed by *Mediation in de Praktijk* (Mediation in Practice). This category is the ultimate gathering for the practising mediator. Here the ins and outs of a mediation case are discussed. The principle 'learning by doing' is the centre of attention in the category with the telling title *Valkuil* (Pitfall). Here mediator-mistakes are described and analysed. Each issue concludes with information on mediation workshops and recent developments. The number of subscriptions of the journal is steadily growing. Its readers are legal professionals, accountants, psychologists, architects etc.

Another carrier of mediation information is the *ADR Nieuwsbrief* (ADR Newsletter), which is published eight times a year. Its main focus is to serve its reader with brief, up to date mediation information and is sent to all NMI-mediators.

6 Mediation training and university education

The (short) history of mediation teaching in the Netherlands largely runs parallel with the development of modern mediation itself and has become a booming business for private training institutions.

The first, full fledged training programmes took off in the early 1990s. It were private institutions that took the lead in compiling and offering specialist, mediation training schemes. Educational institutions, such as universities, would follow suit later. As a consequence of those private sector initiatives, the early programmes were particularly designed for professionals such as lawyers and psychologists. The emphasis was and still is on imparting skills.

20. These costs do not cover all legal costs.

21. One may wonder whether parties will turn down a suggestion by a judge to mediate.

At present, there are 10 programmes, which have been certified by the NMI. The conditions for NMI-certification, however, are obscure.

These 10 NMI certified programmes differ in length, costs, and contents, which makes the selection of the "right" programme by an interested applicant cumbersome. The average length is six days, while the costs may amount up to 3600 Euro. There is no hardcore contents, shared by all these schemes. This is not surprising. As yet, there are no rules or legislation laying down minimum requirements for the teaching of mediation. Basically, training institutions are free in selecting the topics to be taught. The majority, however, seems to pay attention to the Harvard style of negotiation, generally considered to be a useful tool for the mediator.²² This style of negotiation is oriented towards "win-win solutions" by focussing on interests, instead of rights. This is what a mediator is precisely supposed to do: directing the parties towards focussing on their interests.

Thus far, little thought seems to be given to legal aspects of the mediation practice. This may be regarded as an omission, certainly now that mediation in many European countries will be practised within the presence of an established legal system. A clarification for this may partly lie in the background of the respective trainers: the majority is psychologist.

At universities, particularly at faculties of law, it were initially individual staff members who undertook the teaching of mediation. In 1994, for the first time in the Netherlands an optional course (*Alternative) Dispute Resolution: Theory and Practice* was on offer at the Rotterdam law faculty.

The ultimate goal of this course is to give the participating students an overall perspective on the emergence and resolution of disputes and the role of law there in. In addition, some practical training is provided through role-plays and other practical exercises, which are supervised by qualified mediators.

At present, most law faculties pay attention to mediation and other modes of dispute resolution. However, the format of mediation teaching varies from separate courses to integral parts of existing courses such as civil procedure law.

7 The regulatory framework for mediation

In Dutch law, there are no specific statutory provisions pertaining to mediation, and only a few court decisions on the subject have been published so far. Therefore, the 1995 NMI Mediation Rules (as amended in 2000) thus fill a gap, providing standards for mediators, disputants, and judges.

Three basic principles have been written into the NMI Mediation Rules:

1. mediation is based on the continuing voluntary consent of all parties;
2. the mediator must be independent and impartial; and
3. confidentiality and secrecy are to be observed during and after the mediation, by all parties concerned.

These three basic tenets, voluntariness, impartiality and confidentiality, can also be found in the 1980 UNCITRAL Model Rules on Conciliation, arguably the world's

22. Fisher R & Ury W *Getting to Yes* (Houghton Mifflin, 1981) and later editions.

primary set of modern mediation rules.²³

Confidentiality and secrecy are essential. A mediator will try to get negotiations back on track again, by probing underlying interests, possibly during side meetings with each party, and creating an atmosphere where parties feel free to put their interests on the table, accompanied by further proposals or offers. However, a party will only come forward this way if she cannot be penalised for her frankness and good will in the open courtroom later on, in case the mediation effort fails. Both the mediator and the disputants will contractually bind themselves to this duty of confidentiality and secrecy, by signing an agreement to mediate, at the outset of the mediation. In the agreement to mediate, key provisions of the NMI Rules are reiterated and the Rules are declared to apply in their entirety to the mediation procedure.

Independence and impartiality are secured through the selection procedure whereby both parties essentially have to agree on the person to be appointed as mediator, and through the NMI Rules of Professional Conduct, which oblige a mediator to disclose any conflict of interest to the parties without delay.

These basic tenets of mediation are thus secured contractually only. In theory, if a dispute still ends in court, there is nothing to prevent a judge to hear a party or a mediator about the mediation process. A mediator, for instance, could not invoke statutory professional privilege.²⁴ Court decisions published so far, however, indicate that the Dutch judiciary does respect the contractually secured rights and duties in a mediation.²⁵

If a NMI mediation results in a settlement, that settlement will usually be casted in the format of a *vaststellingsovereenkomst* (settlement contract), one of the named contracts enlisted in art. 7:900 of the Civil Code. The terms of such a contract, if concluded following a mediation, fall outside the duty of secrecy. Such settlement contracts can be litigated in court against a defaulting party. However, the scope for judicial review may be more restricted than in plain contracts, for instance where defects of consent were pleaded. In addition, there are circumstances where such settlement contracts will stand, even in the face of inconsistency with mandatory law.²⁶

Statutory law, and even treaty law, may have relevance to mediation procedures in other ways. Devices emanating from the general law of obligations, such as contributory negligence, may be brought to bear where parties have unreasonably

23. UNCITRAL Conciliation Rules, A/RES/35/52, 10 December 1980; reference is made to articles 2, 7, 14 and 20.

24. The profession of mediator is not protected by law in the first place.

25. Pres Rb Arnhem 4 February 2000, KG 2000/65, held that submission of a draft *vaststellingsovereenkomst* (a settlement contract, not as yet signed) to Court must be regarded as a violation of the duty of confidentiality laid down in the NMI Mediation Rules; Ktr Amsterdam 21 December 2000, NJ kort 2001/13, declared plaintiff's claim inadmissible, as he had sued defendant without any prior reference to the mediation clause concluded with defendant as part of the contract under review.

26. Article 7:900 and 7:902 BW. Reference is made to HR 14 February 1992, NJ 1992/245, and HR 29 September 1995, RvdW 1995/193.

refused to agree to mediation or early neutral assessment procedures.²⁷ In the procedural law ambit, the fundamental right of access to court, entrenched in both Article 17 of the Dutch Constitution and Article 6 of the European Convention on Human Rights, has relevance to both the "entry" and the "exit" side of mediation.

The gist of the case law created by the European Court of Human Rights in this respect, can be summarized as follows. If there are no opportunities for effective judicial review of the outcome of an ADR process, the Court will satisfy itself that the ADR process has been entered into voluntarily by the parties concerned.²⁸

A prima facie, one might think this requirement of voluntariness will have relevance to arbitrations, but not to mediations, as mediations merely result in settlement contracts. It remains to be seen, however, whether mediated settlement contracts lend themselves to *effective* judicial review. The duty of confidentiality dictates that material facts pertaining to the process of concluding such a contract will be exempted from review. In addition, such mediated settlement contracts may be incorporated in arbitral awards, which would make judicial review illusory as well. We submit, therefore, that in view of these uncertainties at the "exit" side of mediation, the "entry" into mediation must indeed satisfy the requirement of voluntariness.

At this point, another interesting comes in focus. Does the test of voluntariness apply to the very decision of parties to refer their case to a mediator, or is the meaning of "voluntariness" more restricted, and does it apply only to the freedom of parties to accept or reject a settlement proposal? Currently, opinions are divided in the Netherlands. In the spring of 2001, Lord Woolf was invited over to Amsterdam, to discuss his arguments in favour of a restricted interpretation of voluntariness. In Lord Woolf's point of view, mandatory referral of "suitable" cases to mediation is justified to alleviate the court system. As a consequence, courts will be able to handle the remaining cases more swiftly. Lord Woolf concludes therefore that the "mandatory strategy" is exactly in support of the right of access to court.²⁹

This paradox will be revisited towards the end of this national report.

8 The practice of mediation in family, labour, and administrative disputes

Through regular surveys, NMI seeks to ascertain the use and "success" of mediation in a large number of practice areas. Although the outcomes of these surveys are not fully representative "the surveys are merely based on mediations *registered* with NMI - they certainly provide an impression of actual Dutch mediation practice.

According to the 2001 NMI data, three areas stand out in terms of caseload: family disputes (618 cases registered since 1999, being 44 % of all registered cases), labour disputes (345 cases, being 25 % of all cases) and commercial disputes (184

27. In labour disputes, see for instance Ktr Utrecht 2-20-1998, JAR 1998, 219, and Ktr Eindhoven 7-1-2000, JAR 2000, 51.

28. *De Weer*, Decision of 27 February 1980, Series A, No. 35. Also *Obermeier*, Decision of 28 June 1990, Series A, No. 179.

29. Jagtenberg R, Cry Wo]lf (2001) *Tijdschrift voor Mediation* Vol. 2.

cases, 13 % of all cases).³⁰

Hereafter, the following three areas are discussed: family disputes and labour disputes – the two largest practice areas – and administrative law disputes, as a smaller practice area (31 cases since 1999, being 2 % of all cases).

A further reason for this selection lies in the overwhelmingly private law character of family disputes, the largely private, but partly public law character of labour disputes, and the essentially public law character of administrative law disputes.

8.1 *Family disputes*

8.1.1 Nature and legal framework

Most disputes in this area are centered around divorce. These disputes tend to have a tremendous impact on the personal lives of the spouses, and, particularly, their children. Deep emotions, workable arrangements with regard to the children, the family house and other financial matters such as alimony, all need to be addressed in divorce cases. Where historically, family mediation was aimed at saving the marriage where possible, modern family mediation is primarily concerned with the consequences of divorce. The outlook is no longer paternalistic. The purpose is to assist parties in terminating their relationship in an acceptable way, without unnecessary damage and bitterness, thereby facilitating the negotiation of necessary, future arrangements.

Under Dutch law, there is only one ground for divorce: the permanent disruption of marriage, a ground that will be accepted by the court without evidence. Much more complicated to work out are the legal consequences of a divorce: issues such as the parental authority over the minor children, the arrangements required to implement the reciprocal right of access for the child and the non-custodial parent, and the amount of alimony that would be reasonable in the light of the ex-spouses' financial capacity and need respectively. Dutch law allows for considerable judicial discretion here, and for party autonomy in the form of joint requests made by the (ex-)spouses. Such joint requests are increasingly embedded in comprehensive agreements between the (ex-)spouses, termed *scheidingsconvenanten*. Where such agreements merely concern alimony, the parties may even exclude judicial adaptation of the agreement.³¹

The legal framework therefore facilitates negotiated solutions, and hence mediation. Since the 1970s, the use of modern mediation in this area steadily increased, and in 1989, divorce lawyers established their own professional mediators association. The underlying idea here was that both parties might jointly engage just one lawyer, in the capacity of a mediator assisting them in working out a *scheidingsconvenant*. This approach proved very (cost-)effective, as it prevented the dispute from escalating, and parties running back and forth from and to the court.

The current trend is to move away even further from the judicial process. In 1996, a Commission on the Reform of Divorce procedure, chaired by Professor de

30. NMI Informatie (2001) *Tijdschrift voor Mediation* Vol. 3.

31. Article 1:158 and 159 BW.

Ruiter, suggested in its final report that the courts should be left out altogether in cases where the spouses can agree on all major terms. In that case, it would suffice to have a lawyer or notary public reviewing the agreement, and to have the divorce certified and registered henceforth.³²

8.1.2 Organisations and specific models

The *Vereniging van Advocaat-Scheidingsbemiddelaars (VAS)* (Association of Divorce Lawyers-mediators) was established in 1989. VAS is essentially composed of lawyers specialised in handling divorce cases, who have successfully completed a special mediation training course. In this course, psychological skills will be developed next to specific negotiation and legal skills. VAS membership implies compulsory permanent education and sharing experiences in divorce mediation with fellow members. VAS has issued its own Rules of Professional Conduct, and a standard Agreement to Mediate. These are published on its website.³³ VAS maintains regular contacts with similar organisations abroad, such as the Academy of Family Mediators in the US. VAS currently has well over 300 members. Next to VAS, there are mediators practicing individually and independently in this area.

The VAS Rules of Professional Conduct contain some interesting provisions. The basic idea is that one VAS-lawyer will be engaged as a single mediator by both parties. Rule 1 provides that nevertheless, the mediator will not lose her professional status of lawyer. This Rule serves the interest of the parties: it extends the Rules of Professional Conduct of the Netherlands Bar Association into the domain of mediation. Thus, lawyer-mediators are probably able to invoke the well established right to professional secrecy for lawyers.³⁴

In line with the NMI and UNCITRAL Rules, the VAS Rules of Professional Conduct also stipulate that once a mediation has been terminated, the lawyer-mediator will not be allowed to act as a lawyer for one of the parties. This prohibition extends to the partners in the mediators' law firm.

VAS Rule 6 provides that the mediator must see to it that both parties are sufficiently aware of the legal consequences of the steps they might consider in their negotiations.

Model rules have also been laid down at a European level, through the Council of Europe Recommendation No R (98) 1 on Family Mediation. The Preamble refers to [] the detrimental consequences of conflict (resulting from divorce) for families and the high social and economic costs to States []. The Preamble also refers to [] the results of research into the use of mediation [] which show that the use of mediation has the potential to improve communication between members of the family [] and to provide continuity of personal contacts between parents and children [].

The Principles contained in the Recommendation provide, *inter alia*, that the

32. *Anders Scheiden* [] Rapport van de Commissie Herziening Scheidingsprocedure (Ministerie van Justitie/SDU, Den Haag, 1996).

33. www.vas-scheidingsbemiddeling.nl.

34. However, on 5 February 2001, the Disciplinary Tribunal in Amsterdam held that a lawyer does not exercise the profession of lawyer when she is acting as a mediator.

mediator must preserve the equality of the bargaining positions of the parties, that the mediator should have a special concern for the welfare and best interests of the children, and that the mediator should pay particular regard to whether violence has occurred in the past or may occur in the future, and the effect this may have on the parties' bargaining positions. In addition, it is stipulated that the mediator may give legal information, but should not give legal advice.³⁵

8.1.3 The mediators

Although VAS members are essentially lawyers, albeit with special skills in psychology, it is not unusual in serious divorce disputes to have one lawyer and one psychologist working together as co-mediators.

8.1.4 Data from practice and experiments

According to the NMI surveys, many of the registered family mediations result in a settlement agreement. Such settlement rates may be regarded as an indication for 'success', although it should be reiterated that the baseline of divorce disputes is not known. Of the 618 mediations that were initiated, 436 have resulted in a settlement. That is a settlement rate of 70%. Some individual mediators report settlement rates of over 90%.³⁶

Specific results of the court-encouraged mediation experiments in this area, which are conducted under the guidance of the Ministry of Justice, were not yet available at the time of writing this report. In these experiments the researchers set out to uncover at what stage a referral to mediation will be most effective: before a petition is filed, when an interim relief injunction is sought, or while the case is pending for a final judgment.

8.2 *Labour disputes*

8.2.1 Nature and legal framework

Labour disputes constitute the second major practice area for mediators in the Netherlands. Possibly this is because labour disputes, like family disputes, are often centered around long-standing human relationships. As in family disputes, the stakes are high for the parties involved, particularly for employees.

Labour disputes may be much more varied in structure than family disputes. Such disputes may arise between an individual employee and a colleague or direct supervisor, or between a trade union and an employer, or between a trade union and an employers association. Interest groups are important in this area, and a preliminary distinction can thus be made between collective and individual labour disputes. As indicated, the historical institution of *Rijksbemiddelaar* arguably failed

35. The full text of this Recommendation can be downloaded from <http://cm.coe.int/ta/rec/1998/98r1.htm>.

36. NMI Informatie (2001) *Tijdschrift voor Mediation* Vol.3. Hoefnagels G.P. *Handboek Scheidingsbemiddeling* (Tjeenk Willink, Deventer, 2000).

as it was not developed jointly with the interest groups representing both sides of industry.

At the risk of oversimplifying, it can be said that labour relations in the Netherlands were increasingly collectivised and also supervised (by the government) until the early 1980s. Supervision was borne out by governmental wage policy and a system of *ex ante* dismissal authorisation, collectivisation materialised in generally binding industry-wide collective agreements, and also in an extensive social security legislation, providing a huge safety-net for those unemployed for reasons of redundancy or health (disability insurance).

The upshot for labour disputes was twofold. First, for many years, individual disputes in particular were camouflaged. The disability insurance system proved to be an especially attractive way out, both for employers and employees. Second, gradually employers associations and unions began to develop an aversion to government intervention, or indeed intervention by any third party.

From 1980 onwards, the landscape of labour relations is changing drastically, against the backdrop of globalisation, privatisation and de-unionisation. Government interventionism gave way to employers associations and unions working together in a business-like, consensus oriented manner. This practice of mutual consultation (termed the *Polder model*) is said to have contributed strongly to a restoration of Dutch economic competitiveness. In this context, initially no need was felt by employers and unions to institutionalise mediation. Recently, however, employers and unions have come to change their minds about the usefulness of mediation, particularly in individual labour disputes. For employers, the tightened employment market provides an incentive to negotiate with employees. For unions, financial limitations provide an impetus to consider mediation as an alternative for union supported court proceedings. And the rising costs of the national disability insurance scheme now stimulates employers *and* employees to attempt solving underlying disputes first, before resorting to the insurance scheme.

8.2.2 Organisations and specific models

There is not, as yet, an organisation catering for modern mediation services for labour disputes in all sectors of the economy. Collective disputes in the private sector are occasionally mediated by ad hoc *bemiddelaars*, traditional mediators, usually politicians or professors, who may be selected on the basis of their authority.

For collective disputes in the public sector, the situation is different since 1984, when the *Advies- en Arbitrage Commissie AAC* (Advice and Arbitration Commission), was established, to assist civil servant unions and government employers in solving disputes over terms of employment in the public sector. The word mediation is not featured in the name AAC; former AAC Chairman Professor Albeda interestingly regarded mediation as "a form of advice".

By the end of 2000, the public sector social partners established the *Nederlands Instituut Conflictmanagement Overheid en Arbeid NICOA* (Conflictmanagement Institute for Government and Employment). NICOA maintains a register of *bemiddelaars* and mediators, who can be engaged by public sector employers and employees through NICOA's ADR-desk. Mediators must be NMI-certified. Both the *bemiddelaars* and the mediators must have special expertise in public sector

employment relations. NICOA will develop its own Rules of Professional Conduct, which will be inspired by the NMI Rules, but slightly broadened so as to encompass [bemiddelaars-non-mediators] as well. NICOA intends to handle requests for mediation in both collective and individual employment disputes, within the public sector.

Individual labour disputes in the private sector were hardly mediated until recently, although some [crypto-mediation] could be observed in the practice of *ex ante* dismissal authorisation. Staff members of the *Arbeidsvoorzieningsorganisatie* (Labour Office), who are in charge of authorisation, occasionally seek to mediate when handling a request for a dismissal permit, although this practice is not publicised.³⁷

Since a few years, modern mediation services are offered by private foundations, law firms or management consultants. The largest player currently is the *Mediation Centre* in the city of Breda.

An important forum where experts in mediation and labour relations regularly meet is the *NMI groep Arbeidsverhoudingen*, the Labour Relations discussion group within the NMI. Here, lawyers, psychologists, union leaders, personnel officers and management consultants, all certified NMI mediators, meet every six weeks to discuss recent developments in the area.

Specific models do not, as yet, exist for labour disputes. As indicated, NICOA is preparing Rules of Conduct. In the absence of specific models, the NMI Mediation Rules will remain of overriding importance. Meanwhile, the power imbalance between individual employees and their employer is a reason for concern. The problem may be reinforced if the employer pays the mediator's fee, or when the mediator has a prospect of conducting multiple mediations for one employer.

At a European level, specific Models are lacking too, although mention should be made of a major stock-taking of national labour mediation practices by the European Commission in 1993.³⁸ Also noteworthy is the duty undertaken by the Contracting Parties to the European Social Charter, [] to promote the establishment and use of appropriate machinery for conciliation [] for the settlement of labour disputes. If one reads a progressive undertaking in this Treaty provision, then the Dutch government may be said to act in violation of the Social Charter.

8.2.3 The mediators

A distinction needs to be made between the traditional *bemiddelaars* (mediators), the crypto-mediators from the Labour Office, and the modern mediators who are NMI-certified. Traditional mediators tend to be politicians or professors with a background in economics, sociology or law. The Labour Office officials usually have a professional training in personnel management. In the major cities, a number of such officials will hold a law degree. These officials may draw upon their expertise of the labour market when conducting mediations. The Labour Office is,

37. De Roo A & Jagtenberg R *Settling Labour Disputes in Europe* (Kluwer Law and Taxation, Deventer/Boston, 1994). The *Arbeidsvoorzieningsorganisatie*.

38. Kerr A *The Resolution of Industrial Disputes* (Dublin, 1993).

after all, responsible for collecting information about, and acting as an intermediary on, the labour market.³⁹

8.2.4 Data from practice and experiments

According to the NMI surveys, 206 out of the 345 mediations registered since 1999 have resulted in a settlement agreement. This implies a settlement rate of almost 60%. These figures apply to modern mediation. With regard to crypto-mediation it has been recorded that in about 3% of all permit applications pending, mediation efforts take place. These mediations then result in a settlement rate of 90% approximately.⁴⁰

Over the last 10 years, traditional mediators acting in major collective disputes have only managed to appease parties in a minority of cases. It should be noted however, that in these cases the mass media tend to be present, creating an outside pressure which may complicate mediation work. Some mediators have carefully avoided the public eye, and may quietly have created the right conditions for a solution, for which the audience at large credits the parties.

8.3 Administrative law and planning disputes

8.3.1 Nature and legal framework

Administrative law is concerned with the exercise of powers of a public law nature. Such powers – entrusted to various agents (usually) within the public administration – are essential for the discharge of the public tasks or duties assigned to these agents. Such powers may or may not involve the exercise of discretion.

Dutch administrative law is constructed around the substantive concept of *besluit*, commonly translated as public law juridical act (as opposed to private law juridical act). Such public law juridical acts constitute a key instrument for public administrators to balance particular interests against the general interest they are assumed to represent. This applies particularly to *besluiten* of a general nature, such as plans or policy rules. During the preparation of such *besluiten* of a general nature, interested parties may enjoy a statutory right to comment. Such a stage is commonly termed *beleidsvoorbereiding* (policy preparation).

There are also *besluiten* in which a statute, plan or policy is concretised in an individual case, as a *beschikking* (public law decision). The addressee may challenge such a decision in law, whereas here, too, other interested parties may raise objections in designated cases. Before an official decision can be challenged in a court of law, the grievant will first have to submit the decision to the relevant public authority for reconsideration, in an internal review procedure, called the *bezwaarfase*.

As administrative law contains special safeguards for interested parties to voice their objections, public administrators must use public law tools instead of private law tools, where possible. After all, the essence of public administration activity is

39. De Roo A & Jagtenberg R 1994, above.

40. NMI Informatie 2001 o.c. and De Roo and Jagtenberg 1994, above.

its involvement with multiple addressees, who may or may not be easy to identify. Exactly here lies a pitfall for mediation in administrative law disputes.

Mediation is a method tailored to achieve individualised justice. Individualised justice presupposes that all interested parties have been identified, and participate in the process. Many administrative law experts in the Netherlands regard the (im)possibility to involve all interested parties as the key test for or against using mediation. Nevertheless, many experts see opportunities for introducing mediation, or mediation techniques, during the *beleidsvoorbereiding*, the preparation of public acts of a general nature, and during the *bezwaarfase*, the internal review of official decisions. Various mediation initiatives and experiments can be observed in these particular stages.

Parties can also be referred to mediation by a court. Once a case is pending in an administrative court, Dutch law allows for the judge to probe opportunities for an amicable settlement.⁴¹ And indeed, experiments do take place within the *Mediation naast Rechtspraak* project.

In their relationship with public authorities, citizens are not always and necessarily confronted with public law instruments. What citizens always experience, however, is a particular *bejegening* (treatment) by public authorities. When citizens have complaints about a mere treatment, they can turn to the National Ombudsman, or to any of the Municipal or other specialised Ombudsmen in the Netherlands. Within these established complaint procedures, mediation is now also increasingly playing a role.

8.3.2 Organisations and specific models

A single organisation offering mediation services in the administrative law area is currently lacking. Neither are there any specific, nationwide standards for handling such disputes. At a European level, there is the recent Council of Europe Recommendation, No. R (2001) 9, on Alternatives to Litigation between Administrative Authorities and Private Parties. This Recommendation is, in itself, quite interesting, as some of its provisions seem to imply a departure from stances taken by the Council of Europe in its earlier mediation Recommendations. In article III, 2, it is stated that “[...] mediation can be initiated by the parties or by a judge, or can be made compulsory by law[...]. And “[...] mediators can invite an administrative authority to repeal or modify an act on grounds of expediency or legality[...].⁴² One would expect future models on administrative law mediation to address specific issues, such as the tension between secrecy and freedom of information, or the amount of discretion which should be left to a public agency for it to have room to manoeuvre at all.

A few private organisations have been set up recently to cater for mediation in the administrative and planning area; a good example is the *Stichting Mediation in Milieu en Ruimtelijke Ordening* (Foundation for Mediation in Environmental and Planning disputes). This foundation accommodates expertise particularly in regard

41. Article 8:44 Awb.

42. The full text of this Recommendation can be downloaded from <http://cm.coe.int/ta/rec/2001/2001r9.htm>.

of mediation during the preparation of new plans or policies. The role of the mediator here is to bring all major interest groups potentially affected by a new public law instrument together. If consensus can be reached at this early stage, as to the contents of the draft instrument (plan, policy), its implementation is likely to meet little resistance. It is also possible for the public authorities and the interested private parties to cast their agreement in a so called public-private covenant. This type of mediation is akin to the Reg-Neg phenomenon, emanating from the United States. It is preventive in character.

Mediation during the internal review of official decisions is increasingly entrusted to so-called *Adviescommissies voor de Bezwaarschriften*, standing committees actually in charge of hearing grievants and advising the relevant public authority on whether and how to reconsider the decision under internal review. What happens here is that the result of a successful mediation reached before the committee is taken as the basis for a new official decision. It is important to realise that a public authority cannot simply waive its specific statutory powers to act. Eventually, the authority itself must remain in charge.

As indicated, judges are allowed to probe the opportunities for an amicable settlement. The mediating judge cannot have side meetings with each of the parties, and at the same time be in charge of hearing and deciding the case. This would constitute a violation of the principles of natural justice. If a judge is to act as a full-fledged mediator, this judge should be a person different from the judge actually hearing the case. This division of roles was actually adopted in the court-encouraged mediation experiment with administrative law disputes, in the Zwolle district court.⁴³ It is not clear whether Ombudsmen resort to a similar division of roles, when they are handling complaints, and yet feel that mediation may give better results.

8.3.3 The mediators

Judges, Ombudsmen and their staff, members of Advisory Committees in Internal Review procedures and Reg-Neg mediators often have a background in law (judges always). Increasingly, they will also have completed a professional mediation training programme. In this respect it is noticeable that the *Vereniging voor Administratief Recht* (National Association of Administrative Law Experts) VAR, dedicated its annual meeting in the year 2000, to Mediation and other alternative modes of dispute resolution.

8.3.4 Data from practice and from experiments

Mediation is a relatively new phenomenon in all the aforementioned varieties of administrative dispute handling.

Mediation during the preparation of public law instruments (Reg-Neg mediation) is just beginning to show positive results, particularly in the area of environmental policy. Experience shows, that mediators in this area must be prepared for the fact that interest groups have acquired a firm place in Dutch politics

43. Pach M A Mediation in het bestuursrecht; het kan, het mag en het werkt *Alternatieven van en voor de Bestuursrechter*, VAR Preadvies 126 (Boom Juridische Uitgevers, Den Haag, 2001).

and behave like repeat players, just like the public authorities.⁴⁴

Information on mediation during internal review procedures is merely anecdotal. It seems mediation is used successfully in those cases where the number of interested parties is limited, and the parties are identifiable. This applies particularly to employment disputes between government employers and their civil servants; and □ to a lesser extent □ to disputes over building permits, that merely have an impact on the direct neighbour(s) of the applicant.

More statistical information is available over the in-court mediation experiments in the city of Zwolle. In the year 2000, judges in the Zwolle district court referred 65 cases to the specialised judge-mediator (who herself was not involved in hearing or deciding these cases). Out of these 65 cases, 34 were completed in the year 2000, and out of these 34 cases, 21 were concluded with a settlement agreement. It is noteworthy that a considerable number of settlements related to labour disputes involving civil servants; such disputes are handled by the administrative courts. Out of 34, 13 cases related to civil servant disputes; 11 of these cases were settled through mediation.⁴⁵

Finally, a figure relating to the mediation practice of Ombudsmen mediation. The Municipal Ombudsman of Rotterdam reported that during the last few years, 25% of the complaints brought to his cognizance, were actually mediated.⁴⁶

9 The future of mediation in the Netherlands: some considerations

From the developments discussed above, it appears that a mediation-infrastructure is evolving in the Netherlands. Of particular interest seems the role of NMI as a national umbrella organisation concerned with quality assessment and benchmarking, hovering above various specialised mediation institutes and professional associations of mediators. This structure may be interesting for the development of cross-border mediation in the nearby future. Such cross-border mediation will depend on the existence of national clearing houses, such as NMI. This is borne out clearly by the European ADR Model Rules, which exactly seek to facilitate cross-border mediation in Europe, using national clearing houses as a starting point.⁴⁷

In the meantime, it is not clear in what direction modern mediation will develop in the Netherlands. This is partly due to the unclear role of the government.

Perhaps, the interplay between private mediation initiatives, government – particularly the Ministry of Justice – and researchers is characteristic of the Netherlands.

The Ministry of Justice is interested in mediation, as an additional method of conflict resolution, which could at the same time reduce judicial caseloads. Through the ADR Platform, the Ministry has first mapped out the areas where mediation might be used with some success; it then proceeded to subsidise experiments in these

44. Al J Beleidsbemiddeling *Mediation* (2000), *Justitiële Verkenningen* Vol. 9.

45. Pach M A 2001, above.

46. Gemeentelijke Ombudsman Rotterdam, *Verslag van Werkzaamheden 1997/1998* (Humanitas Rotterdam, 1999).

47. Jagtenberg R Cross-border mediation in Europe, in Barret G. *Creating a European Judicial Space* Series of Publications Academy of European Law Trier Vol 30, 2001.

areas. For the actual mediations, the Ministry relies upon private mediation schemes and training programmes. For monitoring and measurement, researchers are engaged from various universities and private institutions. Conversely, mediators in private mediation schemes are interested in these governmental experiments, as they need mechanisms to secure a steady influx of cases. Researchers, from their part, are in need of research assignments. The resulting picture is that of an overall symbiosis.

This approach starts with experiments and not with legislation, as in many other countries. It seems a prudent approach; the beneficiary is said to be the *rechtzoekende*, the citizen involved in a dispute and looking for justice to be done. The enthusiasm for mediation among private parties seems to be growing, witness the proliferation of standard mediation clauses in the business community.⁴⁸

Nevertheless, we would like to add a critical remark. There is a lot we do not know about personal characteristics of disputants and dispute characteristics that may be determinant of the [success] or [failure] of mediation. In this respect we welcome the experimental approach. Yet, it appears that some policy makers in the administration of justice are already in favour of mandatory referrals to mediation. It is argued that in this way, courts would be made more accessible. This is Lord Woolf's plea.

We believe this is a misguided strategy. This viewpoint presupposes we know all there is to know about changes in the baseline of conflicts in society. The truth is that we know very little about this. Law can be regarded as an instrument of risk management. Other, traditional ways of risk management, such as family networks or social security are on the wane everywhere. Hence the demand for legal services is rather likely to increase. Citizens seem to be willing to allot significant portions of their income to legal dispute resolution, for example by taking out a legal expenses insurance. The assumption underlying Lord Woolf's statement is that citizens as taxpayers are not willing to invest in the administration of justice. In that situation, indeed the only way of speeding up the legal process will be to divert cases to mediation. But the alternative might simply be to invest more in the administration of justice.

We contend that mediation can only be truly facilitative, if it is structured against the backdrop of an accessible legal system.⁴⁹ It should not be mediation *or* law. It should be mediation *and* law.

48. Jagtenberg R & De Roo A Mediation in het Bedrijfsleven Mediation (2000) Justitiële Verkenningen Vol 9.

49. Jagtenberg R & De Roo A The [New] Mediation: Flower of the East in a Harvard Bouquet (2001) *Asia Pacific Law Review* Vol 9 No No 1.