1. Conciliation in The Netherlands: An Historical Overview

1.1. No Conciliation in the Nineteenth Century

Article 1 of the Dutch Code of Civil Procedure 1838 read: 'Every action shall be commenced by a writ of summons.' This phrase accentuated the abandonment of two phenomena from earlier times; firstly, the obligation to obtain leave from the judge to start an action and, secondly, mandatory preliminary conciliation. By abandoning preliminary conciliation, Dutch Law receded from the French regulations of the late eighteenth century.

A French Decree of 1790 imposed on parties an obligation to appear before a judge, who had to make an effort to reconcile the parties, before they were allowed to commence proceedings. This was not the continuation of ancient old French practices but, ironically, was based on what Voltaire believed to be the Dutch practice. When Voltaire was in Holland he had discovered the Leidse Vredemaker (Justice of the Peace of Leiden), an institution that dated back to 1598. Half a century before the French Revolution Voltaire wrote:

La meilleure loi, le plus excellent usage, le plus utile que j’aie jamais vue, c’est en Hollande. Quand deux hommes veulent plaider l’un contre l’autre, ils sont obligés d’aller d’abord au tribunal des conciliateurs, appelés ’feseurs de paix.’

---

1 This section is, to a large extent, based upon R. van Boneval Faure, Het Nederlands burgerlijk procesrecht, Volume III, Leiden, É.J. Brill, 1901, p. 173-178 and A. Oudeman, Het Nederlandsch Wetboek van Burgerlijke Rechtsvordering, 4th edition, Groningen, Wolters, 1874, p. 3-4. The cited text is a translation of: 'Elke regtsingang vangt aan met eene dagvaarding, [...]’ It is quite similar to an English Rule, dating from the nineteenth century (Order II, Rule 1, as cited in the Dutch law review Themis of 1898, p. 330).


3 Or at least to a large extent, according to C.M.G. ten Raa, De oorsprong van de kantonrechter, Deventer, Kluwer, 1970, Chapter III.

Although Voltaire may have influenced the French lawmaker in 1790, his enthusiasm was not shared by the Dutch Legislator of 1838. In Bills from 1809 and 1827, preliminary conciliation was absent. The reason for this is that high expectations – in the revolutionary spirit of 1790 – were disappointed; even in France, the mandatory conciliation was already in 1806 named a *vaine formalité*. The Dutch Code of Civil Procedure of 1838, however, introduced the *kantonrechter*, a judge with similar functions to those held by the French Justice of the Peace, except that conciliation was not a special duty of the *kantonrechter*.

While receding from the French way – and thereby from what Voltaire thought to be their own history – the lawmakers of the young Kingdom of The Netherlands turned their eyes further east and were inspired by Genevan lawmaking. This inspiration materialised in Article 19 Code of Civil Procedure 1838: ‘The judge may in all cases, in every phase of the proceedings, instruct the parties to appear before him in order to attempt to reach a settlement.’ In divorce cases and cases about the separation of matrimonial assets, it was obligatory for the presiding judge to attempt preliminary conciliation. In this, too, the Genevan example was followed. The underlying principle of Article 19 was that ‘all judges are Justices of the Peace’ and therefore should be capable of taking initiatives inconciliation.

Article 19 of the Code of Civil Procedure 1838 allowed one or both parties to take the initiative for a court hearing, but (theoretically) the judge could also decide on his own initiative that an attempt should be made to reconcile the parties. He could do so even after the oral pleadings (for example, if he still did not know in whose favour he ought to decide). At the beginning of the twentieth century, legal commentators concluded that this regulation had not been very successful. Probably learning from his own experience as practicing lawyer, Van Rossem explicitly stated that Article 19 was not much used at all. He attributed this to the fact that it was considered unlikely that lawyers would go to court without first having made any attempts to reach a friendly settlement. Besides, exercising the authority that the judge had been given to instruct the parties to appear before him might interfere with the principle of party

---

5 R. van Boneval Faure, supra note 1, p. 173.
6 C.M.G. ten Raa, supra note 3, p. XV; the *kantonrechter* handled mainly small claims.
7 ‘De ondervinding had geleerd, dat die verplichte conciliatie meest altijd neerkwam op eene nutteloze, geld- en tijdverlopende formaliteit’ (‘Experience taught, that the obligatory attempt at conciliation most often lead to a useless, money and time consuming formality’). See M.H. Godefroi, ‘Over enige onderwerpen van burgerlijke regtsvordering […],’ Themis, 1863, p. 40.
8 Author’s translation of: ‘De regter kan in alle gevallen, en in elken stand der zaak, […] partijen gelasten om […] voor zich […] te verschijnen, ten einde eene vereeniging te beproeven.’
9 Articles 805, 819 and 826 of the Code of Civil Procedure 1838.
10 This principle was found in the 1809 Judicial Code (*Wetboek op de regterlijke instellingen en regtspleging*) for the Kingdom of Holland (under Louis Bonaparte), which never entered into force. See C.M.G. ten Raa, supra note 3, p. XXII.
autonomy.\textsuperscript{13} Also, it was feared that the impartiality of the judge would be threatened.\textsuperscript{14} Finally, Van Boneval Faure pointed out that a lawyer might well take it as a vote of no-confidence if his client insisted on requesting a judicial attempt to settle the case despite his lawyer’s efforts.

1.2. Miscellanea; Mandatory Conciliation

Van Boneval Faure mentions two other kinds of cases (besides divorce proceedings) in which conciliation by the judge had been institutionalised.\textsuperscript{15} According to the Law on Bankruptcy (\textit{Faillissementswet}), the examining judge\textsuperscript{16} had to try to reconcile the parties if the claims that led to the bankruptcy proceedings were disputed. A similar task was also given to the examining judge in the special proceedings in which a ‘trustee’ had to give account for the holding of property in ‘trust’.\textsuperscript{17}

2. Developments in Modern Times: From the Twentieth Century Onwards

2.1. The Abolition of Mandatory Conciliation in Divorce Proceedings

As previously stated, an attempt at conciliation was mandatory in divorce proceedings. This lasted until far into the twentieth century. Article 818 of the Code of Civil Procedure obliged the spouses to appear in person before the judge, without bringing their lawyers or other advisers. It was then up to the presiding judge to make such remarks as he thought prudent to establish a reconciliation.\textsuperscript{18} If the judge failed in his attempt, he gave the plaintiff leave to summon his opponent. When the rules on proceedings in divorce cases were revised in 1971, Article 818 was adapted to modern times, or so the Government intended.\textsuperscript{19} No longer had the claimant to request leave to summon. According to the new rule, the judge ordered a hearing at which both parties had to appear in person as part of the proceedings. If they wished to do so, they could bring their attorneys. Just a few years later, this rule was already heavily criticised; in 1973, the Government decided that the mandatory hearing had to be abolished. This eventually happened, but only after eleven years.\textsuperscript{20}

\textsuperscript{13} See the contribution of R. Verkerk on the powers of the judge in the Dutch legal system in this volume.
\textsuperscript{14} W. van Rossem and R.P. Cleveringa, supra note 12, p. 215.
\textsuperscript{15} R. van Boneval Faure, supra note 1, p. 175.
\textsuperscript{16} The Rechter-commissaris, who could be compared to the official receiver.
\textsuperscript{17} Doen van rekening en verantwoording; especially Article 778 Code of Civil Procedure 1838.
\textsuperscript{18} Article 819 Code of Civil Procedure 1838: ‘Op den bepaalden dag maakt de president aan beide echtgenoten [...] zoodanige aanmerkingen als hij naadzaam oordeelt om eene verzoening te weeg te brengen.’
\textsuperscript{19} Wet herziening echtscheidingsrecht, Law of 6 May 1971, revised by the Law of 6 June 1971, Staatsblad (Dutch Official Journal), No. 380 (and No. 476).
\textsuperscript{20} Law of 28 November 1984, Staatsblad (Dutch Official Journal), No. 559. See the Report of the Advisory Committee on possible improvements in the rules regarding divorce proceedings (Commissie De Ruiter), The Hague, Staatsuitgeverij, 1974. Although some authors claim that the basic idea was to lighten the tasks of the judiciary, there were also critics from outside the judiciary, like the lawyers; M.J.C. Koens and
2.2. Appearance before the Court early in the Proceedings

Until recently, in standard civil proceedings each party was given two ‘rounds’ to produce written statements. From 1989 onwards, the law required the judge to decide immediately after the first statement of the defendant whether or not the case was suitable for a personal appearance of the parties. An important reason for this change may have been that Article 19, the sleeping beauty of the nineteenth century, had become a very useful instrument after all. The regime of one round of written statements, immediately followed by the appearance of the parties before the court, is referred to as the comparitie na antwoord-model (appearance following the statement of defence).

Since 2002, it is no longer primarily up to the discretion of the judge whether he will order an appearance following the statement of defence; it has become the rule that he will do so and only in exceptional cases he will allow parties to have a second round of written statements. The use of the appearance is threefold: the judge can try to reconcile the parties (or, more likely, invite them to settle), he can obtain more information from the parties and, finally, the judge and the parties together can decide how to proceed if no settlement is reached. It seems probable that the effect of this judicial activity can be much greater if it occurs early in the proceedings.

2.3. ADR

The global ADR-wave reached The Netherlands, and became an important factor in its legal system, during the mid-1990s. Some authors remarked that, in The Netherlands, there is no – or not so much - need to introduce alternative dispute resolution, especially mediation, because there exist plenty of possibilities for the citizens to address all sorts of mediating bodies. Nevertheless, in the past ten years

---


J.E. Bosch Boesjes, Lijdelijkheid in geding, Deventer, Kluwer, 1991, p. 2. For further references, see also R. Verkerk on the powers of the judge in the Dutch legal system in the present volume.

W. van Rossem and R.P. Cleveringa, supra note 12, p. 216.


For the difference between these goals, see infra note 30.


See, e.g., the contributions in M.A. Kleiboer et al. (eds), Alternatieve wegen naar het recht, Nijmegen, Ars Aequi Libri, 1997 (e.g., N.I.H. Huls and M.A. Kleiboer, ‘Het rapport: Alternatieve wegen naar het recht?’, in M.A. Kleiboer et al. (eds), Alternatieve wegen naar het recht, Nijmegen, Ars Aequi Libri, 1997, p. 64. J.F. Bruinsma is strongly opposed to the introduction of mediation in The Netherlands; see, ‘ADR als praktijk in Nederland en als mode uit Amerika,’ in M.A. Kleiboer et al. (eds), Alternatieve wegen naar het recht, Nijmegen, Ars Aequi Libri, 1997, p. 91).
Mediation has become of growing importance in commercial and labour disputes. Of course, here the goal is not to reconcile the parties (as was the case with the nineteenth-century mandatory conciliation); spouses, realising that their divorce does not necessarily imply litigation and hostile behaviour, engage in mediation to make arrangements for their future mutual relations, like those concerning their children.

In the past few years, several European Governments have initiated legislation to regulate mediation and to give it a place in civil proceedings. In 2004, a proposal for a European Directive on mediation gave this process a firm incentive. The Dutch approach has been another one. In March 2000, the Government initiated a pilot system at several courts under the name ‘Mediation alongside the courts.’ Cases in these courts were screened and, if a case met several criteria, a court official advised the parties to consider voluntary mediation. When this pilot was evaluated in 2004, 973 cases had been mediated and in 61 per cent of these cases the parties had reached a settlement. The project was considered successful and the Minister of Justice decided that, from 1 April 2005 on, every court will have to install a ‘referral mechanism’ for

---

28 Mediation is considered the most important ‘new’ form of ADR (see, e.g., ‘Beleidsbrief ADR,’ Handelingen Tweede Kamer 1999-2000, 26352, No. 19). It has been strongly promoted by a few pioneers, most of whom have, at some time, received training in the United States and since 1995 also by the (private) Nederlands Mediation Instituut (Netherlands Mediation Institute or NMI), an organisation that was founded to promote the quality of mediation in The Netherlands. The NMI holds a public register of mediators. See <http://www.nmi-mediation.nl/> (consulted May 2005). The site contains information in both English and Dutch. There are many other organisations, like the Dutch Association of Attorney-Mediators, the Foundation for Informal Dispute Resolution (Neeva), the ADR Centre for the Business Community (ACB), etc.

29 See, e.g., G.P. Hoefnagels, who is one of the pioneers of mediation in divorce cases in the 1970s, ‘Een ontdekking en een uitvinding,’ Tijdschrift voor Mediation, 2001, p. 74.

30 Other than in England and Wales, in The Netherlands the terms conciliation and mediation are not always interchangeable. It is possible to differentiate between conciliation, settlement and mediation. Conciliation can be described as the process by which parties attempt to really end their conflict and, if they have succeeded, for that reason cease their hostile activities. Settlement is less far-reaching; although the basic conflict may still exist, the parties agree that they will no longer litigate, because they have reached a compromise. In this definition the mandatory preliminary conciliation that existed in France may, in fact, have comprised both conciliation and settlement. Mediation is the process in which the parties seek a settlement, based on their real interests (as opposed to mere legal interests), which may or may not lead to conciliation in the strict sense.


33 Courts of First Instance, i.e., rechtbanken. Since 2002, the lower first instance courts, i.e., the kantongerechten, have been integrated into the rechtbanken. Besides the 19 rechtbanken there are 5 Courts of Appeal (gerechtshoven), which predominantly handle appeals, and one Supreme Court (Hoge Raad).


mediation that has to be in working order within two years after that date.36 So far, the Government has taken the stand that mediation is an informal and voluntary process that should not be endangered by overloading it with regulation. Also, according to the experience so far, it hardly seems necessary to develop new legislation to adapt to the (proposal for a) European Directive.37

37 R. Verkijk, ‘Mediation in wetgeving in Nederland,’ Tijdschrift voor Civiele Rechtspleging, 2005, p. 35 ff. Of course, it is not yet said that the continuation of the project on a regular and overall basis will be as successful. The courts that were not part of the pilot may be more sceptical.