

# Justice in service of the humane

*How Preventive Law could be complemented by Restorative Justice*

Master thesis

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## **Abstract**

Various legal and social scholars have observed an increasing juridification and pluralization of society, that our current justice system has not yet adapted to. There are a number of new approaches that try to address the increasingly diverse and dynamic context in which the justice system must function. In this thesis two of these alternative legal approaches are brought together. By bringing literature from both fields together, I aim to explore to what extent preventive law and restorative justice might complement each other in addressing the new challenges the justice system must adapt to, if it is to be a humanizing system that generates durable solutions that are conducive to the well-being of a pluralist society. The hypothesis is that together they might inform a justice system with values and practices that accommodate the complexity of current social reality and actively involve citizens in solving their conflicts in a more humane way.

The literature study shows that both preventive law and restorative justice offer approaches to justice that are mindful of the relational and contextual nature of conflicts, allowing the stakeholders involved to actively participate in formulating durable solutions. Preventive law covers the necessary competences of legal professionals and is focussed on civil law, while restorative justice provides a framework for deliberative practices and an alternative to the current criminal justice system. The two approaches therefore have considerable potential to be complementary to one another and their possible combination should be of interest to anyone wishing to reform the current justice system.

## Preface

For a student at the University of Humanistic Studies my choice of subject is a little unusual, to say the least. The law and the justice system are not exactly part of our core curriculum and I certainly felt this while doing my research.

I am very grateful I was allowed to pursue this subject, however, because my minor in Criminology and my years as a volunteer at Victim Services have made me very passionate about the realm of legal justice. In the stories of the victims I speak to every week and in my occasional contact with the police officers that work on their cases, I have heard so much of the messy reality of the criminal justice process. It gave me glimpses of the great potential it has to do good, but also many examples of how often nearly everyone involved feels no real solution can be offered within the system.

These experiences led me to the theories of preventive law and restorative justice, as possible sources for a justice system that *could* offer the solutions we are in need of.

My sincere thanks go to Dr. Nicole Immler, for her faith in me when I came to her with such an unusual proposal and for all her attentive feedback and enthusiasm.

I would also like to thank Dr. Eric van de Luitgaarden, both for his inspiring dissertation and for his willingness to discuss my thesis. As well as Prof. Thomas Barton for his very encouraging and helpful emails and for providing me with examples of preventive lawyering I was sorely in need of and hard pressed to find.

Very warm thanks goes out to my sister, the actual student of law, whose help in proofreading and brainstorming was invaluable while writing this thesis. Apart from her I am also indebted to my mother and several friends, for spellchecking and for listening to me going on and on about it.

Lastly, a word to my beloved late father, who while always encouraging my ambition responded with a thoughtful “that sounds more like a subject for a dissertation” when I explained my plans. You were probably right, but here we are all the same, and someone is even reading it!

Thank you in advance, dear reader, I hope you will find something inspiring here.

Shawn Pieters Kwiers, Zeist, October 2018

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## Introduction

In any place where humans live together, there is bound to be some conflict. Conflict that needs to somehow be dealt with if the normal order of the day is to be resumed. On the playground, when children cannot settle an argument themselves, a teacher might be called. If the argument escalates to a fight, the teacher might intervene on their own initiative. In society we have given the role of the teacher to the justice system. This system is expected to be able to tell right from wrong, to intervene when boundaries are crossed that we as a society have collectively decided should not be crossed and to deal with this in a just manner.

Except society is changing. In our current society, dynamic as it is, the justice system needs to be able to operate in a highly diverse and changeable context. If a just, humane democracy is the goal, it is imperative that the justice system adapts to the needs of the citizens of this democracy.

The goal of this master thesis is to explore the possibilities that preventive law and restorative justice offer concerning the new challenges that the justice system must adapt to, if it is to be a humanizing system that generates durable solutions that are conducive to the well-being of a pluralist society.

As a democratic institution the justice system – comprehending civil and criminal law – operates within a rapidly changing society and is increasingly faced with pressing new challenges. Our current society is increasingly globalized and pluralistic, with a rapidly changing social reality (Appadurai, 2013; Scholte, 2005). It is no longer compatible with a justice system that relies on a national population adopting shared morals and cultural habits (Siesling, 2006). Whether this premise was ever justified is perhaps doubtful, but it certainly is no longer justified today. Nowadays the people that work in and are processed by the justice system are living in a globalizing, yet individualistic society rife with cultural backgrounds and ever-changing systems of meaning (Bovenkerk, 2009).

In his Royal Address on the 20th of September 2016, His Majesty King Willem-Alexander expressed:

*“No one shall be asked to renounce their heritage or culture, but constitutional norms cannot be detracted from [.]”<sup>1</sup>*

This is exactly the task that those working within the justice system find themselves presented with. It is the responsibility of lawyers and judges to interpret the laws based on

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<sup>1</sup> Original text: “*Van niemand wordt gevraagd de eigen herkomst of cultuur te verloochenen, maar aan grondwettelijk vastgelegde normen kan niet worden getornd[.]*”, found on: <https://www.rijksoverheid.nl/documenten/toespraken/2016/09/20/troonrede-2016>

our constitution and apply them to real situations concerning real people in the real world. Legal scholars agree that there is room in the justice system of our democratic state to take matters like cultural background into consideration (Bovenkerk, 2009). However, the permissible extent of these considerations and how to include them is highly disputed (Rutten, 2002).

There is a tendency in society to react to clashing values by holding more tightly to one's own and this might be reflected in the justice system, by framing the content of the law as facts that are beyond reproach or discussion. The formation and interpretation of laws has never been unambiguous, however, and treating it as such would not do justice to the very constitutional values the state is trying to protect (Bovenkerk, 2009; Ten Voorde, 2007).

The justice system is one of the principal pillars of the modern democracy and should therefore reflect this changing, pluralist society. It should become more aware of what kind of society it creates and it should provide the opportunity for citizens to engage with and discuss their constructed values (Ten Voorde, 2007). That is the ethical work legal professionals concern themselves with: the creation and maintenance of the constitutional democracy (Luijtgarden, 2017, p. 17). Failing to maintain a connection between citizens and the justice system that they must answer to, gives rise to various tensions and problems, and this is exactly what we are facing today.

That our current society is subject to strong social and political tendencies that complicate its relationship with the law, is the premise of Dr. Eric van Luijtgarden's 2017 dissertation "*Preventive Law; Aanzet tot normatieve professionalisering in de opleiding van juristen.*" His work is the main inspiration and starting point for this thesis, because he aptly describes the challenges the justice system faces at present and brings a humanistic perspective into the legal practice. To my knowledge his work is also the first work that applies preventive law to Dutch society.

Luijtgarden states that it is not just society that has changed, but also the way that the law is present in society. The *juridification* of society has brought us to a situation where the law has an increasing presence in and influence over daily life, while the *socialization* of the law simultaneously means that the law does not just shape society, but is also used as a tool and reacts to what is passing in society. Between these two complimentary tendencies Luijtgarden warns for the prevalence of legal alienation. This is the phenomenon that citizens feel disconnected to the governing laws that they feel they have no influence over, fail to protect their rights, or they no longer understand. This combination of a disconnect from legal justice, while there is an increase of legal intervention in daily life, calls for a change among legal professionals, according to Luijtgarden. He suggests that *preventive law*, which approaches conflicts from a broader perspective than just the legal, would be an excellent theory to draw from in addressing these challenges.

The theory of preventive law states that in any legal conflict there are bound to be losses and that these losses are often not easily quantifiable in terms of monetary gain. Therefore a legal professional that truly has the well-being of clients centre stage would need to assess the situation more broadly, comprehending all risks, costs and benefits, taking into account the specific context and the *relationship* between the parties involved. The goal is that the professional prevents further damage and ideally even prevents any initial harm (Luijtgaarden, 2017, p. 141-145).

American lawyer Louis Meir Brown, the ‘father of preventive law’, wished to humanize the practice of law by encouraging lawyers to focus on the relationship between lawyer and client, and emphasizing the importance of the human dimension in their cases. They were to consider that certain cases benefitted from a non-legal solution and that the emotional costs (damaged relationships, loss of faith in humanity, etc.) of legal intervention might do more harm than good (Luijtgaarden, 2017, p. 149-54). The practice of preventive law prioritizes the human dimension of legal justice and accommodates the complexity and context of the conflicts that people face daily (Luijtgaarden, 2017, p. 250).

However, the question is whether preventive law alone is enough to address the myriad of challenges the justice system now faces. The theory originates from and is particularly suited for civil and corporate law, but it is limited. Particularly with regards to criminal law where the state, not individuals, hold the power to prosecute (Luijtgaarden, 2017, p. 171). One might argue that efforts to prevent legal interference and assuage conflict come too late for criminal justice. Perhaps repeat offences can be prevented, but harm has already been done. Luijtgaarden’s theory also focusses mostly on providing legal professionals new approaches and guidelines on how to act, the conflicting parties themselves get less of a spotlight.

Therefore I propose in this thesis to look into the possibility of combining the theory (and practice) of preventive law with that of restorative justice. This would expand the broad, context-oriented perspective of preventive law to the realm of criminal justice, allowing for a more integrated approach to doing justice within a pluralist society that makes it possible to take into account the broader context and relational aspects of conflicts. It could for instance provide deeper insight into the relationship between victim and offender, not just client and lawyer. Together the two approaches might have the potential to provide new options for the justice system as a whole.

Like preventive law, restorative justice is – both as a theory and a practice of justice – a reaction to perceived shortcomings in the present Western justice system (Van Ness & Strong, 2010, p. 8). They also share a focus on humanity and complexity.

Restorative justice aims to repair harm done by criminal offences by respecting the ‘feelings and humanity of both the victim and the offender’, while not losing sight of the context of the larger community and the implications for the future (Van Ness, 2010, p.

22-23). Or, as defined by Lode Walgrave (2011, p. 22) it is: ‘an option for doing justice after the occurrence of an offence that is primarily oriented towards repairing the individual, relational and social harm caused by that offence’. This is often done through meetings between victims, offenders, and other stakeholders, so a human connection is made and a solution to repair the committed harm can be found.

This approach could benefit greatly from the legal professionals Luijtgarden speaks of in regards to preventive law. As the civil and criminal justice systems are inherently connected, a reform of the one also suggests a reform of the other. In this thesis I will therefore explore whether restorative justice might be the right theory to complement preventive law to help work towards a humane justice system that support a pluralist society and that allows the realms civil and criminal justice to be more closely connected.

Compared to preventive law, there has been significantly more attention for restorative justice in the Netherlands. Restorative initiatives have been present in the Netherlands since the 1990s (Blad, 2011, p. 41) and it is altogether a much larger movement worldwide. Preventive law offers a new perspective on the role of legal professionals, whereas restorative justice focusses on the relationship between victim, offender and society, often even preferring community volunteers over professionals when mediation or coordination is necessary (Van Ness, 2010).

Yet like preventive law, restorative justice highlights the human dimension of justice, law, and conflict, and considers their broader contexts. According to restorative justice, finding constructive solutions after a crime benefits society as a whole, as well as the victim and the offender (Walgrave, 2011, p. 23). Just as in preventive law, restorative justice looks beyond the legal, considering the quality of relationships and their durability for the future, thereby contributing to a more just and inclusive society (Walgrave, 2011, p. 31).

The goal of this thesis is to investigate whether restorative justice is a good supplement to preventive law in reforming the justice system. I wish to explore the possibilities that preventive law and restorative justice offer concerning the new challenges the justice system must address, if it is to be a humanizing system that generates solutions that are durable and conducive to the well-being of a pluralist society. Although there are many (ethical) arguments in favour of preventive and restorative practices, I will focus specifically on how both approaches accommodate the complexity (and relationality) of conflicts. This is not merely to narrow down the subject of this study to an achievable goal, but also because the current justice system seems to fail to accommodate exactly this human complexity, thereby missing a great opportunity for humanization within formal justice. Additionally, this messy complexity of life has always been important to humanistic scholars.

The following question will guide the research process of this thesis:

*How could restorative justice complement preventive law in creating a justice system fit for a pluralist society?*

This question shall be split into four sub-questions:

- *What are the challenges that a pluralist society presents the justice system with?*
- *What does preventive law have to offer the justice system?*
- *What does restorative justice have to offer the justice system?*
- *How could preventive law and restorative justice complement each other?*

Regarding the definition of concepts, both preventive law and restorative justice will be more thoroughly explained in their respective chapters, as will the legal-social tendencies briefly mentioned earlier in this introduction. It is important to note at this time that within the scope of this research ‘justice’ will not be defined as a philosophical concept, but is meant as it appears in the legal-social theories it draws from: founded in theory, but always applied in practices.

Another important point, especially since direct translation to Dutch is not possible, is that the justice system means the institutions tasked with *applying* the law. The *legal* system refers to the system of laws and regulations. The justice system, then, is comprised of the people, efforts and procedures that apply the *legal* system to provide justice. This is exactly where the complex normativity of the law is revealed (Bovenkerk, 2009).

Apart from answering the questions named above, the larger goal I wish to contribute to is bringing legal justice and academic humanism closer together. Luitgaarden looked at humanistic theory from a legal perspective, I will be conducting this research coming from a background of humanistic studies. This situates me among the relatively small number of humanistic scholars that have concerned themselves with formal, legal justice, as opposed to the broader concepts of social justice and the just society as a whole.

When it comes to this conception of a just society, the work of Peter Derkx has been influential in the definition of my normative standpoint. In his oration on the multicultural society<sup>2</sup> Derkx (2004, p. 23) describes the ideal of a free, democratic, pluralist society wherein the state acknowledges the equality and upholds the human rights of all citizens, while acknowledging, accepting and appreciating the moral and political importance of their cultural differences.

This pluralist, liberal democracy exists according to a specific formula. The specific institution that must create and uphold it, just like the policies of any democratic government, will always be dependent on the specific and ever-changing political and socio-cultural context and rooted in their history and culture (Derkx, 2004, p. 13).

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<sup>2</sup> Instead of speaking of a pluralist society, Derkx usually chooses the word ‘multicultural’. His use of the word is compatible with pluralism, however, as he states quite clearly that the differences within society he speaks of comprehend more than just the cultural (2004, p. 54).

However, Derkx does describe an important principle he feels must be followed. Namely that democracy in a pluralist society should be ‘just’ in two different ways. Firstly, justness in the sense of ‘*impartiality*’ and secondly in the sense of ‘*evenhandedness*’. The state should be impartial, because it should respect the freedom of individuals and regard them as equals, regardless of their respective choices concerning culture, worldview and identity. However, the state should also take the trouble to be informed about these choices, about its citizens’ wants and needs, and to attempt to treat everyone fairly and equally accordingly. This evenhandedness is an addition to the impartiality and is deeply embedded in the ever-changing context of concrete reality, while the justness as impartiality is a more theoretical value. This abstract impartiality is not enough to be just, because to be completely neutral and impartial is impossible. In the end what matters is that the freedom of all individuals is promoted. Sometimes this means policies must favour specific minorities. The right for all individual citizens to be able to choose their own path in life must be protected, so inequality must be combatted. How this must be combatted will always be heavily dependent on the specific context (Derkx, 2004, p. 14-15). All (political) principles, even those believed to be the most fundamental must be evaluated and applied anew in every new situation. It is often revealed that they were not as universal and neutrally formulated as previously supposed (Derkx, 2004, p. 16).

This calls for the continual deliberation and amendment of institutions and their policies to suit the changing circumstances, in order to create a balance between the combinations of values represented in the diversity of people in society (Derkx, 2004, p. 23-24). According to Derkx this debate should be carried out at all levels of society. The mutual respect and solidarity of a pluralist society must emerge from civil society, it cannot be enforced by the state. The state can create the necessary conditions, however, and that is – from a humanist perspective – what it must take as its main responsibility (Derkx, 2004, p. 49).

Regardless of this call to amend institutions in order to create the necessary conditions to let a pluralist society flourish, Derkx’s theory does not arrive at practical applications. A number of fellow humanistic scholars have attempted to make this difficult translation from theory to practice. Harry Kunneman (2002), Joachim Duyndam (2003), Judith Leest (2003) and Claire Laus (2013) have all written about restorative justice in various capacities, but probably the most concrete translation of humanistic values into (criminal) justice practice comes from Jan Hein Mooren.

Joined by José Frijns he wrote a book on the “*project Herstelbemiddeling*” that was set up in 1997 to implement victim-offender mediation. Mooren states that society benefits from social cohesion and citizens have a need for mutual trust and a feeling of safety, and that the manner in which the state chooses to respond to crime can make an essential difference here (Frijns & Mooren, 2004, p. 151-152). He advocates for a humanization of the criminal justice system, which must take shape by understanding that crime implies a relationship and by incorporating a moral dimension in the coping with crime. By bringing victim and offender together, they get the opportunity to see each other’s human side and

both may work towards restoring their self-esteem and respect (Frijns & Mooren, 2004, p. 10-12). For Frijns and Mooren the goals of this restorative mediation are far-reaching. They state that it would help to create a more humane society, by facilitating the practical and symbolic conditions for human dignity and solidarity. A crime is a significant violation of a world in which people are connected with one another and in which they must live a meaningful life. This asks for a constructive answer, an answer that is conducive to a restoration of connectedness. They argue for *restorative mediation* because it builds a bridge between victim and offender, and between them and society as a whole. With such an answer to crime, society can show her social resilience and show her morality and humanity (Frijns & Mooren, 2004, p. 12).

How to bring this into practice is extensively discussed in the book. However, for Mooren these restorative practices should not replace the current criminal justice system, but should instead take place only after all legal procedures have already taken place (Frijns & Mooren, 2004, p. 32). Similar to Duyndam (2003, p. 88), they see the restorative practices as an additional instrument. For most of the authors yet to be discussed in this work, adding to the current justice system is not enough. They envision a larger change.

Regardless, the goal of striving towards a just, pluralistic democracy is something that the legal scholars discussed later share with the humanistic scholars mentioned above. This makes it valuable to look at these socio-legal theories from a humanistic standpoint as the two disciplines must both have a lot to gain from a dialogue between the two, considering their shared values.

## **Methods**

This thesis is an interdisciplinary study of literature. It is a theoretical social sciences study informed by criminology, law, sociology and humanistic studies.

The works that this study relies on were selected for their direct applicability to my research questions, how thoroughly and coherently they discuss their subjects and the author(s) reputation. Some works were previously known to me, some came recommended, and others resulted from broadly searching academic literature for restorative justice and preventive law. In searching, I relied on several online (academic) databases, the University for Humanistics Repository, and the Utrecht University library catalogue and e-Journal search.

As mentioned before Luijtgarden's book on preventive law is the starting point for this thesis, both because he aptly describes the challenges the justice system faces at present and because his work brings a humanistic perspective into the legal practice. Luijtgarden has a history of legal education and has membership in the international working group for preventive and proactive law. To get a firmer grasp of the core elements of preventive law, I supplement Luijtgarden's work with several articles by the

authors he himself refers to. Most notably Edward Dauer and Thomas Barton, both professors of law particularly concerned with preventive justice.

For restorative justice, I rely firstly on Van Ness and Strong's (2015) introduction to the theory and practice of restorative justice, first published in 1997 and regularly revised since. Their book incorporates a history of the theory as well as an overview of current practices, including multicultural perspectives. To add a more in-depth and European perspective on restorative justice, I included works by Walgrave (2009; 2011; 2013), a Belgian criminologist and emeritus professor at Leuven University with a special focus on restorative justice, whose conception of restorative justice is ultimately more directly applicable to Dutch society.

Various scholars from the legal and social sciences have been used less extensively to supplement the authors mentioned above.

In my analysis, my goal is to consider every text critically and to look for points where the texts support, complement or contradict one another. In the interest of transparency, my normative perspective as a student of humanistics will be explained in chapter 1, with the aid of the humanistic scholars mentioned above.

Ultimately this study is meant to be an exploration, it takes Luitgaarden's work as a starting point and will – by bringing together several authors and different perspectives – hopefully provide a base for future researchers and theorists to work with. Though this study is theoretical, it also seeks to contribute to a very practical and normative goal: the creation of a more humane justice system.

## **Thesis setup**

To give a clear picture of the context in which the justice system must operate, the entire first chapter will be devoted to explaining the challenges and legal-social tendencies it will be forced to adapt to. This overview is based largely on Luitgaarden's (2017) findings, but will be supplemented with the perspective of other (legal) scholars. In this chapter I will also devote the necessary attention to the concept of the 'just democracy' the justice system strives to create and maintain, using viewpoints of several of the key authors incorporated in this research and making explicit my own normative, humanistic standpoint on this matter.

Chapter 2 and chapter 3 will explain preventive law and restorative justice. Their key authors and core concepts will be described, before exploring their possibilities in addressing the issues stated in chapter 1.

In chapter 4 both approaches will be placed side by side and compared to see where they might differ, overlap or supplement one another. It shall be explored if together they might offer new possibilities for a change in the justice system.

Chapter 5 deals with answering the stated research questions, evaluating this research and, to some extent, making recommendations for future research.

To illustrate the theories under discussion I have added short examples of possible best practices from the field. The sources of these examples will be provided in footnotes and their unabbreviated text has been added to the appendices. These examples do not claim to show how the theory *should* be applied, merely how it *could* be. They are meant to offer a more concrete perspective on the often rather general theory.<sup>3</sup>

While the illustrative examples will necessarily describe specific individuals, when discussing the theory I will refer to all involved parties with the singular ‘they’. This is to avoid the use of he or she, which might skew the perception of the reader, a particular risk when talking of victims of offenders.

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<sup>3</sup> To stick to the constraints of this master thesis the number of examples is limited and also primarily focussed on illustrating the practices of preventive law and restorative justice. For general examples of the complex legal cases that occur in a pluralist society, especially with regards to multiculturalism, I recommend Ten Voorde’s *Cultuur als verweer* (2007).

## **Chapter 1: The justice system in a pluralist society**

The reality of modern Western societies is increasingly globalized and pluralistic. Our social reality has become less linked to the local and is instead increasingly influenced by ideas and developments that span the entire globe as improved (cyber)technology allows us to travel and communicate across the world (Appadurai, 2013, p. 255-256). This gives rise to what Scholte (2005, p. 424) calls a reconfiguration of geography, economy, polity, identity and knowledge and has a great impact on social relations, creating more and more diversity.

This reality gives rise to new normative questions for the practice of law. Luitgaarden's analysis of the developments most directly relevant to these practices brings forward the horizontalisation and juridification of society (Luitgaarden, p. 73). I will give a brief account of his findings, supplement his viewpoint with that of a few other authors, and close with a reflection on the normative standpoint of what constitutes a 'good society'.

### **Horizontalisation of society**

In discussing his views on the current changes in modern society Luitgaarden characterizes our Western society as a "horizontal society" of free choice, rather than the traditional society which was structured hierarchically.<sup>4</sup> His analysis has clear common ground with authors such as the aforementioned Arjun Appadurai (2013) and Jan Aart Scholte (2005), and concerns the developments of increasing individualization and globalization. These developments are linked to several important consequences for the justice system.

The modern democracy is a society of free choice and ever-expanding possibilities, with more equality and personal freedom than ever, but also with great personal responsibility and a loss of power for the traditional institutions like family and religion (Luitgaarden, 2017, p. 91-92). These developments give rise to a different legal culture, where citizens are much more aware of their rights, but less so of their obligations. This comes with the lack of clarity concerning norms and values. People are required to construct their own social coherence, to gather their own values, norms, identities and perspectives. To give them this freedom legal frameworks are indispensable. Within society equality and freedom must be safeguarded by making sure that citizens do not infringe upon each other's rights and in an individualized society with increasing equality and social mobility, there is also an increasing tension between different manners, morals and values (Luitgaarden, 2017, p. 94-95).

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<sup>4</sup> Luitgaarden states in his analysis of society he is primarily informed by Lawrence Friedman's book "The horizontal society" (1999), though other authors are cited in corroboration.

This more flexible society makes new and strenuous demands on the legal and justice systems, because they are tasked with creating the societal conditions for the mutual equality and freedom of the citizens. First of all, it must ensure everyone's basic human rights, in all the spheres where the individual freedom to build one's own life must be allowed to exist. This necessarily means that the law has a certain prominence in nearly all spheres of society. Less so in the private sphere, but much more as soon as groups of people are concerned and extremely so when it comes to civil society (Luijtgarden, 2017, p. 96-98).

Looking at this pluralized society, it is imperative to realize that the justice system is not merely a system of rules and their interpretation, but a system that supports and shapes choices. The law supports citizens in achieving their goals, but it also provides the framework within which they must act. The law comprehends content and context at once and this creates a tension that requires careful positioning from both citizens and legal professionals. (Luijtgarden, 2017, p. 99). It also gives the law a prominent position in society and a lot of authority. In a more horizontal society where traditional authority is waning, citizens are more likely to look to the law. However, Luijtgarden states that the law is merely a facilitation tool, not a human authority (Luijtgarden, 2017, p. 102).

The justice system upholds laws and structures of power, but it is also dynamic. It comprehends both the rules and elaboration on the ways to follow or change these rules. It is often seen as a mere collection of guidelines, but it is a part of society and is shaped by society, because there is a need for a structured collection of rules and principles. As a system it has multiple purposes and it is the subject of much debate which is the most important. To name two examples, there is the redistributive function, meant to ensure a certain standard of living, and the conflict resolving function, that deals with social unrest by solving conflicts. Luijtgarden remarks that in the public debate, it is often the instrumental function of the justice system that is discussed. Its function as a tool to reach societal goals. While legal scholars emphasize the justice system moral function to guard the citizen's rights and obligations (Luijtgarden, 2017, p. 106-108).

Regardless of its main function, there are three main threats to an optimally functioning justice system: unfairness, (social) inequality, and the exclusion (of persons or groups) from rights. The prevention or limiting of these threats are an essential task of the justice system and the legal professionals that function within it. If this is not done adequately, it gives rise to social unrest (Luijtgarden, 2017, p. 108-109).

The most important prerequisite for a well-functioning justice system according to Luijtgarden is to allow enough space for interpretation. If there is enough space within the system to interpret the rules and choose from a range of acceptable behaviour within these limits, it is more likely that citizens feel represented by this system and that they will actually be motivated to follow its rules. This space is inevitably limited by the basic legal principles and human rights. The amount of room there is to interpret the law is an important characteristic of the legal culture of a society. In the Netherlands there is a

relatively large amount of freedom for legal professionals and judges to interpret as the context of specific cases requires, but there is still an ever-present tension between personal freedom and the constrictions of the law (Luijtgaarden, 2017, p. 110). In a modern pluralist society this tension is particularly noticeable. Personal freedom has grown, but so has the number of regulations and the reality these regulations must regulate has grown increasingly complex. This brings us to Luijtgaarden's second point of interest.

## **Juridification of society**

In a direct link with the horizontalisation of society, there is the juridification of that same society. Luijtgaarden explains juridification with three themes: juridification of society, socialization of the law, and legal alienation.

Juridification is an often used and frequently ill-defined term. Luijtgaarden (2017, p. 74-75) names three, heavily overlapping aspects of the phenomenon:

- an increase of the number of legal professionals;
- an increase of the influence the law has over daily life;
- an increase of (over-)regulation or excessive interference by judges.

All three are present in Dutch society. Luijtgaarden observes an increase in the number of legal professionals (the number of law students more than doubled since 1970), an increase in the number of (especially civil) court cases (a growth of 70% between 1999 and 2016) and an increase in complaints against the legal system (a 55% increase when comparing 2009 and 2013), an increasing number of which go all the way to court.<sup>5</sup>

He follows legal scholar and sociologist Pieter Ippel in saying that the increase of legal professionals and their efforts is not necessarily a bad thing. A welfare state necessarily comes with a lot of legislation and the professionals to create and maintain it (Luijtgaarden, 2017, p. 75-65). However, the increase of legal presence comes with risks and downsides as well.

One of the biggest downsides is the increase of the influence of the law over daily life, coupled with a decrease in understanding of the law. This is not just the case for the general public, whose attitude towards the law is increasingly negative and who seem to be progressively confused by the now much more complex system of rules they are supposed to be familiar with, but also for the legal professionals. There is such a strong tendency of specialization in the legal field, that legal professionals themselves are at risk of getting lost in the complexity as well (Luijtgaarden, 2017, p. 77-78).

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<sup>5</sup> Luijtgaarden bases his findings on several reports and factsheets from the legal world, cited on page 76 of his book.

Regulations are meant to guide life in a desirable direction, but can also lead to the feeling that there is no more room for life or work, only for checking the rules. Often with the help of a legal professional, because they are too complex to understand without council. Think for instance of the administrative rules to be observed within universities, hospitals and other public institutions. This gives rise to frustration and a call for fewer regulations and simpler procedures, because citizens are increasingly vocal about their dissatisfaction. This also influences the juridifying tendencies, because citizens nowadays are much more likely to be aware of their rights and of the fact that the law can influence their position (p. Luijtgaarden, 2017, p.78-80). Citizens are therefore more likely to look to the law to get what they want, which is probably linked to the increased number of court cases and complaints.

This influence of the law clearly overlaps strongly with the aspect of overregulation. Luijtgaarden says that there are more ‘legal rulings’ nowadays (from civil and criminal courts, from examining boards, dispute committees) and that these rulings are often interpreted as regulations by citizens. The complexity of the system of rules leads to the risk of people lacking the information and understanding to make the right choices in life and therefore will result in people looking for a way to undo the consequences of their choice. It makes sense that they would turn to a legal professional for this, who may, after having fixed the situation, introduce further regulation to prevent this sort of mistake from happening again (Luijtgaarden, 2017, p. 82-83).

Luijtgaarden states that many regulations are necessary and therefore shouldn’t be seen as an evil. The complexity of modern life demands them, in the interest of safety and security (for example rules about the quality of health care, or the manufacturing of cars). These are regulations we as a society trust in and doing away with them would not be beneficial. We rely on the law to both guard our society and to make our social reality better. This means that the juridification of society as described above is not a one-sided development, society has influence on the law in turn. Luijtgaarden calls this influence of society on the law, coupled with the influence of the law over society, and the interlocking of the two “socialization of the law” (Luijtgaarden, 2017, p. 83-84).

## **Socialization of the law**

The socialization of the law concerns the potential that the law has to counter inequality and to benefit social developments in society if it is able to properly respond to it. This socialization is two-pronged. On the one hand it concerns changes in the law on several fronts, where the purpose of the law is to correct for inequality in power and access to opportunities. For instance, the regulations concerning the rights of employees and tenants. On the other hand, socialization of the law also refers to the law as a system that is held accountable by the social context in which it functions and must provide an answer to the questions and developments that occur in society. The legal domain must anticipate

and accommodate the ever-changing social reality. An example from family law would be the shift away from the notion that the mother of a child is always the primary caregiver and therefore automatically has most claim to custody, as well as incorporating the possibility of same-sex partners and family units that include stepparents and children (Luijtgaarden, 2017, p. 84-85).

The law as an active tool to aid social change can be seen as a positive form of juridification. Social wrongs might be corrected and improvements made. However, it is not easy to anticipate social needs, and it is extremely risky to let the law simply follow public opinion. The law and its legal professionals are continually dealing with the tension between the correct application of the law and satisfying the public (Luijtgaarden, 2017, p. 86-88). Especially because failing to do so can lead to legal alienation.

## **Legal alienation**

Legal alienation is the feeling among citizens that they no longer identify with the laws that govern their country and the institutions that enforce them. It is part of the increasing divide between the constitutional state and the lived experience of its citizens. This phenomenon can be seen as a result of juridification and poses a problem of legitimacy for the law. After all, in a modern democracy the law should have the support of the citizens. The increased emancipation and assertiveness of individual citizens makes the legal alienation more noticeable now, it may have existed long before (Luijtgaarden, 2017, p. 88-89). Luijtgaarden names four types of legal alienation:

- legal<sup>6</sup> powerlessness, the feeling that a citizen has no influence over their case.
- legal clarity, the citizen is unable to see an order or pattern in the law that can provide them with certainty.
- legal anomie, the feeling that the violation of the citizen's rights by others is the norm rather than an exception.
- conflict of legal values, the citizens does not recognize themselves in what the law considers important (Luijtgaarden, 2017, p. 89)

Luijtgaarden follows Richard Susskind in saying that a problem for legal professionals themselves is that they have turned too much inward and that the law is now too far removed from the people it was created for. Professionals also suffer from their own form of legal alienation, because of the increased complexity of society and the therefore required specialization of the various domains of the law. It is likewise a problem that the law no longer seems to be a clear translation of the norms, values and ideals it is supposed to represent, and this (lack of) connection with moral foundations is often not discussed

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<sup>6</sup> To keep these terms in line with the term "legal alienation" the word "legal" is used here, even though one might argue that "juridical" is in some cases a better translation of the Dutch word "*juridisch*".

(Luijtgarden, 2017, p. 90-91). It is exactly this discussion and reflection that is essential for a normative, humanistic approach.

## **Criminal justice**

The developments of horizontalisation and juridification influence all of society, but Luijtgarden focusses particularly on the civil realm of the law. To get a more comprehensive picture of the justice system it is important to include some of the social analysis done by legal scholars focussed on criminal law. This side of the justice system is, of course, subject to the same tensions and changes as described above and there is certainly overlap with civil law. Still, even though the authors I analysed generally seem very compatible with Luijtgarden's viewpoint, they highlight different aspects of the globalizing society. Namely, the (cultural) heterogeneity of society, an increased perception of risk among citizens and a decline in social and civic engagement.

These aspects are relevant for the justice system as a whole, both civil and criminal, that deserve to be discussed.

Bovenkerk (2009, p. 50-51) points out that the Dutch justice system is still largely designed to accommodate a homogenous group of citizens and that it cannot stay this way. The presupposition of (cultural) homogeneity is false (perhaps it always has been) and it is becoming jarring. Of course everyone is equal in the eyes of the law. Every legal dispute – in this case criminal prosecutions – is individually looked at, but the core idea of the law and the certainty it must provide, is that the judge bases their verdict on universal principles.

According to Bovenkerk (2009, p. 53) the system is not yet adapted to the wide variety of individuals that it is now presented with and as a result clients are often misunderstood and interventions have unanticipated effects. His closing remark is that the criminal justice system will have to deal with plurality and multiculturalism, whether it wants to or not, and must adapt (Bovenkerk, 2009, 59).

Ten Voorde (2007, p. 309) arrives at a similar conclusion in his work on the room for cultural diversity within criminal law. He states that the criminal lawyer of today must be aware that criminal law is part of a continually changing society that is increasingly critical of its institutions. The legal professional cannot afford to be so far removed from the social reality that they lose sight of how the criminal system should function. This is a warning statement that fits very well with the legal alienation described above.

Walgrave gives an analysis of the society in which he sees the need for restorative justice, describing firstly how we seem to be in a period of increasing awareness that the current focus on punishment and social exclusion of offenders (and victims) is

contributing to a downward spiral of discomfort, discontent and a perceived lack of safety (2012, p. 1). He states that during recent cultural developments, the postmodern society has become more morally fragmented, increasingly pluralistic and heterogeneous. A single common identity such as religion, can no longer provide the normative, ethical standard for society. Even though such an ethical standard, or at least a 'normative minimum', is required to give certainty to social life (Walgrave, 2012, p. 71-72).

Walgrave also speaks of the tendency of juridification and pairs it with a worrying observation of a growing gap between citizens and the state, which appears to be a broader version of Luijtgarden's legal alienation. He cites studies carried out in the United States of America to illustrate a growing decline of social capital and civic participation and says:

The decline in civic engagement and in mutual trust and the rise of lawyers and other professional experts in welfare agencies and in the governance of social life seem to be typical Western phenomena of recent decades. The distance between governments and citizens is increasing, the democratic deficit increases and discontent of citizens grows. (Walgrave, 2012, p. 172)

This discontent has to do with a perception among citizens that there is more crime and less safety. A belief that is, according to Walgrave, gradually contaminating the overall quality of social life, civic commitment and democracy as a whole. The basis for the deterioration of the perception of crime, justice and safety he finds in capitalist globalization (Walgrave, 2012, p. 173). This development gives rise to cultural and moral fluidity, as well as a lot of opportunities, but also to socio-economic uncertainty. It comes with an existential feeling of insecurity that can affect all aspects of life, from relationships to our environment. He calls the current era one of "liquid modernity, in which nothing is fixed and nothing is predictable" (Walgrave, 2012, p. 174-175). This uncertainty offers us new opportunities, but also many risks. Risks to which we are extremely sensitive; the threats of terrorism, global warming, unemployment and victimization are to an extent felt by all. Walgrave (2012, p. 175) states that all these developments have caused citizens to become "increasingly cynical consumerists" and governments to be influenced by penal populism and focus more and more on perceived unsafety and the punishment of crime. These are two mutually reinforcing tendencies.

According to Walgrave (2012, p. 179) the expansion of security and the aggressive, punitive response to crime, cannot give the reassurance it promises and increases anxiety among citizens. It promises freedom, but instead erodes civil liberties. Something that has been much the subject of debate in the Netherlands of late, concerning the new law on Intelligence and Security.<sup>7</sup> All these developments are leading to what Walgrave sees as a "weakening of democracy", something he hopes a change in the justice system can help to counter (Walgrave, 2012, p. 198).

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<sup>7</sup> Wet op de inlichtingen- en veiligheidsdiensten, Wiv 2017, also nicknamed the 'sleepwet'.

## **An ideal for society**

All these developments lead to a felt need for improvement with many scholars and practitioners. This implies a normative standard, however, a goal to work towards what is considered a 'good' justice system. A good justice system would be one that facilitates a good society, but what comprehends a good society is an equally normative question. Not all the legal scholars incorporated in this research make their standpoint on what kind of society is worth striving for explicit, but their values are clearly present in their theories and they are remarkably compatible.

Walgrave does not merely have concerns about society, he also has aspirations for it. He holds that the goal for a modern democracy should be to foster 'common self-interest' in its citizens. There will always be tension between individual freedom and communitarianism and according to Walgrave the question of how to combine the liberties of the individual with a social life within a society cannot be resolved with laws and rules. Instead it is a matter of socio-ethical understanding (Walgrave, 2011, p. 80). It is an ongoing debate and a continual search for balance. Common self-interest is an ongoing project that aims to achieve more autonomy by promoting a high quality of social life. Each individual citizen has their rights and liberties, but to make use of them to their full extent is not always ethically advisable and it is often not 'social'. Just as complete sacrifice of the self to common interest would leave no good life left to live for the individual (Walgrave, 2012, p. 83). Common self-interest promotes "a society wherein mutual dependencies operate based on mutual respect and understanding, so that each individual will have the maximum amount of space to enjoy their liberty and live their life as they wish" (Walgrave, 2012, p. 80-81).

Walgrave is well aware that what he is describing is an ideal, but he believes that giving in to cynicism and presuming that all humans are inherently selfish is a self-fulfilling prophecy and that aiming for a well-constructed ideal is the best way to gain improvement and avoid degradation (Walgrave, 2012, p. 83). Ideally speaking, then, Walgrave would like to see the vision of common self-interest represented in all social institutions and agencies (such as schools, or the justice system) and above all in the way democracy is practiced (Walgrave, 2012, p. 88). From this perspective he wishes to approach justice from the concept of solidarity, basing it on mutual care and partnership rather than on formal rights, an approach that directly contributes to the possibility of pluralism:

Freedom is a social good which needs to be seen through more fundamental principles of respect and solidarity. By intrinsically respecting fellow citizens as they are, you grant them the possibility to be different and to behave accordingly.

Furthermore, solidarity will lead to support for others to express their differences freely. (Walgrave, 2012, p. 93)

This pluralism and these differences can, as discussed in the beginning of this chapter, also lead to conflict. For Walgrave the decision of how to deal with this conflict is an important opportunity for society to show its values. The conflict can be stopped by force, with strict intervention, often leading to frustration and discontentment for those involved. Or it can be taken as an opportunity for deliberation about the balance between individual self-interests and common self-interest. Within a climate of mutual respect there will be a chance for peaceful, constructive and durable solutions to emerge (Walgrave, 2012, p. 93). This deliberation is especially important to Walgrave, since he does not see the law or morality as objective, which makes top-down legal intervention in conflicts a problematic solution to choose:

Fundamentally, morality and social norms are pragmatic, to preserve self-interest and social life. Evil is not an abstract moral category, as opposed to another abstract category of good. (Walgrave, 2012, p. 94)

Rules, he says, are necessary to organize social life into a liveable collectivity. Laws are important and some behaviour must be criminalized. But the only acceptable reason for this criminalization is to preserve the quality of social life. Therefore, if social harm has been done and a crime been committed, society's response must be to repair this harm and restore social life. A societal context that presupposes active participation by responsible citizens, who respect each other's personal freedom in mutual solidarity, must have procedures of justice that are both inclusive and deliberative (Walgrave, 2012, p. 167-169).

It is only when there is room for conflicting views, which are to be resolved, 'responsibly, reasonably and publicly without the guidance of independent consensual norms', that democracy has vigour. (Walgrave, 2012, p. 186)

Luijtgarden similarly, although he does not make it quite so explicit as Walgrave, believes that the law and its application are subjective and therefore call for reflection and deliberation. He calls the law a normative science, linked to political, social economical and historical values and in their normative practices, legal professionals are concerning themselves with the pillars of the democratic constitutional state (Luijtgarden, 2017, p. 45). A state which should be just (p. 139) and which should counter inequality and exclusion from civil rights (p. 125). Luijtgarden connects his theory positively with the social welfare state (p. 85) and states that even though it comes with risks, the modern development of a society that allows a just equality between free citizens that all have their rights guaranteed and with it their social mobility, is a great good (p. 92). Within this context legal professionals must strive to 'do good work that does good' (p. 125) with a professional attitude grounded in moral values (p. 244).

Van Ness and Strong concern themselves less with describing an ideal society, but rather with the observation that the social norms within society are contested, and are best revealed in the course of conversation. In their aspirations for a society that includes restorative justice, they show that they are committed to a social context that values justice and fairness and that promotes equality by going against social, economic and political power imbalances (Van Ness & Strong, 2015, p. 172-173). They state that hypocrisy, injustice and indifference are moral problems and should be solved with solidarity and shared responsibility instead of antagonism (Van Ness & Strong, 2015, p. 174-175).

Looking at the normative perspectives of the authors described above, I am confident that their compatibility with the views of humanist scholars I presented in my introduction has become apparent. They do not speak of it in exactly the same terms, but all strive towards a humane democracy that allows room for the pluralist reality we are faced with today.

Let us now turn from the sometimes abstract ideals and the increasing challenges of society, to the first proposed solution: preventive law.

## Chapter 2: Preventive law

This chapter serves to introduce the theory of Preventive Law by reviewing its history and reviewing three principal authors: Louis Mer Brown, Edward Dauer and Thomas Barton. It will then go on to discuss the limited presence of Preventive Law in the Netherlands, its possibilities in regards to the challenges laid out in the previous chapters and its possible shortcomings.

It is important to realize that many of the authors quoted below are describing ideals and making recommendations based on the potential they see in certain practices. The theory is founded in a deeply rooted engagement with the law and justice, but while its goals are practical, the described values and principles are not yet widespread and therefore less concrete than might be desirable. This need not diminish their worth, but it must be kept in mind. To show the genuine potential of the theory, two examples of preventive practices have been included by way of illustration.

Preventive Law is mostly a collection of practices and views on law, rather than a theory with a clear definition. Luijtgaarden (2017, p. 200) points out that the definition of preventive law (and the closely related proactive law) is a subject of much discussion and that opinions differ greatly between legal professionals of different backgrounds. Brown (1962, p. 272) discussed the first definition ever given for it in Webster's 3<sup>rd</sup> International Dictionary (1961): "*a branch of law that endeavors to minimize the risk of litigation or to secure more certainty as to legal rights and duties*", and points out that rather than "securing certainty", the second aspect of preventive law might be called "maximizing legal rights". This very general definition will certainly benefit from further explanation by discussing some of the more practical aspects of this theory, as formulated by Brown, Dauer and Barton respectively, and brought forward by Luijtgaarden's (2017).

### Brown

Preventive law is a practice that originated in the work of Louis Brown, started in the fifties of the previous century. It explored the innovation of the law and legal work to include more than just the traditionally legal. His efforts were focussed on his work as a lawyer and legal advisor, making most of his ideas rather practical in nature. Later authors<sup>8</sup> applied Brown's principles of preventive law to the broader concept of legal practice (Luijtgaarden, 2017, p. 142).

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<sup>8</sup> Edward Dauer, Thomas Barton, Helena Haapio, Richard Susskind and Marc Lampe, for example.

Brown's motto was: "*The time to see an attorney is when you're legally healthy—certainly before the advent of litigation, and prior to the time legal trouble occurs*" (Brown, 1986, quoted in: Luijtgarden, 2017, p. 142). The idea of his 'preventive law programme' is that clients are better off if their legal professional works on a relationship of trust, gives advice beyond the legal and plans ahead with them, for legal and non-legal situations. Preventing conflicts should be the goal and legal intervention should not be seen as the only way to solve a problem.

The theory is based on the idea that while there *are* situations where legal intervention is the only way to solve previously arisen problems between parties, every legal procedure springs from a breach of trust of some kind. Therefore good communication, good planning and clarity could prevent that legal intervention is needed in the first place (Luijtgarden, 2017, p. 143).

The term preventive law is somewhat misleading, since it is not actually the law that is preventive, but the activities of the legal professional. Brown's starting point was that lawyers were too preoccupied with conflict. He didn't believe in that approach. Instead he compared legal work to medical care and claimed that it is much more creative than people think it is. He states that lawyers want to work preventively, but are not taught how to (Luijtgarden, 2017, p. 144).

Simply said, his starting point was the adage that "prevention is better than cure". His premise was that a legal procedure always leads to losers and pain. And since this is inevitable, it would be beneficial to everyone if legal professionals were capable of working with the law and their clients in such a way that problems that warrant actual legal intervention could be prevented. Luijtgarden agrees with this, pointing out that the study of civil and administrative legal conflicts in the Netherlands ('Geschildbeslechtingdelta,' 2004) shows that after a civil court case, both parties are often dissatisfied, whether they won or not. He also cites research done by Ter Voert, saying that citizens often feel powerless and therefore hurry to end a conflict (with legal intervention) regardless of the outcome. (Luijtgarden, 2017, p. 145).

The tools belonging to this method of practicing law are making a full risk assessment about the possible consequences of applying all relevant legal *and* non-legal solutions. To do all this, legal professionals would need to be more aware of the context of their clients and cases, more multidisciplinary in their methods and information, and more mindful of their client's best interest in the broad sense of the word, including interpersonal relations and emotional well-being (Luijtgarden, 2017, p. 146).

To give lawyers these essential skills Brown saw a great necessity to train them differently. He wanted to humanize the legal practice. The human aspect – in the law, in practicing it and in the situations it had to be applied to – was his focus. Brown took inspiration from sociology, history, political theory and psychology. He stated that the law was a product of cultural historical development and that the legal professional had to make use of this. He spent a lot of time attempting to reform legal education and stood out

in America because of his focus on the ‘normal’. The mundane real life that is so very important to understand to help people properly. He put the relationship between client and legal professional centre stage, emphasizing that practicing the law is an inherently *human* endeavour. He hoped to counteract the negative aspects of juridification and help build more trust in the law and the constitutional state by training lawyers that had more than the traditional skills focussed on litigation (Luijtgarden, 2017, p. 149-151).

He wanted lawyers to be aware that the threat of a court case leads to much more (legal) aggression with both parties than the actual content of the case warrants. A lawyer that jumps straight into the legal, can escalate a situation, whereas people are quite likely to settle something in more amicable ways if the lawyer is capable of looking beyond the legal (Luijtgarden, 2017, p. 153).

Correctly gauging the costs of a case (financially and emotionally) is therefore more important than the legal content of the case. A lawyer usually focusses on what the legal position of the client is, what their rights are, which injustice has been done to them, and what the law can provide them by way of an answer. Brown was of the opinion that they should be more aware of the great emotional cost though (broken relationships, lessened trust in people or society, the sleepless nights worrying). He pointed out that the law has a tremendous impact on people and that lawyers are not adequately aware of this fact. They treat all clients equally, but in reality they all react very differently. In the eyes of the law they may be equal, but their specific personal and contextual circumstances differ greatly. A lawyer must take the trouble to find out more about the person of the client and their specific circumstances to be able to actually help them (Luijtgarden, 2017, p. 153-154). This is greatly opposed to the habits of the traditional lawyer, who is trained to only look at the legal, to not ‘meddle’ in the personal life of the client and to always aim for a win (Luijtgarden, 2017, p. 157).

In the end Brown wanted to teach lawyers how to practice law from their own moral ethical code. Their own values, which need to be acquired, examined and reflected upon. This should start at law school and continue throughout their career (Luijtgarden, 2017, p. 155). Following Brown, Luijtgarden likewise seeks to reform legal education.<sup>9</sup>

## **Dauer**

If Brown laid the foundations of preventive law, Edward Dauer was someone who built on them towards more specific practice. He was an assistant to Brown while he was refining his theory and later became the head of the National Centre for Preventive Law at the University of Denver and professor of Preventive Law.

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<sup>9</sup> It is beyond the scope of this thesis to go into detail about his wishes on these points, but his perspective as an educator on the possibility of reform within Dutch law schools is well worth reading.

Dauer supplemented Brown's theory with even more focus on the client, the person behind the legal problem. In many of his works he speaks of Proactive Law but refers to this as "the same set of lawyering operations" compared to preventive law (Dauer, 2006, p. 93). Luijtgarden does remark that while the methods are the same, the focus does differ. Mostly because proactive law was largely developed within corporate law and is therefore more specialized (Luijtgarden, 2017, p. 167-168). Dauer focussed specifically on:

- Predicting human behaviour to prevent litigation and improve relationships (business and personal).
- Conflict management that comprehends preventing future conflict as well as dealing with the present one.
- Being mindful of all possible risks and working on reducing them all, instead of neglecting most of them in favour of attempting to completely eliminate a select few.
- Working preventively in a multidisciplinary team that can plan ahead for businesses detecting, anticipating and preventing legal problems early on (Dauer, 2008, p. 13-35).

Furthermore he stated that most legal procedures are started because a person feels injured somehow, rather than because of a breach of contract or breaking a rule:

[P]eople are moved to bring claims when they experience a feeling of injury. Often, having a sense of injury arises from having suffered a disappointed expectation. Some of the expectations in a contractual transaction are in turn created by the "rules" that describe who gets to do, or has to do, what. Precision, clarity, and comprehensiveness in those kinds of rules promotes shared expectations, as well as creating norms for resolution if need be; and in that way they help create expectations in the contracting parties which, due to their clarity and accuracy, reduce the possibility that one party's acts will be seen by the other as an injurious disappointment of a legitimate expectation. (Dauer, 2006, p. 95-96)

Dauer interprets preventive law as the effort to guide these feelings in a legally conducive way. As a legal advisor what needs to be done is to prevent (further) disappointment (Luitgarden, 2017, p. 158). He gives six recommendations for practicing law in a preventive (proactive) manner:

1. Teach people what to do, and what not to do, and state it with clarity.
2. Provide physical barriers to doing the wrong things.
3. Have detection systems that discover problems early.
4. Create incentives for people to want to do things right.
5. Create systems that encourage reporting and foster follow-up. (Dauer, 2006, p. 108).

He emphasizes that the last two points of this list have to do with changing the culture in which the legal professionals and clients operate, defining this culture as “the unspoken vocabulary of behaviour in a given place or time, and the aspects of a local environment that create expectations about what should and what should not be done” (Dauer, 2006, p. 95). In his view it is imperative that if preventive law is going to get anywhere, this culture needs to change:

Culture means nothing more than the norms and expectations about behavior that color and in turn take shape from the environment. It is culture that makes some things seem OK even when they really aren't. So far as I know this has never been precisely measured, but I think it's a fair bet that when law and culture clash, culture always wins. (Dauer, 2006, p. 98)

In other words, a new way of lawyering isn't enough, the legal and social culture that provide the framework for lawyers to work in need to change as well.

Dauer's predicting, practical approach is a good supplement to Brown's broadening of the legal professional's view and clearly they both have a significant change in mind, that reaches further than simple legal practice.

#### **Example of preventive lawyering: The blood bank<sup>10</sup>**

An illustration of the preventive techniques of open communication, looking beyond mere material damages, and acting on ethical considerations to prevent litigation is the following case of a lawyer representing a blood bank.

This blood bank had been operating in a time that it was impossible to detect the presence of the virus hepatitis C in blood supplies, meaning that patients could unwittingly be given infected blood and be put at risk for serious health difficulties in the future. Statistically, a number of patients were going to be infected and seriously harmed. The temptation would be for those patients to sue the blood banks, which were run as non-profits. Lawsuits could have jeopardized the blood supply in the U.S. When a means of identifying hepatitis C was developed, the blood bank suddenly had the possibility to go back and test old samples, thereby finding out how many people had been given infected blood. The question remained, however, what to do with this information.

Even though the blood bank had not been negligent, the lawyer advised to communicate honestly to all affected patients and inform them of the risks as well as issue an apology and to promise them that in the event of an infection, the patient's health needs would be taken care of, for free, for life. No patient was required to sign any sort of agreement not

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<sup>10</sup> This is an anecdotal example provided to me by Professor Barton of the National Center for Preventive Law in California, an unaltered version of the text provided by him can be found in Appendice 1.

to prosecute, as this would have given them the need for legal intervention, jeopardizing the preventive approach.

In the end, though there were a large number of infected patients and some with serious injuries, not a single lawsuit was filed against the blood bank.

## **Barton**

Barton can be seen as Brown's contemporary successor. In 2008 he became the inaugural Louis and Hermione Brown Professor of Law at the California Western School of Law in San Diego, is the current Coordinator of the National Center for Preventive Law, housed at the same institution, and he has published multiple works on "preventive lawyering".

Luitgaarden points to Barton's 2009 book "Preventive Law and Problem Solving, Lawyering for the future" to show he has a very broad definition of preventive law, basically comprehending in it everything that can be done to prevent a case from escalating legally. Central to Barton's work is his analysis of the current western justice system as a rational-analytical approach focussed on separating the client from their social context and on manipulating power balances. This is a paradigm Brown wants to move away from and to do this he provides practical tips and instructions for legal practitioners (Luijtgarden, 2017, p. 159-160).

The paradigm Barton wants to work towards is one that is based on understanding, integration and accommodation. The idea being that the legal professional understands the broader context the legal problem is embedded in. They must solve the problem with an integrated, multidisciplinary approach that tackles the issue as the contextually complex, human problem that it is. Finally, they have to accommodate all parties, looking for ways to adapt that are conducive to a good relationship between the people involved (Luijtgarden, 2017, p. 160).

The goal of the preventive lawyer is not to focus solely on the legal side of a conflict and find where the blame lies, but to create an environment wherein they can work together with the client to prevent future problems. This means there are several differences compared to a more traditional way of practicing law:

- Instead of focussing on punishing the past, it is geared towards the future, making sure solutions are durable for future dealings and continuing relationships.
- It requires open communication and clarity of goals and needs, instead of secrecy to protect one's own legal position.<sup>11</sup>
- Instead of separating people from their context, it sees clients as social creatures in a relational network.

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<sup>11</sup> This aspect of the practice is well represented in the example of the lawyer representing the blood bank given above.

- It no longer works with black and white win-or-lose rhetoric, but thinks in shades of grey, allowing complexity and once again valuing care for future needs and possibilities over a victory of the moment.
- The interpretation of (legal) rules are no longer at the centre of attention, this is now secondary to assessment of the professional, legal and social risks that legal action entails.
- Instead of confining themselves to contracts and legal agreements, preventive lawyers go for a holistic approach. Still working from a legal perspective, but including the human context in their analysis (Luijtgaarden, 2017, p. 161-162).

Above all preventive law is a mindset, a different way of thinking (Luijtgaarden, 2017, p. 163). A mindset that belongs to a very specific kind of legal practitioner:

The multi-dimensional lawyer must be a sensitive listener, an open-minded yet skeptical and realistic counselor, a person with the creative vision to understand problematic environments and make suggestions for their restructuring, and an advocate with the courage and passion to advance a client's interests in whatever forum is required. (Barton 2000, p. 1)

Traditional practice for the lawyer is to come in after a problem has escalated and to stay strictly within the realm of the legal, but the preventive approach is about having a broad view on the problem and about searching for solutions in the entire context of possible assistance. This asks for broad problem solving skills and insight into the client's personal situation, the organization, the financial, economical, intellectual and social context all matter. All this must be carefully analysed and the legal professional must work creatively. According to Barton involving the context will make for a more personal approach that in the long run is more conducive to legal health and client well-being, without deteriorating the specialism of the legal (Luijtgaarden, 2017, p. 163-164).

This is once again where the wish to include the human, normative dimension in the practicing of law is clearly present. Barton quotes Susan Daicoff, saying:

The techniques and skills of preventive law are being combined with a philosophical approach to lawyering that reaches beyond simply preventing lawsuits and preventing legal problems and encompasses actually benefitting or improving human well-being. This adds a valuable, explicitly normative dimension to preventive law. (Daicoff, quoted in: Barton & Cooper, 1999, p. 22)

This creative, well-being centred approach is clearly shown in the following example of the practices of a lawyer in South Africa.

### **Example of preventive lawyering: The comic book contract<sup>12</sup>**

An illustration of thinking beyond the legal, working with the specific context of a case and responding to the particular needs of the people involved can be found in this example of a lawyer that was asked to write an employment contract for a large agricultural business in South Africa.

The workers would largely be fruit pickers and were rarely literate in English, nor did they share a common language. So a traditional contract, in English, would be completely incomprehensible to them. Even if the workers indicated their formal consent to such a contract, it might not be considered legitimate due to their inability to understand the actual contents. As a solution the lawyer paired up with a cartoonist to create a “Comic Book Contract,” an actual comic book that heavily used cartoon images to depict the mutual promises and working rules, including such matters as being injured on the job. The comic book was distributed to each worker, and information sessions were held in small groups to walk the workers through the comic book before they agreed to it. The response was overwhelmingly positive. The supervisors, as they walk through the fields filled with fruit and fruit pickers, carry a copy of the comic book contract with them. In the event of a problem, the comic book is consulted by both worker and supervisor.

The lawyer reports that the results are most impressive, with stronger workplace satisfaction. This example particularly shows how practicing law in a different (cultural) context, where it suddenly applies to a different kind of individual, requires flexibility. An issue that is much more likely to occur in a globalized society.

### **A workable definition**

Looking at the contributions of those authors, one can follow Luijtgaarden’s observation that it is hard to give a single definition of preventive law. It is client-oriented, yet lawyer focussed, and should be geared towards the prevention of legal problems (Luijtgaarden, 2017, p. 244-245). Luijtgaarden sees preventive law as the incentive for a more normative way of practicing law, a way to allow the human dimension into legal practice. In the end this means that preventive law broadens the scope of the legal professional and brings with it a significant change in the legal culture. The thoughts he summarizes on this point at the end of his book, can serve as a practicable definition:

Preventive law is a cluster of measures that deal with the non-legal content, skills, and attitudes of lawyers, with which the enriched lawyer could be perceived as having “added value”. In the preventive law movement, the lawyer is seen to change from an individual legal practitioner into a context-oriented legal normative

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<sup>12</sup> Another anecdotal example provided by Professor Barton, an unaltered version of the text can be found in Appendice 1.

professional. This requires continuous development, normative reflection, and re-evaluation of the profession, the legal education curriculum, and jurisprudence, because the context is constantly changing. That is, for a generally conservative profession, a major change, because it is usually focussed more on the content than on the context; more on the correct interpretation of the rules than on what works; more on proper application of the law than legal work that feels and is good. (Luijtgaarden, 2017, p. 246)

This definition, though broad, provides sufficient clarity for the purposes of this thesis, because it clearly describes the key points of the legal professional's attitude and their relationship with their client and the context in which they operate.

## **Preventive law in the Netherlands**

As a theory of practicing law preventive law has very little history in the Netherlands. To my knowledge Luijtgaarden's book is the first work that applies the theory to the Dutch legal context. Luijtgaarden learned about it from Thomas Barton and has been working with Pieter Ippel to incorporate preventive law in legal education and research since 2005 (Luijtgaarden, 2017, p. 11).

Neither preventive nor proactive law are concepts that have properly found their way into the world of the Dutch legal professional. The word 'preventive' is most used when speaking of measures to prevent reoffending by current offenders<sup>13</sup>, or occasionally preventive sanctions meant to discourage perceived future transgressions in administrative law<sup>14</sup>. Proactive law as a (frequently vaguely defined) concept is used slightly more often, mostly by professionals offering legal advice or consultancy for businesses<sup>15</sup>. Apart from this neither term is particularly prevalent in Dutch legal practices.<sup>16</sup>

In Belgium there is likewise very little interest. None for preventive law and what little there is about proactive law is focussed on the corporate sphere, as is befitting for its origins<sup>17</sup>.

With this scarce representation in mind, let us look into the possibilities preventive law might offer the Dutch justice system.

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<sup>13</sup> <https://www.justitieinterventies.nl/content/projectidee-gericht-op-preventie-van-recidive-meld-het-aan-bij-%E2%80%9880%98koers-en-kansen%E2%80%99> ; <https://hetccv.nl/> ; <https://www.rijksoverheid.nl/actueel/nieuws/2018/03/14/gerichte-aanpak-high-impact-crimes-leidt-tot-daling-recidive>

<sup>14</sup> <https://blogomgevingsrecht.nl/jurisprudentie/preventief-preventief-is-vraag>

<sup>15</sup> <http://www.proactivelaw.nl/pages/capita%20selecta%202008.htm> ; <https://recht-oprecht.nl/over-ons/> ; <http://www.pro-actief.nl/nl/pro-actief/>

<sup>16</sup> Of course preventive law is amply represented at the Zuyd Hogeschool in Sittard, where Luijtgaarden is a lecturer. Luijtgaarden states that his wish is still to be able to link a "preventive-law school quality label" to their school, by way of proof that they have trained preventive lawyers (Luijtgaarden, 2017, p. 195).

<sup>17</sup> <http://intersentia.be/nl/proactief-ondernemingsrecht.html>

## Possibilities

To summarize, preventive law could be a source for much-needed renewal that comes explicitly from *within* the legal field. Luijtgaarden suggests using it as an impulse for normative professionalization of the law, to provide the necessary normative reflection and positioning. Because, as shown earlier, there are increasingly pressing normative questions that need to be addressed and preventive law can be used to address them. Its theories and practices provide insight into the ways legal professionals can deal with the complexity of their work and the world around them. After all, society increasingly requires an ethical stance from professionals (Luijtgaarden, 2017, p. 141 and 179).

For legal professionals this creates a particularly complex situation, because the law is often used to enforce the ethical practice of professionals, for instance in the forms of official codes of professional ethics and codes of conduct. Luijtgaarden states that the law can only provide a minimum here, however. Naturally this goes for the conduct of the legal professionals themselves as well, causing him to state that an ethically acting legal professional does more than the law demands and less than the law allows. Legal education should prepare lawyers for this ethical acting. For instance by teaching them transparent communication and stimulating active social responsibility (Luijtgaarden, 2017, p. 180-181).

The preventive lawyer should be equipped to see, discuss and connect with the core values of a client, be this an individual or an organization. By working with a broader perspective than just the legal and practicing outside of the formal law and the courts, the preventive lawyer can have a deep de-juridifying impact. They should therefore be taught skills like mediation, where the human aspect and the client's own agency gets much more room than within the confinements or court procedures (Luijtgaarden, 2017, p. 186). This accommodation of the human dimension could be a way to counteract some of the negative aspects of horizontalisation and juridification (Luijtgaarden, 2017, p. 250).

All this certainly calls for the paradigm change and the reform of legal education advocated earlier by Brown, Dauer and Barton. Luijtgaarden is adamant in his plea to start changing the way legal education is done. Preventive law goes further than preventing court cases, it is about addressing the new tensions in the legal context. Problems that have no set solution. Law students must be taught legal techniques, but these techniques must be implemented in a social context and this calls for legal professionals that are capable of navigating in a normative, ethical context of work (Luijtgaarden, 2017, p. 194).

In teaching, the preventive mission statements of legal education could be learned as a good foundation, a humus layer, for deepening the normativity of legal education. In any case, in my view, it is an impetus to the structural normative reflexive dialogue that is needed in addressing the difficult social issues, multitude of normativity, and the tensions surrounding legal professionals. The preventive

law movement could bridge the demands of legal education and the glaring normative questions which are related to complex normative issues for lawyers in society. (Luijtgaren, 2017, p. 245)

Barton and Cooper argue that we have entered “the era of relativity” and that, in a landscape of globalization and multiculturalism, (cultural) sensitivity and a focus on collaboration are called for to bring about long-term results if lawyers mean to facilitate (legally) healthy relationships for their clients (Barton & Cooper, 1999, p. 35-36). They state that the law has always had to balance two opposing tasks: “first, to protect individuals from other people who may be violent or manipulative; and second, to facilitate human interaction and purpose (Barton & Cooper, 1999, p. 5). They observe that this last function has been neglected under recent (cultural) changes within the legal profession and in society at large (Barton & Cooper, 1999, p. 8).

Lawyers need to act differently. To act differently, they must think differently. This is the place to begin: with a new mentality for lawyers and the public about the possibilities in law for securing human interaction and fulfilment in solving problems. To make that new mentality real, lawyers must develop new skills of listening, of identifying interests, of framing and investigating problems, and of finding solution systems that offer mutual gain. As lawyers use these new skills, new legal structures will evolve around them. When that happens, the law will have re-invigorated its historical function of helping to secure human goals. (Barton & Cooper, 1999, p. 9-10)

If lawyers can learn to do this they can make their clients invested stakeholders in their own cases again, parties that are actively involved in creating solutions to their own problems. Such a change of practice and perspective is at its heart a wholesale reform, that would have to include all kinds of professionals within the justice system as well as the media, non-governmental organizations and, of course, law schools (Barton & Cooper 1999, p. 33).

Preventive law could be used to provide structure to such a project. A body of knowledge and insights that comes from within the legal community and could help it cope with the new ways of practicing law that the modern, pluralistic society demands. In that respect the justice system has considerably more to gain than it has to lose:

It begins by recognizing the potential of lawyer as well as client to talk in a different way. It also requires trusting that the legal system itself has room for solving problems accommodationally. The integrity of legal professionals is not jeopardized by simple efforts at empathic, personal conversations. Nor is the social order threatened by a lawyer’s plain talk with a client about the need for that client to reconcile a torn relationship, or the need to be more respecting or charitable towards another person. Presuming to judge behavior in the absence of feeling or relational context inevitably weakens the expressive function of law—that force by

which we come to understand our past and make statements about what we wish to become. (Barton, 2009, p. 249)

Luijtgarden concludes his overview of preventive law by saying that it is not quite a coherent concept. Different authors mean different things by it and it seems to be continually evolving. The main idea remains, however, that the ideology and practice of preventive law should be used to prevent the necessity of legal intervention in the social or corporate context. It likewise provides a way to reflect on the normative aspects of the law and its practicing, placed against the moral horizon of a more just society (Luijtgarden, 2017, p. 194).

This is a big change and Barton reiterates, trying to assuage possible fears of the law losing its authority by allowing these more normative aspects, that:

[L]aw should be regarded as a humanistic discourse, “a way of creating and sustaining a political and ethical community.” Law will always have its power. It’s rationality is strongly protected by legal procedures. The legal system need not fear making attempts at deeper human understanding. (Barton, 1999, p. 943, partially quoting James B. White)

## **Shortcomings**

Within the scope of this thesis I must confine myself to reflecting upon how far this theory can take us towards providing an answer to the challenges the justice system has to cope with in a pluralist society.

An important difficulty to consider is that the idea of preventive law is very much about lawyers being involved in situations early enough to create the conditions for harmonious dealings and to prevent conflicts and the need for litigation. Not only can the idea of limiting juridification by the increased involvement of lawyers come off as rather paradoxical (of course this does concern a different type of involvement than traditional lawyering) but it also makes the accessibility of legal counsel a more pressing matter. Not everyone in society had the same access to legal advice and representation and even if they did, they might not be aware of it or capable of acting on it. This access to the law has more to do with the client and the structure of society and the institutions they deal with. A point on which preventive law is perhaps not as capable of giving guidance.

As seen above, preventive law focusses particularly on the behaviour and skills of the legal professional and the relationship they have with their client. It represents a professional approach, a mind-set. The larger, cultural implications of shifting to such a mind-set are far-reaching, but when put into practice the theory does have its limits. It is certainly a goal for the theorists mentioned before to bring legal practice closer to the

client and to involve them in the conflict-solving process, but the theory does not thoroughly describe the exact role and position of the client in the proceedings.

This becomes particularly apparent when shifting from civil law to criminal law. When one begins talking of victims and offenders (instead of, for instance, business partners) the need to give the civilian parties in the legal procedures attention becomes more pressing. Especially since the more informal, non-legal problem-solving skills of the preventive lawyer cannot be used in a criminal context as they were in the civil sphere. In criminal law, only the state holds the right to prosecute. Moreover it often has an obligation to prosecute. Thereby comes that the main directive of preventive law, to prevent litigation, is usually no longer possible once criminal law is involved. Or so it would seem.

Luijtgarden points out that criminal law is by definition not preventive. It is reactive, a direct reaction to the laws of society being broken. This means that the application of preventive law has its limits within the criminal field. However, within the criminal justice system sensitivity for the human dimension and awareness of the complexity of human reality is just as valuable. Perhaps it would be possible for the type of lawyering Luijtgarden advocates to be carried out by criminal lawyers as well. He specifically mentions that criminal law practices including elements of creating justice through durable, sustainable solutions are often classified as *restorative justice* (Luijtgarden, 2017, p. 187-188).

Unlike preventive law, restorative justice is already a widely applied theory and as we have started with preventive law, now is the time to look into what this much more established approach could add to the smaller one.

## Chapter 3: Restorative justice

This chapter will introduce Restorative Justice as a possible supplement to preventive law, to provide additional theory and practices to rethink the justice system with. It is by no means the only source of new angles to approach justice, but it is an increasingly popular and influential one (Walgrave, 2012, p. 1). Other than preventive law, which can be called a single theory with a limited movement around it, restorative justice is a growing global phenomenon that includes a wide variety of interpretations and practices.

In this introduction I will first discuss possible definitions of restorative justice and show a bit of its origins as a reaction to current criminal justice practices. Then we shall look at some restorative practices and their presence in the Netherlands. Throughout the chapter I rely heavily on Van Ness and Strong (2015) to give general insight into restorative justice as a movement and theory of justice and on Walgrave (2012) for a more detailed practical application of the theory. The former were chosen for their thorough and frequently updated overview of restorative practices around the world, which it is beyond the scope of this thesis to provide in full. Walgrave's *maximalist approach* was chosen because he gives as concrete a model for an actual restorative criminal justice system for a European context as I have been able to find and therefore might serve as good practical inspiration.<sup>18</sup>

The chapter closes, just as with preventive law, with a discussion of its possibilities and shortcomings.

As with preventive law, the theory of restorative justice carries a great deal of idealism in its core. It asks a lot from all those involved in the processes and in regards to the potential restructuring of the institutions of society it is extremely ambitious. To link the theory more firmly to its possibilities in reality, two examples have been added of concrete restorative practices.

### Defining restorative justice

Restorative justice belongs to the realm of criminal (and social) justice. Like preventive law, there is no single generally accepted definition as it is a complex concept that has always been evolving. Van Ness and Strong explain that restorative justice reflects both a vision for the way the world should be and values to guide the way restorative programs should function. It strives towards an ideal of a harmonious community with actively responsible, solidary citizens that all cooperate to find solutions to the problems that arise

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<sup>18</sup> This focus means that this chapter does not give the attention to several authors particularly influential in the early development of restorative justice. Regrettably this thesis cannot provide a closer look at John Braithwaite's *Crime, Shame and Reintegration* (1989) and Howard Zehr's *Changing Lenses: A New Focus for Crime and Justice* (1990), groundbreaking as those works were.

in their shared existence (Van Ness & Strong, 2015, p. 49). By way of a workable definition of restorative justice as an approach that complies with the many different incarnations of restorative justice they have been informed of, they suggest the following:

Restorative justice is a theory of justice that emphasizes repairing the harm caused or revealed by criminal behavior. It is best accomplished through cooperative processes that include all stakeholders. (Van Ness & Strong, 2015, p. 44)

This definition is too broad for Lode Walgrave as the description “harm revealed by” would include all social harm and harmful structures contributing to the crime. To him this would shift the goal of restorative justice from reacting to crime towards treatment and preventionism and even though these are important goals, he does not consider them the primary target of restorative justice interventions (Walgrave, 2012, p. 21). He points out that restorative justice is not so much about a justice system that promotes restoration as about doing justice *through* restoration (Walgrave, 2012, p. 5). His proposed definition therefore purposefully does not include the various practices in social- and welfare work that may very well be restorative, but to him have to do more with the creation of a positive society than with dealing justice. He suggests a restricted, outcome based definition that describes restorative justice as:

“[A]n option for doing justice after the occurrence of an offence that is primarily oriented towards repairing the individual, relational and social harm caused by that offence.” (Walgrave, 2012, p. 8)

Being more restrictive than for instance the definition offered by Van Ness and Strong, Walgrave’s definition presents a contrast with the many other theorists who put emphasis on the restorative *process* rather than its *outcome*. Walgrave does not want restorative justice to be reduced to its process alone. This is because the ideal restorative process is usually characterized as completely voluntary and for a formal criminal justice system it is unlikely all offenders (and victims) will be able and willing to lend their voluntary cooperation. Walgrave places emphasis on the purpose of doing justice through restoration, which, according to him, is to address the harm caused by crime as well as may be, even if the circumstances do not allow the restoration to take place via the most ideal process (Walgrave, 2009, p. 19-20).

This element of restoration after harm has been done is at the core of restorative justice. Before we take a closer look at the theoretical application of the theory, I shall give some insight into the origins of restorative justice, its main practices and its presence in the Netherlands.

## **Restorative justice as a reaction**

When Van Ness and Strong (2015, p. 3) speak of the restorative model they put it in contrast with the *punitive* (or retributive) model, which focusses on punishing the offender, and the *rehabilitation* model, which focusses on rehabilitating the offender. Most contemporary criminal justice systems are a hybrid of several philosophies of justice, but these two are particularly well represented. Crime, defined as the breaking of the laws of the state, is prosecuted by a representative of that state and should the accused be found guilty, the offender will be punished with a view towards the prevention of reoffending. In the modern era, this element of rehabilitation has been increasingly influential within criminal justice and while this is a helpful perspective to add to the focus on punishment, Van Ness and Strong emphasize that it is not enough:

At a fundamental level, we recognize that criminal justice should consider not only whether accused offenders have violated the law but also why they have done so. However, even when rehabilitation programs are helpful in addressing the underlying problems that led to the decision to commit a crime, those programs fail to address all the injuries surrounding the crime. Crime is not simply lawbreaking; it also causes injury to others. Although it may be the manifestation of an underlying injury, it also creates new injuries. (Van Ness & Strong, 2015, p. 3-4)

They argue that it is a purpose of criminal justice to heal those injuries, which exist on several levels and are experienced by victims, communities and offenders alike. They express their concern that the current policies and practices of criminal justice focus almost entirely on the offender as a lawbreaker and filter out virtually all aspects of crime except questions of legal guilt and punishment. This creates an adversarial relationship between the government and the criminal offender and fails to address the various reasons for and consequences of criminal behaviour. One of the most important failings of the contemporary system is the exclusion of victims and communities from the dealing with crime and to correct for this Van Ness and Strong contend that what we need is not to add “new programs to an inadequate pattern of thinking”, but to adopt a new model altogether (Van Ness & Strong, 2015, p. 4-5).

This does not mean that the content of the old models must be disposed of entirely, but it does mean that the justice system is in need of new patterns of thinking:

Retributive theory believes that pain will vindicate, but in practice that is often counterproductive for both victim and offender. Restorative justice theory, on the other hand, argues that what truly vindicates is acknowledgment of victims’ harms and needs, combined with an active effort to encourage offenders to take responsibility, make right the wrongs, and address the causes of their behavior. By addressing this need for vindication in a positive way, restorative justice has the potential to affirm both victim and offender and to help them transform their lives. (Howard Zehr in Van Ness & Strong, 2015, p. 13)

In this way restorative justice is a reaction to perceived needs in society as well as a critique of current criminal justice practices.

It is important to note at this point that the dire situation described above, has not gone unnoticed by practitioners of the current system. There have been many reforms, most notably in the past decades is the rise of victims' rights. In the Netherlands, for instance, a law was passed that granted victims the right to speak in court (2005, further extended in 2016). Efforts such as these are not part of restorative justice as such, but they are influenced by it and the movements they are part of have certainly been influential. Apart from the victim's rights movement Van Ness and Strong (2015, p. 13) name the prison abolition movement, critiques giving the preference to informal justice, the growing attention for indigenous/traditional justice practices, reparative justice, and the social justice movement. Most of them starting to emerge from the 1960s onwards.

None of these movements and critiques on contemporary criminal justice directly lead to restorative justice, but they all influenced its development. As there is no clear definition, there is also no canon of best practices. But over time various independent ideas and practices developed that were later gathered together by scholars and practitioners and are now considered quintessentially restorative (Van Ness & Strong, 2015, p. 24).

In their brief discussion on the writings of particular people who influenced early restorative justice theory Van Ness & Strong (2015, p. 25) call the criminologist Howard Zehr the "grandfather of restorative justice". He was one of the first articulators of the restorative justice theory, suggesting that the current criminal justice system was failing to meet the needs of both victims and offenders and that the focus on crime as lawbreaking and justice as allocating blame and punishment was not conducive to society:

Crime is a violation of people and relationships. It creates obligations to make things right. Justice involves the victim, the offender, and the community in a search for solutions which promote repair, reconciliation, and reassurance.  
(Howard Zehr in Van Ness & Strong, 2015, p. 24)

Both in its history and its current development, restorative justice is a growing global phenomenon. It is now one of several competing approaches to crime and justice in an increasing number of countries. These developments have taken place first in North America and Europe, but are also slowly taking root in Asian, Latin American and former Soviet Bloc countries. The most notable example of restorative practice on the African continent is certainly the Truth and Reconciliation Commission in South Africa.<sup>19</sup> Considerations for restorative justice have also entered the policies of intergovernmental bodies, with the Council of Europe, the European Union and the United Nations Economic

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<sup>19</sup> Here we see the overlap between restorative and transitional justice. Though transitional justice deals with human rights' abuses within (post-)conflict societies and generally not with crime on a smaller scale, its core ideas and many of its practices are shared with restorative justice.

and Social Council (ECOSOC) encouraging the incorporation of restorative approaches within criminal justice in various ways (Van Ness & Strong, 2015, p. 31).

These varied views and efforts on the subject of restorative justice are inextricably linked to certain practices. The three most prevalent of these practices will be discussed next.

## **Restorative practices**

According to Strong and Van Ness three key programs have influenced the development of restorative justice: victim-offender mediation, conferencing and circles.

Of these practices *mediation* is both the first and the most widely accepted. Early victim-offender mediation began as a program to impact offenders and to help them understand the harm they caused to victims. It consists of guided meetings between the offender and their victim, in which the two engage in a dialogue, primarily focussed on the offender listening to the victim's experiences, answering questions and possibly apologizing. The practice first visibly emerged in Canada the United States in the 1970s, but sprung up independently in Norway in the early 80s as well. There it was informed by the work of Nils Christie and his claim that victims and offenders ought to retain ownership of their conflict. Soon after similar mediation programs spread through Europe and beyond (Van Ness & Strong, 2015, p. 27-28).

A downside of this approach, as pointed out by Walgrave, is that this form of mediation deals solely with the dispute between the victim and the offender, neglecting to include the public dimensions of the aftermath of a crime. Secondly, because mediation can only happen if both victim and offender cooperate voluntarily, limiting its practicability as a formal response to crime (Walgrave, 2012, p. 34). Within the field there are those that do not see this as a drawback, but believe that voluntary mediation is most valuable when used after legal procedures have ended. In this way one can focus completely on the personal moral aspect and no longer as the question of societal responsibility to deal with (Frijns & Mooren, 2004, p. 8).

*Conferencing* (also called Family Group Conferencing) originated in New Zealand and was developed during the late 80s. It is based on Maori traditions and is originally based in social welfare, not the criminal justice system, and was initially meant only for youthful offenders. The idea is that all stakeholders come together to discuss how the problem is to be solved. The offenders and members of their family or support group are required to be present during the procedures, but while victims are always invited, the conference can proceed if they cannot or will not attend. This is possible because in addition to the victim and offender and their family members and supporters, government representatives are also present to represent the interest of society. (Van Ness & Strong, 2015, p. 29). The fact that police officers may be present as informants and guardians of

public order and lawyers are also invited to attend in order to provide the necessary legal safeguards, conferences are more equipped to responsibly deal with serious crimes in a more formal setting (Walgrave, 2012, p. 35-36).

*Circles* (also called sentencing-, community- and healing circles) were based on the understandings of justice among the First Nations people of Canada. The traditional courtroom setup is adapted to a circle with 30 chairs in which the judge, lawyers, police, First Nations officials and members, the probation officer, victim(s), and other stakeholders could sit. This broad inclusion of the various people involved in the conflict challenges the monopoly of professionals. In its original form it was employed to help merge the values of the Canadian government and First Nations in order to respond more justly to the issue of crime committed by someone with a First Nations background. Circles have since spread through North America and are beginning to appear on other continents as well. Of the three processes, circles are the most inclusive restorative practice, because interested members of the community are allowed to participate even if they have no relationship with the victim or offender. This helps make the justice process more public and hopefully fosters more mutual understanding and engagement in the community at large (Van Ness & Strong, 2015, p. 29-30).

**Example of restorative practice: Battery at a disco<sup>20</sup>**

An illustration of restorative mediation taking the place of legal prosecution in a case where different nationalities and the legal situation across the border came into play, comes from a case handled by the public prosecution of Amsterdam. It involves two young men (O. and M.) who both studied in Amsterdam, but were originally from Germany and Italy respectively.

Both students were on the dance floor at a disco when O. makes a movement that causes his beer glass to get crushed against M.'s face, breaking it. M. has to be treated in the hospital and will have a permanent scar on his face. He angrily presses charges because he thinks O. injured him on purpose. As time goes by M. finds he has become uncomfortable in large groups and is often tense when going out. O. meanwhile feels terrible about the incident and insists it was an accident. When M. files a damage claim for material and immaterial damage, O.'s lawyer approaches the public prosecutor and asks if they might take part in mediation. O. is not a confessing offender, but he acknowledges that the circumstances in the incident caused him to injure M. and he is still troubled by what happened. He wants to explain to M. that his actions weren't intentional and to reimburse the damages he suffered. Criminal prosecution would have serious consequences for O.'s future, because he wants to complete his studies in America and he won't be allowed to do so if he has a criminal record. When asked M. agrees to participate in mediation, in the

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<sup>20</sup> Example taken from the evaluation report of restorative mediation at the criminal court in Amsterdam by Verberk (2011, p. 14). Full translated text can be found in Appendix 2.

hopes this will bring closure to this troublesome experience. Under facilitation of a mediator O. and M. discuss the matter, finding that they both want to come to a solution. When O. hears from M. how large the impact of the incident has been, thinks it fitting he should pay a higher amount to reimburse the damages. O. and M. agree on a total of €3.000. M. says he will ask the public prosecutor not to prosecute now they have reached an agreement.

There are many other restorative practices, such as restorative policing, community reparation panels, and numerous adaptations and mixed variants (O'Mahony & Doak, 2017, p. 5-9). This is largely because the practices are continually adapted to the specific culture and social context of the countries where they are implemented. We also see such developments in the Netherlands.

## **Restorative Justice in the Netherlands**

The first restorative justice projects in the Netherlands started in the 1980s. First only as 'alternative sanctions' meant to correct juvenile offenders that included being educated on the consequences for victims, but soon including various forms of mediation and deliberation.<sup>21</sup>

There were several local experiments with approaches based on Family Group Conferencing and a national initiative from *Slachtofferhulp Nederland* (Victim Support Netherlands) and *Reclassering Nederland* (the national probation system) called "*herstelbemiddeling*", which was a form of victim-offender mediation. The first projects dealt mostly with youthful offenders and non-serious crimes, placing their involvement at the very beginning of the judicial process and generally with very positive results (Blad, 2011, p. 41-42). The latter was geared towards serious crimes, included extremely careful screening of participants, and typically took place after all court procedures had ended (Frijns & Mooren, 2004).

The conferences (often called *echt-recht-conferenties*) are still being practiced, mostly for juvenile offenders and generally not incorporated in the formal system. Social organizations are offering them as a possibility and they exist next to the judicial criminal justice process.<sup>22</sup>

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<sup>21</sup> A more complete overview of restorative justice practices in the Netherlands can be found in a report issued by the Foundation for Restorative Justice Netherlands:

<http://www.restorativejustice.nl/user/file/verslaginventarisatierjn7oktober2011.pdf>

<sup>22</sup> <http://www.wespweb.nl/index.php/jeugd zorg/jeugd zorg-projecten/homepage/136-jeugd zorg breed-projecten-01> ; <https://www.eigen-kracht.nl/wat-we-doen/trainingen/strafrecht-en-herstelgericht-werken/> ; <https://medewerkers.eigen-kracht.nl/waar+en+hoe+echt+recht>

The victim-offender mediation by now has a more formalized role. In 2006 the ministry of justice introduced legislation which required them to be available nationwide and called an independent foundation into existence called *Slachtoffer In Beeld* (Victim in View) to organize them according to set protocols. This organization is still active, and still growing, now called *Perspectief Herstelbemiddeling*<sup>23</sup> (Perspective Restorative Mediation). However, strictly speaking this form of victim-offender mediation, while certainly restorative and positively evaluated, is not actually a form of restorative criminal justice. It takes place after, or at least completely separate from, judicial procedures and is explicitly not meant to influence it (Blad, 2011, p. 51; Frijns & Mooren, 2004, p. 8).

John Blad (2011, p. 51) points out that according to EU legislation<sup>24</sup> the Dutch government should be promoting mediation *within* criminal prosecution procedures and that there should be made room to accommodate and honour the solutions this mediation process produces. To do this would mean a fundamental change in the current criminal justice system.

## **Restorative justice in practice**

In an attempt to provide a starting point for rethinking the criminal justice system with the help of restorative justice theory, Van Ness and Strong formulate three key principles to guide the implementation in processes and in systemic reform:

- First, justice requires that an effort is made to restore victims, offenders, and communities that have been injured by crime.
- Second, victims, offenders, and communities should have the opportunity to actively take part in the justice process as early on and as fully as they wish.
- Third, the relative roles and responsibilities of government and community should be reevaluated. To promote justice and safety, the government is responsible for preserving a just order in society and the community for establishing a just peace as a cooperative dynamic. (Van Ness & Strong, 2015, p. 45)

They acknowledge that the latter especially is a difficult project and they particularly see a possibility for informal care and the involvement of faith communities on this point (Van Ness & Strong, 2015, p. 142).

Looking at the theory from a Dutch perspective, this poses some problems. Walgrave points out that in continental Europe restorative justice practices that are reliant on informal communities tend to meet with resistance. Both because of the strict legal safeguards of civil law codes (as opposed to the less formalized procedures of common law) that are thought particularly essential to preserve legal security, and because of the cultural history to considering oneself a citizen of the state first (instead of the prevalence

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<sup>23</sup> <https://www.perspectiefherstelbemiddeling.nl/Meta-Navigatie/Over-ons/>

<sup>24</sup> Kaderbesluit van de Raad van de Europese Unie 2001/220/JBZ

in Anglo-American countries to firstly identify with a specific religious, geographical or ethnic group). This makes it more logical, in a European context, to attempt to place restorative practices within a judicial frame that was designed with these practices in mind, instead of relying on informal restorative practices situated *around* the justice system. This would provide the more legal certainty and neutral setting civil law countries are used to, while preserving the benefits of informal deliberation by providing room for dialogue and inclusion (Walgrave, 2012, p. 5-7).

This inclusion in a judicial frame is what Walgrave attempts in his book *Restorative Justice, Self-interest and Responsible Citizenship* (2012), in which he shows a possible practical implementation of restorative justice theory in a context like that of Dutch society.

### **Walgrave: A maximalist approach**

More than any other author cited here, Walgrave makes it clear that in describing his vision for restorative justice, he is describing an ideal:

There is nothing as practical as a good utopia. It is a motivating beacon, a reference to work towards. If some progress is observed, utopia is a source of hope. Without a utopia, there is no hope, and motivation for action and improvement drops.  
(Walgrave, 2012, p. viii)

Walgrave argues in favour of a maximalist approach to restorative justice, in which the current punitive criminal justice system is at length completely replaced by a restorative one (Walgrave, 2009, p. 19). A direct consequence of this stance is that Walgrave, in contrast to many other restorative theorists, does not want to limit restorative justice to voluntary deliberation. This prerequisite of completely voluntary participation would mean restorative justice would always remain a mere additive in the punitive system. As there will always be offenders that do not wish to cooperate. He states that while deliberative processes (like conferences) certainly hold the highest potential for achieving restoration, coercive obligations in pursuit of (partial) reparation have to be encompassed in the restorative justice model if voluntary agreements cannot be achieved (Walgrave, 2012, p. 22-23).

For Walgrave incorporating restorative justice means a complete switch in thinking, a paradigm change:

“Restorative justice does not primarily ask what should be done to the offender, but how the harm can be repaired. This is what fundamentally distinguishes it from a punitive justice approach, and also from the rehabilitative perspective.”  
(Walgrave, 2012, p. 23)

To do this, restorative justice cannot be simply co-opted into the current criminal justice system. Crime must be considered in terms of the harm it causes instead of simply as a transgression of the legal order and the primary response to crime must be to assess what this harm is and how it can be repaired as much as possible, for all parties involved (Walgrave, 2012, p. 24). In this way Walgrave's vision very much represents the inclusion Van Ness and Strong speak of:

Basically, restorative justice has this normalising approach to all those involved in the aftermath of crime and looks at both the victim and the offender as normal, reasonable responsible persons. (Walgrave, 2012, p. 193)

Walgrave concedes that he cannot give a full design for a restorative criminal justice system, as this system must inevitably be embedded in local traditions and institutions. However, he does wish to provide guidelines for the institutionalization of restorative justice (Walgrave, 2012, p. 139).

Like Van Ness and Strong express in their first two principles as seen above, he wants to see the harm caused by crime taken away or compensated for. This must be done via fair procedures, wherein victims, offenders and others directly affected by the crime are able to actively participate as much as possible. The more they are involved in formulating the restorative solutions, the more likely it is that the outcomes of the process are satisfactory (Walgrave, 2012, p. 30).

This does not mean that the state should be excluded from the procedures. On the contrary, its involvement assures its citizens that it is committed to their well-being. It must also guard the quality of the processes. Restorative justice processes and their outcomes must be guided by legal safeguards. To protect citizens against illegitimate intrusions by fellow citizens but also against abuses of power by the state. In the more coercive restorative procedures this is particularly important, but it applies to the voluntary restorative processes as well, so neither can be dealt with informally. How the traditional legal safeguards like legality, due process and proportionality must be translated into legal principles for restorative justice is not evident (Walgrave, 2012, p. 30-31).

What Walgrave wishes restorative justice to achieve is to bring legal justice as close to the *subjective* experience of justice as possible. He states that traditional criminal justice procedures may lead to *legal* justice, but that both offender and victims often feel they were treated disrespectfully, like "objects of the investigation and sentencing machine" (Walgrave, 2012, p. 31). By deeply involving the stakeholders of a conflict in the justice process, restorative justice attempts to make the formal, legal process of justice and the actual experience of justice by the people involved coincide as much as possible.

To this end Walgrave proposes a system in which there is first always the option of voluntary restorative processes. Should these fail, then there are more coercive judicial interventions, that nevertheless still have restorative aims. Sometimes the more formal prosecution is necessary because of an uncooperative offender or because community

peace or safety or public order is at stake. However, it should be possible at all stages in the process to transition to voluntary informal crime regulation, as soon as this becomes a viable option (Walgrave, 2012, p. 151). For instance, an offender who denies their guilt has the right to a full traditional trial to prove their innocence. If their guilt is proven after all, the offer for a restorative process should be renewed (Walgrave, 2012, p. 158).

Walgrave sees decentralization of the top-down power of the courtroom towards bottom-up deliberative meetings like conferences as a good way to safeguard citizens from being subjected to arbitrary power by the powerful and the authorities. He also states that rules should be developed to hold these authorities accountable and to check that the victims, offender and other stakeholders' rights aren't intruded upon during the restorative processes (Walgrave, 2012, p. 144).

Some non-serious offences may be dealt with on the community level (albeit still monitored and supported by the state), but there should also be more specialized agencies for monitoring restorative justice processes. These agencies must be equipped to deal with crimes for which the main stakeholders do not live in the same area, as well as the more serious crimes, and they should be operating in cooperation with the police and the judiciary. Apart from this, a victim support agency should provide welfare-oriented assistance to victims, advise them in restorative processes, and to help through more complicated judicial procedures (Walgrave, 2012, p. 149). The support for offenders, although not explicitly described by Walgrave, would have to take a similar form. With the involvement of legal representation and support in a way that is now largely offered by rehabilitative services after an offender has been found guilty.

The state meanwhile is present in the background, to verify that deliberation takes place and results in an acceptable outcome, to safeguard the power balance within the deliberations and, if required, to apply the necessary pressure on the offender to cooperate in the process (Walgrave, 2012, p. 150). This last task also comes with having to evaluate if the case can be handled in a deliberative manner in the first place.

Because if all deliberative restorative justice options have been considered yet fall short, and it is necessary to apply the more coercive judicial interventions mentioned above, the state must make this decision:

[T]he criminal investigation is not only focussed on establishing the facts and guilt, but also on finding out the personal, relational and social prejudices caused by the offence. It includes considerable opportunities for input by victims and others affected by the crime. It also explores the potential for negotiation, and thus for diversion towards restorative deliberations or for possible restorative sanctions if a deliberative response is not possible. (Walgrave, 2012, p. 151)

It is important to note that the reparative sanctions proposed here are not traditional punishments. For serious offenders who are unwilling to participate in deliberation and who are likely to reoffend seriously there might have to be court procedures that are

structured much like the current ones, but the goal of reparative sanctions is not to intentionally inflict pain on the offender, but to be as much conducive to reparation as possible. Examples of imposed reparative gestures are material restitution to the victim, a letter of apology, or community service for symbolic compensation for the harm caused to social life. These measures are called “reparative” and not “restorative”, because they do not have the restorative impact a proper deliberative process would have had. Without the true meeting between stakeholders and mutual deliberation, actual restoration may not be possible, but Walgrave is of the opinion that there is more to be gained by ordering reparative measures than by referring back to the punitive system as soon as voluntary restorative processes are not possible.

Walgrave states that these reparative sanctions would be imposed by a judge and that the offender has the right to argue for a lesser sentence or refuse to comply. In the case of a refusal a curfew or imprisonment may be enforced until they comply. A maximum limit needs to be there to prevent a disproportionate sentence (Walgrave, 2012, p. 153). The upper limits of these reparative sanctions need to be based on experience and solidified in jurisprudence (Walgrave, 2012, p. 164).

Incapacitation (as opposed to imprisonment for punishment) would be reserved for offenders that represent a serious threat to public safety or because they appear to be incorrigible after several interventions. Even with these offenders some reparative measures, like mediation in prison and working to contribute to a victim’s fund, may be possible (Walgrave, 2012, p. 155).

Walgrave’s reparative sanctions show strong resemblance to the community service, probationary programs and monetary victim compensation ordered by current criminal courts. However, these are still largely framed as punishments instead of embedded in a system built upon restorative processes and values. This is the sort of restorative justice system that Walgrave envisions and while he does indeed describe an ideal and it is certainly not without its possible pitfalls, it does illustrate the possibilities that restorative justice has to offer as a practical theory of justice.

#### **Example of restorative practice: Discrimination**

An illustration of the kind of restorative gestures an offender might make (whether they be voluntary or, as is the case here, enforced as reparative sanctions) comes from a case described in the book “Herstelbemiddeling” by Frijns and Mooren (2004) from the project Restorative Mediation (project *Herstelbemiddeling*, 1997-2004).

Several months after September 11 2001, Jan (18) and his friend (17) deface a mosque with discriminatory and threatening slogans and symbols. After the terrorist attacks in America this has a huge impact and it heightens the fear among the population. Jan and his friend are arrested and sentenced to community service and supervision by the

rehabilitation services (*Reclassering*). The latter ask the project *Herstelbemiddeling* if they could offer a made-to-measure program for the offenders. In response a mediator approaches both of them separately to ask them to take part; only Jan accepts. The mediator learns that Jan has quite a lot of prejudice against Muslims in general and hostility towards the conservative imams in particular, for instance concerning values like women's rights and freedom of sexual orientation. He feels confirmed in these views by his family and wanted to 'teach the Muslims a lesson'. The mediator explains he is free to have his own opinions, but not to break the law and that he will not be forced to change his mind, but will be made to educate himself. Jan partakes in a special program, each step of which is overseen by the mediator. First he watches and discusses a movie about the liberation of the concentration camp Sachsenhausen to gain insight in what discrimination on the basis of religion and race means and what it can lead to. Next Jan meets with a well-known Dutch Imam, to be given general information about the Islamic faith. After that he spends a day with a Moroccan neighbourhood police officer, who is a practicing Muslim. By this time the mediator contacts the staff of the defaced mosque. They still feel threatened, but are pleased that Jan wants to speak with them. One of the members meets with Jan and they have a conversation facilitated by the mediator. The representative of the mosque explains the fear among the visitors of the mosque and the connected youth centre, also describing the general hostility towards them. Jan offers his apologies for the fear he has caused, letting him know that he had not considered the personal consequences of his actions.

## **Possibilities**

In summary, the restorative justice model offers a way to accommodate the diversity of our current pluralist society and works on bridging the gap between the law and reality. As seen above victims, offenders and their community would be much more included in the proceedings. This inclusion and the made-to-measure solutions that restorative deliberations give rise to, could start to combat the legal alienation so present in current society and to offer a response to crime that actively seeks to improve social life as well as discourage crime.

Current criminal procedures exclude both victim and offender. The victim, because they have virtually no legal standing in criminal court and rarely have the harm done to them recognized, let alone restituted. The legislative changes of the past decades have given the victim a place in the courtroom, but still very little influence on the actual proceedings, still leaving them feeling powerless and often disappointed due to raised expectations. After all the core structure of the criminal justice system has not changed and this means the victim's role remains very limited. There is also a strong countermovement, claiming that a complete inclusion of the victim in criminal proceedings would directly threaten the rights of the accused and the impartiality of the court (O'Hara, 2005; Zappalà, 2010). The defendant, however, is also excluded. In the

proceedings they are encouraged to deny guilt and shielded by their legal representation. If they are convicted, their punishment usually does little to address the (socio-economic) conditions that contributed to their committing the crime in the first place and frequently provokes further social exclusion. Either by suspending their social and professional life through a jail sentence or by giving them the stigma of being a convicted criminal (Walgrave, 2012, p. 139). The people around the victim and offender, and the community they all inhabit, are even less of a consideration in the current system. The promise of restorative justice lies precisely in the inclusion of these victims, offenders and community members who have all been touched by the crime (Walgrave, 2012, p. 64). In the example about Jan and the Muslim community for instance, the problem was much larger than a simple act of vandalism and the number of people affected was great. If Jan had merely been given a fine, both he and the community he victimized would have missed out on the benefits the restorative program offered.

Walgrave cites evaluative studies into the merits of restorative justice interventions that have found that these interventions make a genuine difference. On average, crime victims who received restorative justice did better than victims who did not. This included post-traumatic stress and a desire for revenge against offenders. Offenders who received restorative justice frequently committed fewer repeat crimes than offenders who did not and when measured by repeat offending restorative justice did as well, or better than, short prison sentences (Walgrave, 2012, p. 53-54). The consideration here is that even if restorative justice was exactly as effective as the punitive approach in correcting offenders, it would still be preferable because harm is being addressed and the overall treatment of all involved is more humane. This is why Walgrave calls restorative justice a promising path towards a more just and more socially constructive way of responding to crime:

Its potentials are its target of restoring individual and social life if a crime has occurred; its focus on what binds us (common self-interest, dominion, quality of social life) rather than what divides; the reconception of the response to crime from a top-down sentencing machine to a responsive bottom-up problem-solving system; the priority for inclusive deliberation, reducing the use of coercion to the strictest minimum; the expansion of deliberative practices to other fields that deal with conflict and injustice; the chance it offers for citizens to experience the power of respectful dialogue and the benefits of investing in common interest; and its basic trust in the crime and justice matters and in other fields of social life. (Walgrave, 2012, p. 10)

If this potential could be realized, a restorative criminal justice system would stand a much better chance of addressing the pressures of social change within a dynamic modern society, by adapting to the needs of the diverse citizens of a pluralistic reality.

Of course the assumption this model is based on is that opponents in a conflict are in general not only willing to meet each other in mutual understanding and respect, but are

likewise capable of finding a constructive solution (Walgrave, 2012, p. 75). There may certainly be a good deal of idealism in this, but the evaluation of present restorative practices as well as research into the needs and wishes of victims and offenders, is beginning to show that while idealistic, the assumption is not an unreasonable one.<sup>25</sup>

## **Shortcomings**

The restorative justice model also has its shortcomings. Morris (2002) gives a fairly complete overview of the most prominent critiques, but my focus is on what difficulties restorative justice might run into in providing answers to the challenges that the pluralistic society brings the justice system (like the growing complexity of society and spreading legal alienation).

Firstly, actually putting restorative justice into practice has far-reaching effects. Restorative practices would require certain changes in the legal system as well and this has far-reaching consequences. The transition from traditional punishments to restorative functions and the assignment of legal authority to the solutions that spring forth from the restorative deliberations for instance, cannot be made without providing the proper legal backing. The criminal justice system must provide a degree of certainty and there must be legal safeguards guarding citizens against possible abuses of power or arbitrary treatment. Reforming procedural law would therefore be necessary, but this is certainly no small feat.

Furthermore, despite the fact that the restorative justice theory as presented above is an approach for the realm of criminal justice, most of its theorists have society-wide aspirations with its implementation. This comes with a certain blurring of the lines between civil and criminal law that would require changes in that quarter as well. To address the challenges of the pluralist society this may well be necessary, but it is not self-evident that restorative justice can provide guidance to implement these changes.

Walgrave (2012, p. 173) specifically says that it is essential to monitor the restorative justice structures—to identify problems that result in less justice for some, and then to remedy and if needed transform those structures. This will not be an easy task, as the position of the professionals is rather underrepresented within restorative justice theory. Perhaps because there is no consensus over exactly what role the professionals are to play. Walgrave wants a more formal system, carefully regulated, overseen, or at least afterwards sanctioned by a judge, with lawyers present to provide the legal safeguards for all parties involved. Van Ness and Strong seem to lean more towards informal structures, deeply rooted in local communities and run at least partially by volunteers. Regardless of their exact professional status, these professionals must be trained and neither Walgrave nor Van Ness & Strong give footholds for this.

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<sup>25</sup> A discussion of these evaluations cannot be given here, but see for instance: Blad (2011), O'Mahony & Doak (2017), Sherman & Strang (2007) and Morris (2002).

Legal professionals, judges and lawyers will likewise need to gain the necessary skill set to operate within a restorative justice system and if mediators are employed to guide the voluntary deliberative procedures, the same goes for them. Just because the system provides the room to deal more flexibly with the plethora of different cases and individuals in the rapidly changing context of pluralist society, does not mean the people operating within it will naturally be capable of doing so.

There are many other considerations, of course, but in light of this thesis the most pressing are that within restorative justice the link between the criminal and the civil realm must be reevaluated and that a framework must be offered for the education of restorative professionals.

Having addressed both preventive law and restorative justice, and in the interest of potentially balancing out their respective shortcomings, the next chapter will put the two approaches side by side to investigate what they have to offer to one another.

## **Chapter 4: To prevent and restore**

This chapter explores the possibilities of preventive law and restorative justice coming together to offer new perspectives for a justice system fit for a humane, pluralist society.

First I will discuss the similarities between the two approaches that makes it so easy to bring them together, followed by a look into the similar solutions they offer to the current challenges for the justice system and the ways they might supplement each other by compensating for a few of their respective oversights. The chapter closes with a number of critical points and considerations and concludes with describing what kind of difference doing justice from the perspective of these two practices might make.

### **Common ground**

Preventive law and restorative justice are both movements born from dissatisfaction with current practices. As these current practices are inextricably linked to the current societal developments, it is not surprising that the two theories overlap in their origins. Walgrave (2012, p. 14) describes the same worrying tendencies that Luijtgarden (2017, p. 88) labels as legal alienation.

Barton (1999, p. 20) explicitly states that the same core principles that inform his vision for preventive law – bringing together stakeholders, a sensitivity for context and a care for the future – are in a criminal law context often referred to as restorative justice. While Walgrave points out that before restorative practices began to be applied to criminal justice, alternative dispute regulations with deliberative methods were already being used in the business world. He goes on to say that:

Restorative justice is one of the driving forces in a broader movement for more participation by actively responsible citizens in all decision-making processes that concern them directly and indirectly. (Walgrave, 2012, p. 194)

Within their actual practices the similarities are clearly visible. The participation Walgrave speaks of is indeed very present in both. As shown earlier, preventive law places great value on actually involving the stakeholders in a conflict just as restorative justice does (Barton & Cooper 1999, p. 33).

Closely linked to this is their mutual commitment for involving the human dimension in the process of legal justice. Both practices go beyond the legal, focussing on the particular contexts of individual cases and advocate for making the effort of finding out all the wants, needs and circumstances of the people involved in order to come to a durable and constructive solution (Walgrave, 2012, p. 93; Barton 1999, p. 20). This solution is meant to be conducive to future well-being as well as solving the current conflict. In the

case of preventive law by preventing escalation and future conflicts between both parties and in the case of restorative justice by actively restoring the harm done with sensitivity to the victim, offender and their surrounding communities.

Here we see that both theories are likewise focussed on the relationality of conflicts (Luijtgarden, 2017, p. 160; Van Ness & Strong, 2015, p. 24). They are aware that the parties involved are locked together in some sort of relationship and that this will continue after the conflict resolution is done. Therefore the procedure as well as the solution should be mindful of this and not needlessly damage the relationship further:

To build durable and better solutions, the legal professional should work at sustaining and building relationships that will outlive any one particular legal situation. (Barton & Cooper, 1999, p. 32)

In preventive law this is particularly true, because civil cases might involve business partners, parents, employer and employee, neighbours, etc. In restorative justice the victim and offender are necessarily connected from here on out by the crime that was committed, but very often had a pre-existing relationship of some sort, if only by living in proximity of one another.

This mindfulness of the human dimension and the (relational) context of conflicts also means that both preventive law and restorative justice theorists emphasize that one must be sensitive to the dynamic nature of that human context:

Society is constantly in flux, and in flux typically faster than the law, so that the probability is always that any portion of law needs re-examination to determine how far it fits the society it purports to serve. (Barton, 1999, p. 20)

The need to make sure that the process of practicing the law and dealing justice remains connected to the lived reality of the clients and the needs of society at large is strongly present in both approaches (Walgrave, 2012, p. 10; Luijtgarden, 2017, p. 246).

## **Joint solutions**

### ***Horizontalisation of society***

The horizontalised society as characterized by Luijtgarden (2017, p. 91-95) is one where increasingly diverse citizens have to construct their own social coherence and values, and are more likely to appeal to the law and to be aware of their rights, but less so of their obligations. It is a society in which there is a decline of civic engagement and a lessening of mutual trust (Walgrave, 2012, p. 172)

Personal freedom and the opportunity for diversity is a great good and within a pluralist society it must be protected. To form a *society*, however, there needs to be some

consensus of common values. Values that nowadays no longer come from traditional authorities like collective religions.

Conflicts are moments when interests, and possibly values, clash and the dealing with these conflicts provides an opportunity to examine and discuss one's standpoint (Van Ness & Strong, 2014, p. 15). The justice system could be a place to have this discussion (Ten Voorde, 2007, p. 318).

Both preventive law and restorative justice inform practices that attempt to give the parties involved in a conflict the opportunity to be truly involved in its solution. In the realm of civil and corporate law there is more flexibility with regard to what those solutions might be than within criminal law, but both theories explicitly support the involvement of citizens in doing justice. Without the guiding structure of traditional society, every individual is now responsible for constructing their own values, identity and social coherence. Active involvement in the solving of conflicts could be conducive to this construction process, as these are exactly the sort of matters that are affected by conflicts and must be given a place in a person's worldview. This is not only good for their personal life, but especially for social life, where more mutual dialogue and understanding would be very beneficial.

### ***Juridification and legal alienation***

To be actually involved in the justice process – to have legal professionals on your side to provide clarification and to guard your rights, but to be personally confronted with your own and the other parties' standpoint and to actively work on a solution – might go a long way in bringing citizens closer to the justice system. A more inclusive process, where stakeholders formulate their own solutions, could begin to bridge the gap between the law and lived reality. It could lessen their now frequently expressed dissatisfaction (Luijtgarden, 2017, p. 76). Personal involvement may lessen the perceived judicial powerlessness, increase their understanding of the law, and give them the opportunity to connect with the values that are represented by the law and society, thus reducing legal alienation.

However, it is equally important that the legal professionals get closer to their clients and that the processes with which they work allow them to do so. The increase of legal professionals and legislation is not necessarily a bad thing, but they must be congruent with lived experience and actually conducive to the well-being of society.

### ***Complexity and relationality***

A perceived failing of the justice system as a whole, both civil and criminal, is the rigidity of rules that no longer seem to reflect the experience of the people it is supposed to support (Luijtgarden, 2017, p. 88; Strong & Van Ness, p. 4). The solutions it offers do

not meet the needs of the citizens and this is not surprising, because the current justice system is focussed almost exclusively on the legal. A core element of preventive law and restorative justice alike, however, is to investigate all possible needs and wishes of the stakeholders and all possible solutions (Luijtgarden, 2017, p. 153; Walgrave, 2012, p. 39).

This attention to the great complexity of conflicts and their deeply relational nature means that justice might be done with less damage to the parties' well-being. Two parties in a conflict are necessarily in some form of relationship and the conflict arises out of some form of pre-existing condition, even if this relationship relies only on physical proximity. It would be better for all involved if the relationship between the parties sustained no further damage during the conflict resolution and if the pre-existing conditions were taken into account and comprehended in the solution by looking at the future as well as the present. In preventive law this starts with not focussing merely on prosecuting and in criminal law with no longer placing punishing the offender as a priority.

Both practices allow for the incorporation of the human dimension in their processes and are particularly focussed on making sure the way the current conflict is being dealt with, may provide the best circumstances for the parties to carry on their lives in the future.

All this being said, as we have seen, each approach certainly has its own challenges. It is here that the value of drawing from both of them becomes apparent.

### **Mutually beneficial**

My argument is that preventive law and restorative justice are most valuable together, because they complement each other on several key points. The first point originates from their different backgrounds. Preventive law is rooted in civil law while restorative justice hails from the realm of criminal justice. Although many core values and approaches are similar, not all of preventive law can directly be applied to criminal justice, just as not all restorative practices can be directly translated to the civil realm. The very notion of prevention means something very different within criminal justice, where certain evil has already come to pass. Just as the direct involvement and even pressure from the state present in restorative criminal justice would be out of place in civil justice. Nevertheless the two systems are very closely linked.

As Van Ness and Strong (2014, p. 56) describe, a restorative criminal justice system would mean a less strict divide between the civil and the criminal. This divide is already a difficulty in the current system, as moving from one to the other does happen and in these

cases it always means an escalation of the conflict. For instance, when a civil law dispute between neighbours leads to harassment and prompts one or both parties to go to the police (Walgrave, 2012, p. 147).

It makes very little sense to overhaul the practices of only civil justice or criminal justice, and leave the other as it is. Seeing as they are based on such similar values, it would make more sense to have preventive practices to guide the civil side and restorative practices to guide the criminal side. This would allow them to work together more closely. Even when one insists on seeing them as separate institutions, they should both represent the values of a pluralist society and foster the conditions for such a society to flourish.

Furthermore, preventive lawyers, with their broader skills and sensitivity to complexity, would be much better suited to operate in a restorative system, where they are given the flexibility to actually utilize these skills. Likewise, a restorative justice system would greatly benefit from lawyers that do not suffer from the preoccupation with only the legal that Luijtgarden has grown wary of because of the increasing legal alienation (2017, p. 247). Lawyers that, as Walgrave says it, can help their clients “take up their active responsibility while protecting their legitimate rights” (2012, p. 164). This is another point where the two theories could aid one another.

Preventive law is largely focussed on the position and behaviour of the legal professional and the kind of relationship they have with their client. It is not so much focussed on the actual position of that client and neither does it thoroughly address the overall system within which the legal professional operates. It is focussed on keeping clients out of court. It does not explicitly consider what happens once you *do* go to court and that the practices within this court might be due for a change as well.

Restorative justice, on the other hand, mostly concerns itself with changing this formal system and describing the sort of role the stakeholders in a (criminal) conflict should hold and how their supporting community might be present and how the interests of society might be protected. What it does not do is provide the legal professionals with a grounding of theory how the more gradual change between civil, informal criminal justice and formal criminal justice could work if civil lawyers kept practicing the more adversarial<sup>26</sup> brand of law generally practiced today.

Preventive law could offer a framework for legal professionals, regardless of whether they practice civil or criminal law. It is an incentive towards a change of the legal culture, which would already go a long way towards changing the way justice is done. Restorative justice could be drawn from to restructure the criminal justice system and the formal part of the civil justice system so as to allow this new way of lawyering to actually take place.

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<sup>26</sup> In this context “adversarial” is not meant to refer to the legal system opposed to the “inquisitorial” system, but instead refers to the general approach of having two parties oppose one another in court where one wins and one loses, instead of the mutual searching for a solution as it would be practiced in preventive and restorative approaches.

Built on common values and with both systems allowing for more flexibility, the divide between civil and criminal would not have to be as absolute as it is now. Both would work towards providing solutions that meet the needs of the involved parties as well as the community and eventually the society around them and both would be based on common principles that would allow them to work together.

## **Considerations**

Despite all this potential, there are certain issues that need to be taken into consideration.

Firstly, the juridification discussed in chapter 1 is an extremely complex societal issue that cannot be fully addressed with efforts concerning civil and criminal justice. It is linked to a variety of tensions and developments that all exude pressure on the pluralist society. Developments that are linked to globalization as a whole and have impact on every sphere of society and the way modern democracy functions such as depoliticization, capitalism and rising nationalism are operating on a much larger scale than the local or even national level.

Linked to this is the question whether demanding preventive and restorative practices to promote human connection, support civil engagement and foster a humane society, is not asking too much from the legal world and the justice system. The law has its limits, the professionals working with it have their limits, and an argument could be made that the current dissatisfaction with the system lies with the expectations of the people, not its practices.

Both preventive law and restorative justice certainly have ambitious goals. They view the law as a humanistic discourse and expect a change in culture that may start in the legal but is meant to extend outwards throughout society (Barton, 1999, p. 943; Dauer, 2006, p. 98; Walgrave, 2012, p. 197; Van Ness & Strong, 2014, p. 175). Even among those that believe it is possible to have such a positive impact on society, there is no general consensus about whether this change should be taking place inside the justice system, or rather alongside it, on the side of social welfare, as Mooren (2004) does.

Even when operating on the premise that the systems, professionals and practices of the civil and criminal justice system should indeed change, it is evident that this would have far-reaching consequences into other disciplines and areas of society.

In restorative justice especially, changes to the criminal justice system would mean reforms in prisons, rehabilitation services, victim services and social welfare organizations. Both restorative justice and preventive law advocate for interdisciplinary practices, but these other disciplines then do need to be considered in redesigning the structures and practices.

Lastly, there is the matter of the laws themselves. As stated earlier, this thesis concerns itself with preventive law and restorative justice as approaches of *applying* the law and of dealing justice. However the reality of a globalizing, pluralist society puts the system of laws itself under considerable strain as well. If we have truly entered “the era of relativity” (Barton & Cooper, 1999, p. 35-36), there must necessarily be tensions with the law, which means to provide certainty of rights and obligations as well as equal treatment. The question of where pluralism must be limited, where certain norms must be set in legal frames to preserve the shared well-being of society, is not one that can be easily answered.

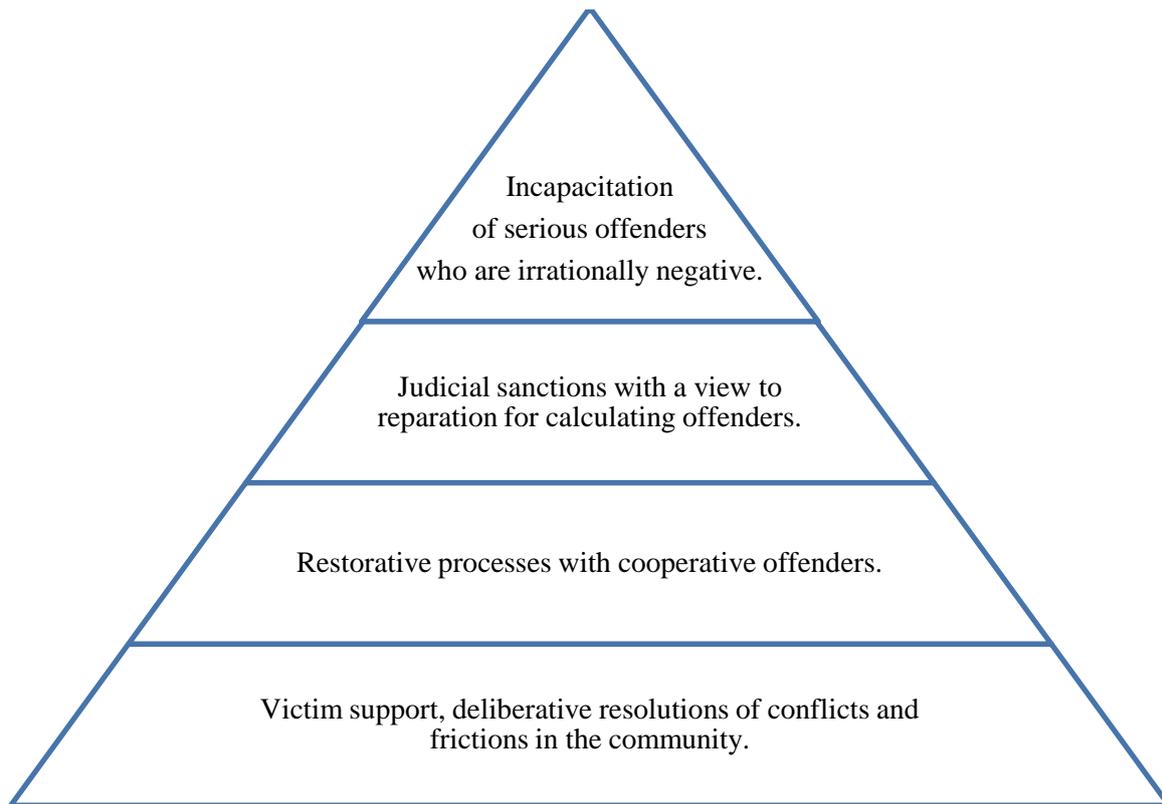
These considerations are certainly pressing and the authors relied upon throughout this research are aware of them all.

### **An ideal for society**

At their core preventive law and restorative justice do not just present an ideal for the justice system, they also present an ideal for society. Ultimately the ideals, ideas and practices belonging to preventive law and restorative justice fit together well because they serve a common purpose in regards to the kind of society they wish to support. There is activism in their call for reform and just as their practices, it goes beyond the legal. It is about “facilitating human interaction and purpose” (Barton & Cooper, 1999, p. 5), about changing a harmful culture (Dauer, 2006, p. 98), about a vision that reflects “the way the world should be” (Van Ness & Strong, 2014, p. 49). It is about creating a more just society (Luijtgarden, 2017, p. 194).

Such a genuine change would require efforts that go far beyond the boundaries of what these theories actually describe and the authors are aware of this.

When Walgrave (2012, p. 147) explains the potential of a restorative system, he gives the following design, with an increased space for free choice and deliberation the more towards the base of the pyramid one goes:



The very base of the pyramid is certainly part of the justice system as Walgrave sees it, but it is not part of *criminal* justice and takes place in a more informal context. It is his vision that by encouraging open discussion and deliberation and by making support, mediation and counsel readily available to citizens, escalation to the criminal realm might be prevented. He explicitly discusses the role of lawyers within this new, more flexible, system too:

If lawyers can make the shift from the traditional narrow view of their role in the punitive criminal justice system to a more open view of what really is in the best interest of their clients, lawyers can make a major contribution to the development of a functioning restorative justice system that respects human rights, procedural guarantees and sentencing limits. (Walgrave, 2012, p. 165)

Fortunately, the preventive lawyers seem to agree with him:

From contracts to criminal law, problem-solving mechanisms should be designed to facilitate a dialogue for the many constituencies that are invested in solving a problem. Problem-solving should provide a venue for other loyalties, bonds and social patterns based on family, clan, ethnic grouping and other affiliations to have a voice. Moreover, the social welfare and other services or faith organizations can play a role in the solution system that results. Traditional vertical systems of justice too often ignore the other juriscapes that parallel the economic and political bonds of Western liberal democracy. (Barton & Cooper, 1999. P. 32)

To work towards the ideal of a just, pluralist society, where citizens are actively involved in solving their conflicts and these conflicts are dealt with humanely, preventive law and restorative justice would both be very valuable sources to draw from. Together they may provide guidance for a restructuring of the system as well as a new outlook for the professionals working in it. Working on a reform of both could be mutually beneficial. The culture of legal practicing shapes the system, but the formal context also shapes the practicing. Just as the justice system and society shape one another.

It is becoming increasingly clear that society requires a change from the justice system, but it is equally true that society itself may need support so that its citizens can navigate their increasingly dynamic and diverse reality. A justice system with values and practices that accommodate the complexity of this reality has the potential to make a genuine contribution on this point and together, preventive law and restorative justice might provide a starting point.

## Chapter 5: Conclusions and discussion

This thesis explored whether Preventive Law and Restorative Justice together have the potential to provide a new avenue for the justice system to address the challenges of a pluralist society. Before discussing this main question, each of the sub-questions will be addressed separately, corresponding to the information presented in chapters 1 through 4.

**Sub-question 1:** *What are the challenges that a pluralist society presents the justice system with?*

As discussed in chapter 1, we live in an increasingly globalized and individualized society. The modern democracy is a society of free choice and ever-expanding possibilities, with more equality and personal freedom than ever, but also with increased personal responsibility and greater relativity of personal norms and values. Society is growing increasingly dynamic and pluralistic, as people are required to construct their own social coherence, to gather their own values, norms, identities and perspectives. That they should have the freedom to do so and the equality to act upon it, must be safeguarded by the constitutional state and its laws. This puts considerable strain on the legal system, which must support an increasingly complex and fast-changing reality. On the justice system too, which must apply these laws to the choices of individuals that now come from a plethora of backgrounds and operate on a wide variety of personal values.

To effectively combat unfairness, (social) inequality and the exclusion (of persons or groups) from rights, the justice system must allow enough room for interpretation. In the Netherlands there is a relatively great amount of room for such interpretation within the system, but there is still an ever-present tension between personal freedom and the constrictions of the law. Personal freedom has grown, but as this has made the reality that is to be governed by the law increasingly complex, the number of regulations has also grown, in an attempt to be able to represent all of it. The juridification of society is a pressing phenomenon. The law has an increasing amount of influence over daily life and it has grown so complex that legal professionals have to specialize so much as to run the risk of losing sight of the larger structure, while citizens often experience a feeling of legal alienation, losing their sense of connection with (the values of) the law. There has been a growing tendency of citizens to look to the law to get what they want, while simultaneously being increasingly dissatisfied with the rulings of the civil courts and the legislation they are subjected to in everyday life.

Apart from the legalization of the law there is the socialization of the law. This socialization is two-pronged: the law is used as a tool to aid social change, to combat inequality and unfairness, but the law is also held accountable by the social context in

which it functions and must provide an answer to the issues in society as they develop. It must therefore also react to the rising pluralism and legal alienation.

In the realm of civil law this gives rise to concerns about the capabilities of lawyers to connect with their clients and provide them with the solutions that they are truly seeking. Within criminal law it has become increasingly clear that the justice system is still largely designed to accommodate a homogenous group of citizens, while this is no longer the reality. This again leads to a gap between the system and the individuals that are processed by it, leading to a lack of experienced justice and security.

If the goal is to support a just, humane democracy, within which all equal citizens have the freedom to make their own choices while not infringing upon each other's rights, the justice system must adapt to the needs of the citizens of this democracy. It must accommodate the complexity of their reality, the plurality of their individual cases and provide meaningful, durable solutions to the conflicts that will inevitably arise while people live together.

A justice system (comprehending both the civil and the criminal) that can do that, will contribute directly to the humanization of society.

**Sub-question 2:** *What does preventive law have to offer the justice system?*

Preventive law is an approach to practicing law that is focussed on preventing the need for litigation and fostering circumstances in which future conflicts are less likely to occur. It is a response to the growing perception that legal interventions have a great impact on people and that litigation often brings quite a bit of harm with it, on top of the initial costs of the conflict. As well as a response to the dissatisfaction of clients and practitioners in the kind of solutions litigation is able to provide.

The approach is both client-oriented and lawyer-focussed. It stimulates lawyers to look beyond the legal and to encourage open discussion with their clients and to reflect upon the social context in which the (budding) conflicts that they must counsel them on take place. Taking into consideration the relationship between lawyer and client as well as the relationship between the two involved parties and meaning to be aware of the emotional costs of legal intervention as well as the specific personal and contextual circumstances of each case.

In the preventive law movement, the lawyer changes from an individual legal practitioner into a context-oriented legal normative professional. By working with a broader perspective than just the legal and practicing outside of the formal law and the courts, the preventive lawyer can have a de-juridifying impact. Preventive lawyering attempts to accommodate the human dimension of conflicts, taking into account all consequences (be they material, relational, psychological, etc.) and all possible solutions (especially outside the legal field). This accommodation of the human dimension could be

a way for the law and legal professionals to reconnect with the lived reality of the citizens, thereby counteracting some of the aspects of legal alienation.

There is a strong aspect of change of (legal) culture in this. Preventive law prompts lawyers to act and think differently. Apart from the new skills, focussed on mediation and open communication rather than shielding information and staying within the rigid lines of the law, they must learn to move away from adversarial thinking and win-or-lose rhetoric. If lawyers can learn to do this, they can make their clients invested stakeholders in their own cases again, parties that are actively involved in creating durable solutions to their own problems.

Preventive law would be a reform of the practice of lawyering born from within the profession itself, supporting a change in legal culture as well as encouraging their clients to approach one another as human beings instead of as enemies.

**Sub-question 3:** *What does restorative justice have to offer the justice system?*

Restorative justice is a theory of (criminal) justice that focusses on repairing the (individual, relational and social) harm caused by a criminal offence. It makes use of cooperative, deliberative processes that attempt to include all stakeholders in a conflict to involve them in formulating restorative solutions. It is a reaction to dissatisfaction with the current criminal justice system, which defines crime merely as a breaking of the laws of the state and is focussed primarily on punishing a passive offender. It neglects to address a large part of the consequences of the crime and even though efforts have been made to give victims a better position within court proceedings they are still not officially a legal party. The general standpoint is that restorative justice is preferable to punitive justice because the variety of harm done is being addressed and the overall treatment of all those involved is more humane.

The preventive approach treats all stakeholders in a conflict as reasonable, responsible persons, actively involving them in the process of doing justice through restoration, with the belief that this will lead to more durable and mutually satisfactory outcomes. It aims to humanize the parties towards each other and steers away from the top-down enforcing of the law by the state, bridging the gap between the law and legal justice and the subjective experience of justice. In practices like conferences and circles, the supporters of the victim and offender respectively are also involved, sometimes also including members of the surrounding communities and government representatives, to give an insight in the interests of society.

When following a maximalist approach like Walgrave's, the deliberative restorative processes, which must be taken part in voluntarily, can be supplemented with more coercive interventions. These would be structured more like a traditional trial, but the

sentence would involve reparative sanctions instead of punishments, meant to be as much conducive to reparation as possible, even if they cannot be truly restorative.

Through inclusion and adaptability the restorative justice model offers a way to accommodate the diversity and complexity of the modern pluralist society and works on bridging the gap between the law and reality. It likewise supports a culture in which human connection and civil participation are the norm.

**Sub-question 4:** *How could preventive law and restorative justice complement each other?*

The processes and practices of preventive law and restorative justice have great potential to be mutually supportive. The first focusses primarily on the actions and standpoints of legal professionals and is particularly suited for the realm of civil law, with its main goal of preventing the need for litigation. The second offers an approach for restoring the harm done when a conflict has taken place, which makes it particularly suited for the criminal justice realm. In this way they would directly complement each other by each taking on a different part of the justice system. However, a restorative criminal justice system would benefit from the broad skills of preventive lawyers and the general change in the legal culture the approach supports. Just as preventive law as an approach to lawyering has considerably more chance of being used to its full effect in a restorative system that is less rigid and adversarial than the current (criminal) justice system.

Their shared values mean that their practices could certainly strengthen one another's efforts. These values are: including the specific context of each case, accommodating the relationality and human dimension of (possible) conflicts, and searching for solutions that are connected with the stakeholders' needs and are geared towards preventing further harm and conflict for everyone involved. The fact that the techniques of both approaches are largely based on open mindedness, human contact and open communication emphasizes this.

Likewise their respective goals, preventing conflict and restoring harm, are mutually reinforcing. Both approaches attempt to create a human connection between the parties they deal with and encourage the investigation and discussion of all possible wants, needs and consequences. Once arrived at restorative justice the prevention of the conflict that has taken place is no longer possible, but the holistic approach that restorative justice takes in solving the conflict fosters the same mutual understanding and open communication that preventive law employs for prevention and is certainly meant to prevent the recurrence of conflicts as well as restoring the harm of the current conflict. At the same time preventive lawyering approaches are conducive in creating circumstances where disputing parties are not forced to see each other as nothing but adversaries and are likely more willing and more capable to enter into restorative processes.

The two approaches' values, goals and practices are complementary by virtue of significant overlap and practicing them together and allowing them to actually overlap in practice, would be mutually beneficial to them.

With the four sub-questions addressed, this brings us to the main question of this study:

*How could restorative justice complement preventive law in creating a justice system fit for a pluralist society?*

The modern pluralist society offers an increasing array of opportunity and personal choice, but it comes with a growing relativity of personal norms and values and an increasingly diverse set of citizens. As discussed above people increasingly feel alienated from the law and the justice system as these institutions no longer seem to reflect their lived reality.

In favour of a justice system that fits the complex and dynamic reality of a pluralist society, the authors discussed in this work agree that a change is needed within both civil and criminal justice and in the legal culture as a whole. Connected as the two parts of the justice system are, especially when one of them begins to operate with less rigid processes, it makes little sense to overhaul the practices of one without also reforming the other. Considering their similar values and complementary strengths, preventive law could be a starting point to reforming the civil side and much of legal culture, while restorative practices could be the basis of a restructuring of criminal justice, as well as the more formal side of civil justice. After all, it would be strange if criminal courts made way for conferences or circles, while civil courts retained their adversarial nature.

Preventive law offers a framework for (the education of) legal professionals, regardless of the branch of law they practice. As an incentive to change the legal culture, it would already have a significant impact on the way justice is done. Restorative justice meanwhile offers tools to restructure the systemic context, which would not only go further towards changing the framing of justice (both formal and informal forms), but it would also allow this new, more humane way of lawyering to actually take place.

When based on values of inclusion, human encounter and open deliberation, it might become a possibility to have a less rigid, more humane justice system. A system that starts with an informal involvement of preventive lawyers that are available to citizens when they wish to get preventive council. It would go on to include more formal intervention via preventive lawyering, bringing parties of (budding) conflicts together, eventually progressing to a formal civil system for more complicated disputes like those in family law. This flexible civil system would be adjoined by a restorative criminal justice system where there is once again a gradual increase of formality and if needed coercion, but

which still aims to bring parties together and to address their particular needs, where only the very end of the scale involves the fully coercive processing and incapacitation of an offender.

Within the inclusive and flexible practices of such a system there would be room to adapt to accommodate the great variety of citizens and be mindful of the specific context of the pluralist society. This could start to bridge the gap between the citizens and the legal state, as well as foster a climate of open discussion, active participation, respect and equality. A climate that would be beneficial to preserving the quality of social life in the context of a diverse and globalizing society.

A justice system with values and practices that accommodate the complexity of their reality and is able to include them in all their diversity could help to work towards the ideal of a just, pluralist society, where citizens are actively involved in solving their conflicts and these conflicts are dealt with humanely.

## **Discussion and recommendations**

This study is meant as an exploration of the merits of preventive law and restorative justice as complementary theories, motivated by a normative standpoint on the need of a more just and humane society. This social perspective has meant that the research has not gone into the legal side of the issue as deeply as might have been beneficial. Neither was there room to expand on all the various practices of preventive and restorative approaches and to provide the practical examples that might have better grounded the theory.

More in-depth research into best practices, especially those of preventive law, is sorely needed. Restorative justice is by now steadily building up empirical evaluations and case studies, but preventive lawyering, while it likely does take place, is rarely reported on.

In this research multiple perspectives were brought together. Firstly preventive law and restorative justice, but also the legal field and that of humanistic studies. Both have everything to do with justice and striving towards the goal of a just society, but as academic disciplines they have not been much connected. Both sides have valuable perspectives to offer the other. If the legal field wants to move towards interpersonal approaches and humanizing values, the realm of humanistics has a lot to contribute. At the same time, if humanistic scholars want to put their commitment to justice in practice in a more concrete way, the institutions where formal justice is dispensed should not be overlooked. I would recommend scholars on both sides to bridge the gap and cross over, to start exploring the possibilities for an ongoing dialogue between the two disciplines.

More interdisciplinary research and practice in general would benefit the various reforms that the different authors presented in this work favour. The discussion on civil

and criminal justice is linked to social and political issues that touch every aspect of society, and that does not stop at a national level. Most of the scholars relied upon in this research are calling for a social-legal paradigm shift towards more just, humanized and durable practices, and this goes beyond the practice of lawyering, and local civil and criminal justice. Movements such as transitional justice on an international scale, corporate social responsibility on a national and global level, and international environmental preservation. All these efforts show a commitment to combatting negative tendencies in (global) society and working towards a more harmonious, humane and sustainable social reality, and it is reasonable that to aid their respective success, their professionals and advocates must come together.

There is much to do and much to gain, and with a just society as the goal to work towards, it should certainly be worth the effort.

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## **Appendix 1: Full text examples of preventive lawyering**

Two examples provided by Prof. Thomas Barton in an email exchange on 23rd of July 2018. These are anecdotal examples of preventive lawyering as supplied to him by others.

### **The blood bank**

1. Hepatitis “C” is a virus communicated through blood that for decades was undetectable in blood supplies. Blood banks routinely gave out needed blood for patients, not knowing whether the blood was infected with Hep C. If a patient has a blood transfusion with Hep C infection, the patient is likely to experience a wide range of health difficulties that can last for a lifetime.

A Preventive-oriented lawyer was representing a blood bank and they knew there was a significant risk from the undetectable Hep C blood. Statistically, some number of patients were going to be infected and seriously harmed. The temptation would be for those patients to sue the blood banks, which were operated on a not-for-profit basis. Lawsuits could have jeopardized the blood supply in the U.S.

Then, a means of identifying Hep C in blood supplies at the blood bank was developed—a technological breakthrough. That meant the blood bank could go back in time, re-test old samples, and trace exactly which patients had been given infected blood (the record-keeping is very strong regarding blood donations and distribution). So what should the blood bank do? Wait for patients to become ill or die, and sue the blood bank? Or, knowing the risk and the people involved, communicate forthrightly. The lawyer counselled the blood bank to communicate honestly to all patients who received infected blood, identifying the risks to them; apologizing (even though the blood bank had not been negligent) and to promise that in the event of an infection, the patient’s health needs would be taken care of, for free, for life. When actual illnesses did arise, the blood bank would communicate with the patient, and quickly take measures to assess the patient on an ongoing basis. Significantly, the lawyer NEVER asked any patient for a “release” from liability or to sign anything legal in appearance. The lawyer told me this would just cause the patient to run to a lawyer, and then the Preventive/Restorative approach would be jeopardized. The end result: out of a large number of infected patients, some with serious injuries, not a single lawsuit resulted.

### **The Comic Book Contract**

2. A Preventive-oriented lawyer in South Africa was asked to write an employment/labor contract for a major agricultural business. The workers would largely be fruit pickers. In

South Africa, the workers involved would rarely be literate in English—there are 11 official languages in South Africa. So a traditional looking contract, in English, with dense prose, would be completely incomprehensible. No doubt it would not be considered legitimate or real, even if the workers had indicated their formal consent to the contract. So this lawyer paired up with a cartoonist and together they created a “Comic Book Contract,” an actual comic book that heavily used cartoon images to depict the mutual promises and working rules, including such matters as being injured on the job. The comic book was distributed to each worker, and information sessions were held in small groups to walk the workers through the comic book before they agreed to it. The response was overwhelmingly positive. The supervisors, as they walk through the fields filled with fruit and fruit pickers, carry a copy of the comic book contract with them. In the event of a worker problem, the comic book is consulted by both worker and supervisor. The lawyer reports that the results are most impressive, with stronger workplace satisfaction.

## **Appendix 2: Full text examples of restorative practice**

Two examples from the pilot for mediation alongside punitive justice in the Amsterdam criminal court, that ran from October 2010 until May 2011. During this time the Openbaar Ministerie (Public Prosecution Office) offered to organise mediation in 61 criminal cases as found in the following evaluation report “Mediation naast strafrecht in het arrondissement Amsterdam: Een beschrijving van het proces en een verkenning van de effecten” by Verberk (2011), published by the Rechtbank Amsterdam. Accessed on the 23rd of July at:

[https://mediatorsfederatienederland.nl/content/uploads/sites/2/2014/05/Mediation\\_naast\\_strafrecht\\_in\\_het\\_arrondissement\\_Amsterdam.pdf](https://mediatorsfederatienederland.nl/content/uploads/sites/2/2014/05/Mediation_naast_strafrecht_in_het_arrondissement_Amsterdam.pdf)

Below is a full translation, made as directly as possible, of the original Dutch text.

### **Battery at a disco**

Suspect O. and injured party M. are both students in Amsterdam and come from abroad. The suspect comes from Germany, the injured party from Italy. One night M. goes to a disco with 4 friends. It is rather busy, it is rather dark and there is a smoke machine. Most of the people are on the dance floor with a glass of beer. On the dance floor O. makes a movement that causes his beer glass to get crushed against M.’s face, breaking it. M. has to go to the hospital for further treatment and will have a permanent scar on his face. M. presses charges because he thinks O. injured him on purpose in response to his presumption that M. spilled beer on him. O. thinks it is terrible what happened, he is upset that he was so drunk and says he merely tried to push someone back that had fallen against him. It becomes clear that the incident at the disco has a big impact on M. At first he is very angry and wonders why O. just suddenly attacked him. Apart from that he worries about the wound to his face. It upsets him to have a scar on his face. Other people associate scars with aggression and he is a very gentle person. Even later he is still bothered by the incident: he no longer feels comfortable in large groups and when he goes out he is often tense. In deliberation with Victim Support (Bureau Slachtofferhulp) he fills out a damage reclaim form: for material and immaterial damage M. asks a restitution of €1.500. O.’s lawyer asks the public prosecutor if O. can take part in ‘Mediation alongside criminal justice’. O. still thinks often about what happened that night and he wants to tell M. that what happened wasn’t personal. He also wants to reimburse the damages M. suffered. The lawyer explains that O. is not a confessing offender, but that he does acknowledge that because of the circumstances at the time he brought physical injury to O. The lawyer declares that criminal prosecution would have serious consequences for O.’s future, because he cannot complete his studies in America with a criminal record. After intervention by the Mediation Bureau M. says he wants to cooperate for mediation. One argument is that it might be a way for him to bring this nasty business to an end. Both

participants are aware of the fact that the decision on the prosecution and possible punishment lies with the Openbaar Ministerie and the judge. The conversations with the mediator are constructive. The matter is discussed, both O. and M. want to come to a closing solution. When O. hears from M. what the impact of the incident has been on M., he finds a higher financial reimbursement as reparation for the grief would be fitting. O. and M. agree on a reimbursement of €3.000. M. says he will ask the public prosecutor not to prosecute now they have reached an agreement about a higher restitution (Verberk, 2011, p. 14).

## **Discrimination**

A case described in the book *Herstelbemiddeling* by Frijns and Mooren (2004) from the project Restorative Mediation (project *Herstelbemiddeling*, 1997-2004), specifically mentioned as an example that provides pointers for further developments on the subject of restorative practice and how it might be supplemented by other practices.

A full translation of the Dutch text can be found below.

Several months after September 11 2001 Jan van Dalen (18) and his friend (17) deface a mosque with discriminatory and threatening slogans, swastikas, etc. After the terrorist attacks in America this has a huge impact and it heightens the fear among the population. Jan and his friend are arrested and sentenced to community service and supervision by probation and rehabilitation services (Reclassering). In the interest of the latter the Reclassering asks the project *Herstelbemiddeling* if they can offer a made to measure program. *Herstelbemiddeling* accepts their request.

The mediator invites both boys separately. This to prevent that the behaviour of one might hinder the other's decision to take part. Jan participates, the other boy doesn't. The mediator starts by listening to his life story and establishes that there is quite a lot of prejudice against Muslims in general and hostility towards conservative imams in particular. Jan thinks that Dutch people cannot just accept discriminating statements about for instance homosexuals and women. That is why he and his friend had decided to 'teach the Muslims a lesson'. He understands that the visitors of the mosque and the staff have begun to fear for acts of revenge and that they have made use of this fear. 'Then they shouldn't come to this country and say such moronic things and have opinions... I'm not the only one that thinks so, my family does too!' The mediator explains to Jan that he is free to think what he wants, just like his family. The different between them is that he has committed a crime.

Restorative Mediation cannot force him to change his mind, but he will have to make an effort to inform himself. The mediator shows him a program based on a rehabilitation program that had been executed several years ago. Jan will follow a version of this program that has been adapted to the particular circumstances of this case. An important component is gathering correct information (knowledge) about Muslims and their faith. Another component is coming into contact with Muslims and speaking to them. First it is important, however, that he gains insight in what discrimination on the basis of religion and race means, what it is based on and what it can lead to. To this end he watches a movie that was filmed by the Russian army at the liberation of the concentration camp Sachsenhausen. Based on this material the mediator discusses the impact of discrimination and the possible consequences with him, and also the origin of the chants against Ajax at football matches.

The next step is that Jan gathers general information about the Islam. To this end a conversation is planned with a well-known imam of Dutch origin in the hope that information given by him will meet with less resistance. After that he spends a day with a Moroccan neighbourhood police officer, a practicing Muslim. By this time the mediator has contacted the staff of the mosque, who are feeling rather threatened and experience quite a bit of fear. They are pleased that Jan wants to speak with them. One of the members will meet with Jan, facilitated by the mediator. This conversation is a meeting as described in chapter 8. During the conversation the incident is brought back to human proportions. The fear that has taken hold of the visitors of the mosque and the connected youth centre is discussed. A few people of the mosque had shaved off their beards because people shouted Bin Laden at them on the street. Jan lets him know that he had not considered the personal consequences and offers his apologies for the fear he has caused (Frijns & Mooren, 2004, p. 148-150).