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Judicial Rehabilitation in the Netherlands: Balancing between safety and privacy

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Abstract

This paper is part of a special edition on Judicial Rehabilitation, a topic that derived from Maruna's work on rehabilitation and rehabilitation rituals. It addresses the possibility of such rituals in the Netherlands. It describes which data concerning criminal convictions can be stored, how long they may be preserved and which persons and organisations can get access to the criminal records. It also pays attention to the jobs and position for which a conduct certificate is needed and the conditions under which it can be issued. Conclusion of this analysis is that the stricter regulations concerning criminal records, the increase of jobs a conduct certificate is needed for and the stricter conditions under which it is issued, hinder the serious efforts that are made in prison and probation to reduce recidivism.

Keywords: Criminal records - Conduct certificate - Rehabilitation

Introduction

The direct cause for this paper is the finding of Maruna in *Making Good* (2001) that rehabilitation rituals can contribute to the desisting–process. The essential aspect of the ritual is the unexpected testimony of the conventional part of society, who imputes normality on the ex-offender (Maruna, 2001:161). This ritual reinforces the offender's necessary confidence in the desistance-process and that of his direct environment and society in general. This inspiring suggestion was the reason for this Special Issue describing the process of judicial rehabilitation as it is shaped in different cultural contexts and to look for rehabilitation rituals that could contribute to the desistance-process (see Herzog-Evans, 2011a). This paper addresses the possibility of such rituals in the Netherlands. It describes which data concerning criminal convictions can be stored, how long they may be preserved and which persons and organisations can get access to the criminal records. Considerable attention will be paid to the conduct certificate, because the hindrance that ex-convicts will experience from their criminal records, will in practice depend mainly on the question if they need a conduct certificate to get access to a certain position or job and if they will receive such certificate. Because of the relation with Maruna's work, emphasis will be put on the consequences of criminal records

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for ex-prisoners although, unfortunately, the registration of these records can also seriously affect the lives of those who received less serious sentences.
Less will be said about formal rehabilitation rituals (see Maruna, 2011), for the simple reason that they do not exist as such in the Dutch Criminal Justice System. The proposition will be defended, however, that the conduct certificate procedure itself can be characterised as a rehabilitation ritual.

Re-socialisation and rehabilitation in the Netherlands

Re-socialisation is an important aim of the implementation of sanctions in the Netherlands. Section 2 of the Penitentiary Principles Act states that sanctions 'should prepare the convict as much as possible for his return into society' and together with the principle of minimal restrictions, the re-socialisation principle forms the heart of the Dutch penitentiary law since 1953. The Dutch re-socialisation concept is as such not known to the English vocabulary. The commonly used English word 'rehabilitation' differs from it in so far that it emphasises the role of the outside world much more. In Dutch language rehabilitation has two connotations: correction of a reputation that was harmed undeservedly and the meaning it has in underlying records: restoration of a convict in his legal rights, as such it is perfectly usable in this context.

Like the concept of 'rehabilitation,' the term 're-integration' looks forward to the result after ending the sentence, a meaning that the re-socialisation concept totally lacks. Morgenstern (2011) emphasizes the legal significance of re-socialisation as a right. In the Netherlands, the principle is formulated as an aim of the implementation of sentences that has significance during the execution of the sentence, but not so much in the period afterwards. It is formal policy (Parliamentary Documents II, 2004/05, 27834, nr. 36) that the position of the ex-prisoner concerning the realisation of his social rights, does not differ fundamentally from the (weak) position of the average citizen (Uggen, Manza and Behrens, 2004, Boone, 2005b) and as such is not a responsibility of the Department of Justice.

Re-socialisation as an aim of sentencing is a very important topic nowadays among both academics and policy-makers, but only in the strict sense of reducing recidivism. The publication of the first results of the recidivism monitor indicating that over 70% of the adult offenders recommitted a criminal offence within seven years and almost 50% within a year (Wartna, Tollenaars en Essers, 2005), together with the agitation in society and politics concerning the high recidivism rates of certain categories of offenders, put the topic of reducing recidivism on the political agenda after a period in which the significance of the re-socialisation concept eroded (Boone, 2007). Inspiration was found in the work of the Canadian scholars Andrews and Bonta on 'What Works' and the practical implementation of their work in Canada and England (Bonta, 2002; Perry, 2002). The points of departure of their Risk Need Responsivity-model (Ward and Maruna 2007) are radically implemented in the Push Back Recidivism Program that was introduced in 2002 (Van der Linden, 2004). First, every probationer and almost all detainees are screened on the criminogenic factors as defined in the 'What Works' literature. Second, cognitive behavioural interventions are applied that have a demonstrable positive effect on recidivism. Third, only interventions are subsidized that are tested by an acknowledgement committee modelled after the British accreditation panel (see Maguire, et al., 2010). Finally, an ambitious After Care Program was introduced for all ex-detainees, aiming to prepare their return into society with regard to four major fields: income, housing, identity papers and care.

Despite the importance of reducing recidivism in Dutch policy nowadays, the regulation concerning criminal records and the Conduct Certificate did become much stricter in the same period and seems to work directly against the objectives aimed with Push Back Recidivism. In the parliamentary debates concerning these changes, the consequences for re-socialisation and pushing back recidivism are rarely discussed. Also the interest among academics is minimal, given the very few publications (the latest dissertation was published in 1980 and the only one that preceded it was from 1955).

On one hand this lack of insight can be explained by the changes that have occurred in the Dutch Criminal Justice System and penal climate in general (Pakes, 2004; Van Swaaningen 2004; Boone, 2005a). Recent changes in the regulation concerning criminal records perfectly reflect the hot topics in the public debate concerning crime and safety: safety before privacy, no mercy for serious offenders, protection for vulnerable groups, and exclusion of sexual offenders. Another explanation for the fact that criminal records are not involved in the discussions concerning the effectiveness of sentencing, can be that the theoretical perspectives from which the insight derives that the label of a criminal conviction can delay the process of desisting from crime, or worse, be a catalyst for crime (Tannenbaum, 1938; Lemert, 1951; Becker, 1963), is not very influential in criminological science at the moment and not very popular among Dutch policymakers either. Much more empirical evidence is needed concerning the effects of these recent alterations on the rehabilitation chances of offenders and the risk that they re-offend. This paper, however, describes how judicial rehabilitation is organised in the Netherlands and is mainly based on an analysis of existing literature, legislation processes and jurisprudence. As far as empirical findings are presented, they concern the decision-making processes and their outcomes, not their effects.

Criminal records

Criminal records are stored in the Judicial Documentation System, which contains judicial data and criminal prosecution data. Judicial data are data that pertain to natural persons or legal entities concerning the application of penal law or penal procedure (Judicial and Criminal Prosecution Data Act, Section 1 Subsection a). Criminal prosecution data have been acquired in the framework of criminal prosecution investigations (Judicial and Criminal Prosecution Data Act, Section 1 Subsection b). In this article, I confine myself to judicial data.

The rules on the registration of judicial data were greatly altered about ten years ago. The legislation up until then dated back to 1955. The 1955 Law on Judicial Documentation and Conduct Certificates was supposed to put an end to the registries, 'black lists' and so on that were used to see whether someone had a criminal record. Legislators and the Rehabilitation Department concurred that from a re-integration prospective, it was not wise to hold an individual's criminal past against him forever. The new law was designed to put an end to the notion of '*Once a thief, always a thief*' (Singer-Dekker, 1980: 15).

The underlying reason for changing the legislation in 2004 was the need for a computerized system to process the data. The existing system was too expensive and labour-intensive because all the information was processed manually. A new Judicial Documentation Act was needed in connection with the Personal Registration Act and the guidelines on computerized personal data (Brok, 1999: 28). What is more, the new law presented an opportunity to radically revise the Conduct Certificate. Research shows that the existing Conduct Certificate was barely taken seriously, and as a result more and more requests were submitted to the Ministry of Justice for direct information from the court and police files (Parliamentary

Documents II, 1999-2000, 24797, no. 7: 1). If this did not work, employers would try other ways to find out whether a job applicant had a criminal record (Brok, 1999). To improve the resocialization chances of ex-convicts, the legislator deemed it necessary to make the criteria for a Conduct Certificate much stricter, thus giving the document a better image.

In the commentary on the bill leading to the present-day legislation, it says the aim is to achieve a proper balance of the two antipodal aspects this bill takes into consideration, i.e. preventing crime and protecting the privacy of the registered individuals. In the first instance, the emphasis of the law would seem to be much more on the use of judicial data for crime prevention purposes than was the case with the previous law. This should however be viewed in the light of the developments concerning the Conduct Certificate as described above.

In the former Act, a distinction was drawn between criminal records and general documentation records. Criminal records only included irrevocable convictions and were mainly designed for external use and were used by the Mayor to issue Certificates of Good Conduct. In addition to convictions, *transacties* (out-of-court settlement or compromise by the Public Prosecutor) and dismissals were registered in the general documentation records. The general documentation records were designed for internal use. Only the judiciary and some divisions of the Department of Justice had access to them.

The present system no longer has two types of records. Instead, there are now regulations on who has access to each type of information from the judicial records (Knape, 1997: 84). The records are now managed by the Minister of Justice (Judicial Information Agency, Section 1, Subsection C, Decree), and judicial as well as criminal prosecution data is stored there (see above for the distinction). The Judicial Data Decree further specifies what is classified as judicial data. As regards criminal offences, the data specified in the Decree pertains to cases where the Police Report is dealt with by the Public Prosecutor (or by the Procurator General at the Supreme Court in the event of offences by representatives of the people (Section 2, Decree). Also, as regards minor offences, interference of the Public Prosecutor is necessary to define data as judicial data, unless an unconditional decree was issued not to further prosecute the case or a fine has been enforced of less than one hundred euros (Section 3 Subsection a). Also in case the judge has issued a revocable or irrevocable decree including a number of hours of community service, a prison sentence, or a fine of one hundred euros or more, the above-mentioned data are classified as judicial data (Section 3 Subsection b). The enforcement of a fine of at least one hundred euros is however not necessary in the case of a number of offences that are apparently viewed as so serious that they always have to be registered. (Section 4 parts 2 a-p). This is an extremely extensive category.

The data viewed in this decree as judicial data pertain to natural persons or legal entities, such as name, date of birth and home address. The decrees of the Public Prosecutor also pertain to punishable acts, for example the penal provisions, qualifications and sentences that are enforced.

Access to criminal records

Judicial Documentation Data can be requested firstly by the individual involved (Judicial and Criminal Procedure Data Act, Section 18 Part 1). Within four weeks, upon request every individual can be orally informed what information about him or her is included in the Judicial Documentation. The law prohibits the provision of written information, to prevent prospective employers from requiring job applicants to hand over a copy of their criminal

records [Knape 1997: 84]. This information can however be refused if and in so far as it is necessary for state security purposes (Judicial and Criminal Procedure Data Act, Section 21). When the bill was on the floor, the legislator could not give a single example of data that needed to be kept from view for reasons of state security (Parliamentary Documents II, 1999-2000, 24797, no. 7, 21) and examples in the jurisprudence were not found.

In addition, judicial data can be given to four categories of officials. With only a few exceptions, it always holds true that the data can solely be used for the specified purpose (Judicial and Criminal Procedure Data Act, Section 8 Part 4):

- Firstly, judicial data can be given to court officials in the Netherlands, Aruba and the Netherlands Antilles for use in court proceedings there. After all, the most important reason for storing judicial data is to be able to inform the court about the criminal record of a suspect. For the same reason, the data can be given to the Minister of Justice, for example in connection with granting a pardon (Explanatory memorandum: 22).
- Ever since staff members at the Office of the Public Prosecutor have been able to enforce independent sentences in the form of punishment orders, they have also had access to data from the Judicial Documentation System.
- If a serious general interest makes it necessary, the Board of Procurators General is authorized to issue judicial data to individuals and agencies that are allowed access to criminal procedure data such as police officers and prison personnel (Judicial and Criminal Procedure Data Act, Section 39). In the Explanatory Memorandum, an example is given of a Public Prosecutor who, in connection with a successful approach to problematic youngsters, not only gave youth social work agencies information about a criminal case in session, but also about the criminal records of the youngster or youngsters (Parliamentary Documents II, 1999-2000, 24797, no. 3: 9 and 10).
- Lastly, individuals and agencies not involved with criminal procedure can also be given data from the Judicial Documentation System if they serve a public function and if it serves the public interest (Judicial and Criminal Procedure Data Act, Section 9). For his chances to reintegrate into society, this category is the most important for the ex-prisoner. In general, all private and public employers have to make use of the Conduct Certificate, as it is clearly stated in the Explanatory Memorandum. Only in case of a few official functions demanding a high level of integrity and responsibility, direct information can be given with regard to the assignment or dismissal of staff. These exceptions are explicitly mentioned in the Judicial Data Decree. Still, exceptions are made for quite some government jobs, e.g. police staff and prison and security staff. In general, the data have to be necessary for the proper execution of duties. It also holds true for this category of requestors that the data can only be used for the purpose for which they have been issued and cannot be stored, or only for a short period of time. The amount of information is limited. The point of departure is that only information about irrevocable convictions that sentences have been enforced for can be provided. The irrevocable convictions cannot have been pronounced more than eight years earlier, and if and when a prison sentence has been enforced, the length of the prison sentence is added to this period of time (Judicial and Criminal Procedure Data Act, Section 10). A different distribution system is used for minors (Judicial and Criminal Procedure Data Act, Section 12). Only irrevocable convictions for offences or penal orders are registered that were issued if the offender was sixteen or older at the time of the offence and a punishment of a certain weight was enforced.

Conduct Certificate

Since the data stored in the Judicial Documentation System can not be given directly to private employers, more important for the desistance process of the ex-prisoner is the question in what cases a Conduct Certificate is needed for a job or a position and under what conditions it can be issued. In this section, I will discuss the type of professions and positions for which a Conduct Certificate can or has to be applied for and the information that can be disclosed for that decision. Because the actual provision of a Conduct Certificate can be interpreted as a rehabilitation opportunity in a restricted context, I will discuss the decision making process in the next section.

A Conduct Certificate is a statement by the Minister of Justice (formerly the Mayor) that there are no objections to the individual in question practising a certain profession or occupying a certain position. The certificate has to be applied for by the local government that forwards the request to the Central Conduct Certificate Agency, an agency consisting of 70 staff members. The application has to be accompanied by a form in which the nature of the function of profession is described by the offerer. For centuries, ample use has been made of statements on conduct or good conduct. In the sixteenth and seventeenth centuries, various cities such as Amsterdam and Groningen started to require certain letters of introduction from ecclesiastic or civil officials who wished to settle within the city gates (Singer-Dekker 1991: 11). Starting in this same period, 'statements of reputability' were required in order to practise the legal or teaching profession (Singer-Dekker 1991:12). To come to a more objective judgement, one started to make use of criminal records. A reliable registration was lacking, however, and so, the practice of issuing conduct certificates led to the establishments of a criminal registration system in 1896 (Mulder, 1955: 35). Opposition soon arose to the value judgement implied in the name of the statement (Singer-Dekker, 1992:19 and 45), but it remained the same until 1955. The awareness then grew that the statement did not imply a value judgement of the individual in question and it came to be known by the more neutral term Conduct Certificate. Underlying the changing terminology, Singer-Dekker sees a world of changed views. In 1955, Mulder even devoted the title of his dissertation to this issue: *From Evidence of Good Moral Behaviour to a Conduct Certificate.*

The purpose of today's Conduct Certificate is on the one hand to prevent individuals with a criminal past from holding certain positions or practising certain professions that would endanger public safety, on the other to protect the privacy of condemned individuals as much as possible by combining limited distribution with the possibility, mainly for employers, to request a Conduct Certificate in connection with holding certain positions (Parliamentary Documents II, 1995-1996, 24797, no. 3: 3). In 2004, radical changes were made in the regulations on Conduct Certificates. The status of the Conduct Certificate needed to be enhanced since employers barely had any confidence in the statement on individual conduct and preferred multifarious other methods for acquiring information about the possible criminal past of prospective employees. It is striking that in the development of the law, only indirect references were made to the importance of re-socialization. Although of course this importance is related to the protection of privacy, it is striking that there has barely been any serious discourse on the consequences of the rather radical revisions as regards to the return of ex-convicts to society.

Admissibility

Firstly, there was the proposal to eliminate the assessment prior to the treatment of a request. The assessment meant that prior to the treatment of the request, the agency supplying the Conduct Certificate should determine whether an investigation into the individual's conduct was necessary in order to restrict the risk to society. This assessment was included in the law at the time to prevent just anyone from requesting a Conduct Certificate without being necessary. Now that this criterion is taken into consideration when deciding whether or not to provide a Conduct Certificate, and not when deciding whether a request can be accepted for it, a refusal is solely to the disadvantage of the individual and no longer serves the original purpose. The aspects that are taken into consideration when deciding to eliminate this clause emphasize however not the interest of the ex-convict, but the gained importance of a safe society. It was considered for example that:

> 'Against the background of present-day developments in society, in most cases the need for insight into the possible criminal past of natural persons and legal entities is justified. It occurs with increasing frequency that indications are observed in society that it is desirable, before engaging in more or less business-like contacts, to do everything possible to prevent problems of a criminal nature' (Parliamentary Documents II, 1995-1996, 24797, no. 3: 10).

Also the Members of Parliament at the time found this line of reasoning an oversimplification and in the present legislation, the admissibility test has thus been preserved (Judicial and Criminal Prosecution Data Act, Section 34). However, the option of declaring a request inadmissible is now extremely limited. A request is always admissible if a Conduct Certificate is mandatory, and this is far more frequently the case than before the new law went into effect in 2004. What is more, the request is always admissible if it is made in connection with an employment relationship, a concept that includes voluntary work and traineeships as well. In the past, there had been a great deal of discussion on whether a work relationship fell under the *necessity criterion*, and the decision about this issue could differ from one district to the next. Should a cashier who steals from the cash register also be viewed as a risk to society? The above-mentioned explanatory notes on the Policy Framework made this discussion redundant. According to a policy staff member at the Central Conduct Certificate Agency, the point of departure is now that every company risk is also a risk to society since companies shift their damages to society. The policy staff members who decide on the requests now utilize a restricted list of instances for which no Conduct Certificate is issued, for example family matters such as marriages.

Judicial data involved in the decision to assign a Conduct Certificate

One radical change introduced with the new law in 2004 is that in judging a request for a Conduct Certificate, the Minister of Justice not only receives information about irrevocable convictions, but also about other matters such as open cases, dismissals and *transacties* (Judicial and Criminal Prosecution Data Act, Subsection 3.2.1, Policy Framework). The underlying idea was that this not only made it possible to make a more well-founded decision, it could also increase the value of the Conduct Certificate in society. It was viewed as plausible that this would reduce the need on the part of individuals other than the Mayor to gain access to the judicial data (Parliamentary Documents II, 1995-1996, 24797, no. 3: 6). In addition, there was already the possibility of using data from the police files, the *soft* data that never led to a legal decision, let alone prosecution. According to the Minister of Justice at the time, it was 'inconceivable that a Conduct Certificate would be refused purely on the basis of

soft data', since the individual requesting it could always register an objection or file an appeal (Explanatory Memorandum: 14). This line of reasoning, however, overlooks the fact that the procedure to object, let alone appeal against a primary decision will be too time-consuming in most cases with regard to the objective of the application.

Practical implications

The enhanced admissibility of a request for a conduct certificate, the legal exclusion of private employers from getting direct information from the Judicial Documentation System and the increase of the number of professions and positions for which a conduct certificate is legally obliged, has resulted in a huge increase of the number of applications as is shown in Table 1. Since 2005 the number of applications almost doubled. The proportion of Conduct Certificates that was refused also increased, but remained very low. If a conduct certificate is refused, however, the majority of employers (79%) will not offer the applicant a job, while for the other 21% it depends on the situation (Roth et al. 2006). This still does not say too much about the rehabilitation chances of ex-convicts, however, since most of them will choose not to apply for a Conduct Certificate in case they expect a refusal. At least, this was the conclusion of earlier research to this matter (Singer-Dekker, 1980, Brok 1999). This research also indicated that most ex-prisoners did find a job after release, but the question is if this is still the case since the increase of sectors for which a Conduct Certificate is legally obliged. Conduct Certificates are obliged now for all educational, child care and nursery jobs, but also in the branches in which ex-convicts traditionally could easily find a job, as for example the taxi-branch, the security branch and the transport sector. Debate is going on now concerning a proposal to oblige a Conduct Certificate for all volunteers, in particular those working with children (Letter of the Minister of Justice, 13th November 2007). This proposal has become stranded so far on its technical and practical difficulties, but can have major consequences for the rehabilitation process of ex-convicts if it passes.

Table 1: Number of conduct certificates applied for

	2005	2006	2007	2008	2009
Applications	254338	279700	384724	474751	459633
Assignments	251612	276221	380133	470480	453825
Refusals	1053	1772	3171	2894	3315

Expunging techniques/Rehabilitation opportunities

Herzog-Evans (2011b) distinguishes in her contribution to this edition, three expunging techniques with regard to criminal records: automatic measures, measures based on the mere absence of further reconviction and measures requiring some forms of merit. While the first two are forms of legal rehabilitation, the third one is characterised as judicial rehabilitation.

In the Netherlands, only the first is at stake. Up until the Judicial Documentation Act was passed in 1955, there were barely any rehabilitation opportunities. Judicial data were only removed when individuals reached the age of eighty, and only in the event that no punishable acts were committed in the preceding five years (Singer-Dekker, 1991: 21). Initiatives to introduce a form of judicial rehabilitation were made on several occasions. Both in 1909 and 1950 an Advice Committee recommended a form of judicial rehabilitation (Mulder, 1955). In 1950, the International Penal and Penitentiary Foundation held a conference in The Hague, where the criminal record was one of the topics discussed. A Dutch solicitor by the name of Hoogenraad advocated rehabilitation after a certain period of time. In addition, in special

cases, there should be a procedure comparable to granting a pardon. Rehabilitation granted by the Queen (actually, the Minister of Justice) in the event of an altered interpretation of a punishable act, for example if a prohibition is rescinded, or because of special merits (Singer-Dekker, 1991: 32). Also Mulder pleaded in his dissertation of 1955 for a form of rehabilitation as a reward for good behaviour besides the legal rehabilitation that is by than already introduced in the Proposal that leads to the Bill of 1955. Judicial rehabilitation as such, however, was never introduced in the Dutch legal system.

Automatic measures

In the Netherlands, people who have been in trouble with the law are primarily rehabilitated by the mere passage of time. In accordance with the present-day arrangements, in principle, judicial data on criminal offences are kept for thirty years after the criminal sentence has become irrevocable (Judicial and Criminal Procedure Data Act, Section 4 Part 1). In the original bill, this was still twenty years (Brok, 1999: 30), but in 2005 this period was extended. This period of time can be extended by the duration of the non-suspended prison sentence enforced in a penal case. If a non-suspended prison sentence of more than three years is enforced, this is added to the length of the storage period, and the same holds true for mental hospital orders and youth detention (Section 4 Part 1 of the law). Moreover, in these cases, ten years is added to the length of the storage period if the crime is penalized by a maximum prison sentence of eight years or more.

When the act was on the floor, an exception was made by amendment for sexual offences. Judicial data on sexual offences is not removed until twenty years after the death of the individual in question. This was supposed to keep '*people like that*' from ever occupying a position with any kind of dependence relationship. Although several Members of Parliament argued that this proposal was contradictory to the proportionality requirement of Section 8 of the European Convention on Human Rights, the Minister of Justice at the time refused to accept this. He felt it was characteristic of sexual offences that the unrest in society is greater and lasts longer. What is more, sexual offences are often based on the sexual inclinations of the perpetrator, which are often viewed as being of a permanent nature. Lastly, a distinction was considered justifiable between sexual and other serious offences because the circle of possible victims is larger.

The point of departure is that in principle, data on minor offences are stored until five years after the irrevocable settlement of the case. This period of time is, however, extended to ten years if the individual was sentenced to prison or community service.

In any case, data on all types of offences are removed eighty years after the birth of the individual. This is based on the assumption that after the age of eighty, an individual is not going to commit any more punishable acts, though this was a point of discussion when the bill was on the floor (Parliamentary Documents II 1999-2000, 24797, no. 7: 30).

Measures requiring some form of merit

Under the previous law it was possible in one instance that the criminal record was officially removed by the judge. If the individual was below the age of sixteen at the time of the offence and juvenile law was applied, the judge who pronounced the judgment could at any time order the removal of the criminal record. This option actually falls beyond the distinction Herzog-Evans (2011) makes, because it did not need some form of merit per se. Very little use was

made of this option (Singer-Dekker 1991: 33) and it was not included in the new law. There is a different system of data access where minors are concerned though, as is described above.

Inaccurate data can be corrected or removed upon the request of the individual in question. However, this stipulation does not have anything to do with promoting rehabilitation. The request can be made if the data are factually incorrect, incomplete for the purpose of the processing, not relevant, or have been processed contrary to a legal regulations (Judicial and Criminal Prosecution Data Act, Section 22). While the act was on the floor, a proposal was made to give the person involved the right to request a removal of data for specific personal circumstances. This opportunity could have come close to a 'rehabilitation ritual' (Maruna, 2011), but was heavily criticized during the parliamentary debates and never came into force (Parliamentary II 1999-2000, 24797, no. 7: 13).

The only measure that more or less fits this category is the HALT project (a term that literally means STOP, but is also an abbreviation for the Alternative). The police can propose that youngsters do a maximum of twenty hours of community service if they are caught committing a punishable act. This is a way to keep the case from being sent on to the Public Prosecutor and entered into the criminal records. However, this is presented to youngsters as something more attractive than it actually is, since a HALT sentence is entered into the police data system and can be consulted when making a decision about whether to issue a Conduct Certificate (Parliamentary Documents II 1999-2000, 34797, no. 7: 19).

Issuing a Conduct Certificate

In addition, however, the granting of a conduct certificate can be interpreted as a form of rehabilitation; at least it restores a former prisoner's rights to fulfill a certain job or position again, in particular if a conduct certificate is legally obliged to fulfill that particular job.
Under the previous law, the evaluation criterion to issue a conduct certificate was 'that the Mayor would provide a Conduct Certificate in instances where it was clear to him from an investigation into the conduct of the individual in question, in view of the purpose the statement was requested for, that there were no objections to the individual in question'. Under the new law, the criterion is 'that our Minister of Justice refuses to issue a Conduct Certificate if a punishable act is cited in the judicial data on the individual requesting the certificate which, if repeated, in view of the risk to society and the other circumstances of the case, would serve as an obstacle to the proper performance of the task or activity the Conduct Certificate is being requested for'. Two changes catch the eye: the criterion did become much stricter and it is no longer the Mayor who decides whether a Conduct Certificate is to be issued, but the Minister of Justice. This last change was made with the purpose of increasing the trust in the Conduct Certificate.

Policy regulations have been drawn up that extensively describe how the Minister of Justice is to arrive at a judgment. These policy regulations were updated in 2008. A distinction is drawn in the policy regulations between an *objective criterion* and a *subjective criterion*. The Minister of Justice first needs to evaluate whether the act in question, if repeated, can pose a risk to society in the performance of the task or activity in question, i.e. the objective criterion. On the grounds of the subjective criterion, the interest of the individual in the issuance of the Conduct Certificate can be evaluated to be more important than the risk to society determined by the objective criterion (Conduct Certificate Policy Regulations, Subsection 3.3). Below some remarks on both criteria.

Objective criterion

Whether or not there is an actual risk of a repetition of the punishable act is not taken into consideration in the objective evaluation, the Minister just has to consider what the effects would be in case of a repetition of the punishable act. The risk to society is assessed on the basis of a general *screening profile* and specific screening profiles. The general screening profile focuses on the risks in eight areas specified in the Policy Framework, i.e. information, money, goods, services, commercial relations, processes, steering organizations and individuals. In specific screening profiles, for example the screening profile for special investigation officials or for judicial services, the risks relevant to the profile have been included. The risks are described in such wide terms, however, that it is hard to imagine an offence that won't be a threat for at least one of them.

Whether, in addition to posing a risk to society, a punishable act is also an obstacle to the proper performance of a task or activity has to do with the relation between the punishable act and the position the individual is applying for. For instance, in the Policy Framework, the example is given that in principle, a Conduct Certificate will not be issued to a taxi driver who has been sentenced for driving under the influence of alcohol, although this is not necessarily the case if it is an accountant who has been sentenced for driving under the influence of alcohol (Explanatory notes: 7, Subsection 3.2.4). It is clear from the jurisprudence, however, that the relation between the desired position and the offence that has been committed does not necessarily have to be that close. For example, an appeal of the refusal to grant a Conduct Certificate to a taxi driver was dismissed because he had repeatedly grown and sold hemp plants and this was not in accordance with the nature of the position of taxi driver (Administrative Law Division, 20 July 2008, National Jurisprudence Number: BD 8884). An individual who had been found guilty of stalking, did not receive a Conduct Certificate for a job as assistant occupational therapist (Administrative Law Division, 27 January 2010, National Jurisprudence Number: BL 0691).
The objective criterion was honed even further in 2004 with regard to sexual offences. Not because committing other offences is necessarily any less serious, but because it is characteristic of sexual offences that they cause greater 'unrest' in society and that the unrest lasts longer, as it is explicitly stated in the explanatory notes on the Policy Framework (Law Gazette, 24 June 2008, no. 110: 16). If a request is submitted for a Conduct Certificate for a task or activity in a relation of dependence (e.g., caring for vulnerable others) and there are judicial data on sexual offences, in principle the objective criterion has already been met with (Conduct Certificate Policy Regulations, Subsection 3.2). This means that with very few exceptions, by definition, a request for a Conduct Certificate for a position as teacher will be refused, although according to the explanatory notes, this is not necessarily the case for a position as accountant.

Subjective criterion

The subjective criterion seems to have lost much of its importance, at any rate since the introduction of the new Policy Framework. Three factors have been cited that play a role in testing the subjective criterion, i.e. the way the criminal case was settled (verdict of guilty, nature and length of the sentence), the amount of time that has since passed and the number of previous convictions (Conduct Certificate Policy Regulations, Subsection 3.3.2). In the previous Policy Framework, other factors were cited as well that could be used for evaluation purposes, including the age and marital state of the individual requesting the Conduct Certificate, his or her age at the time of the punishable act, and whether or not the offence is

likely to be repeated. According to the jurisprudence, the circumstances that led to the offence are in general not weighed in the decision to issue a conduct certificate. In case the judge imposed a sentence of a certain weight, it is assumed that the offence was serious enough (Administrative Law Division, 4 February 2009, National Jurisprudence Number BH 1831).

Evidence for the proposition that the subjective criterion has lost importance is the altered role of the Probation Service. In the Explanatory Memorandum when the law was first formulated, attention is emphatically devoted to the importance information of the Probation Service can have in meeting the subjective criterion. In the explanatory notes on the Policy Framework, it is however explicitly stated that only in special cases the Probation Service is questioned about the personal development of the individual to be investigated. Up until recently, making recommendations about whether or not a Conduct Certificate should be issued was an important task of the Rehabilitation Department. Inquiry at the Probation Service, learned that the number of requests dropped very fast in recent years. While in 2002 still 658 advices were issued, this number was dropped to seven in 2009, while in 2010 only one advice was produced so far (Information of the Probation Service, October 2010).

At any rate, in itself, re-socialization is not an interest that can be classified as a special circumstance that can lead to a correction in the application of the objective criterion. In fact, the Administrative Law Division reasons that the fact that re-socialization can only occur after the termination of the retrospective period (the period from which punishable acts taken into consideration) is a ramification of the regulations, so that it can be assumed that the court responsible for the decision has made it very deliberately (Administrative Law Division, 21 January 2009).

In testing the subjective criterion as well, an exception is made for sexual offences. If there are judicial data on sexual offences and the Conduct Certificate is requested for a position in which there is a relationship of authority or of dependence, on the basis of the subjective criterion, there is only very little chance that a Conduct Certificate will be issued.

Retrospective period

The law does not specify how long judicial data remain relevant to the decision whether or not to issue a Conduct Certificate. It can be deduced from the Policy Framework that in principle, a retrospective period of four years is common practice starting at the moment when the request form is submitted. Only if judicial data are observed in the retrospective period relevant to the request, the Central Conduct Certificate Agency evaluates all the data relevant to the request from the judicial documentation in the twenty years prior to the request. There are, however, three exception on this rule.

First, an exception is made for sexual offences once again. Regarding sexual offences as referred to in Sections 240b to 250 of the Penal Code, the entire judicial documentation on the individual requesting the Conduct Certificate is examined. According to the explanatory notes, this is not justified as much by the severity of this category of offences as it is by the fact that it is characteristic of sexual offences that they cause greater unrest in society than other offences and that this unrest lasts longer, certainly if children or persons incompetent to act for themselves are involved (explanatory notes on Policy Framework: 5).

An exception is also made in case the Conduct Certificate is requested in connection with some special law or regulation that specifies some different period of time. For a request that

has to do with the Arms and Munitions Act for example, there is a retrospective period of eight years. A retrospective period of five years applies in the case of taxi drivers and lorry drivers.

Finally, the Policy Framework in 2008 introduced the option of refusing to issue Conduct Certificates outside the evaluation framework described above (Section 3.4). If the individual submitting the request is not cited in the judicial documentation within the specified retrospective period but the issuance of a Conduct Certificate would be irresponsible in view of the position it is being requested for, it will still be refused. Use is only made of this option if in the judicial documentation of the twenty years prior to the request, punishable acts are observed that can be punished by a maximum sentence of twelve years or more, and the individual submitting the request served a non-suspended prison sentence for this offence or a hospital order.

Rehabilitation rituals

Rehabilitation rituals as such are not institutionalised in the Netherlands. Although several authors have been pleading for it (Mulder, 1955; Singer Dekker, 1980), a ritual like that has never been part of the Dutch Criminal Justice System. Desistance is rewarded sometimes, for example by giving a less severe sentence in case (not too serious) recidivism does occur after a crimeless period or by not executing a suspended sentence after the passage of an operational period. A procedure that is relatively often used in the Netherlands is the suspension of the pre-trial detention. In that case, the period until the hearing can be used by the suspect to show his good will by participating in a reintegration-project and, at least, by not re-offending. In these cases also, desistance and good behaviour are sometimes explicitly rewarded by the courts.

The ex-prisoner, however, does not have the opportunity to ask the courts to expunge his criminal records after a period of not offending. He has, however, the opportunity to ask a Conduct Certificate to the Minister of Justice and to object and appeal against a negative decision. In its current form the procedure lacks all the characteristics Maruna (2001, 2011) attributes to a true rehabilitation ritual: It is not public, it is not highly exclusive, you cannot even say that the judgement that there are ‘no objections’ is a positive reinforcement of the efforts of the ex-prisoner not to re-offend. Still, after reading the jurisprudence concerning the Conduct Certificate, I can imagine that for those relatively few ex-prisoners who object and appeal against a negative decision, the procedure could be interpreted as a rehabilitation ritual. They try to convince the executives of the Justice Department and in a latter stage the judge that they desisted from crime and really want to make a new start. And although the procedure is highly formalised and objectified in recent years, a positive decision still expresses the message that the ex-prisoner is good enough again, at least for carrying out the position he applies for.

Conclusion

The conclusion of this analysis must be that criminal records keep following the ex-prisoner long after a sentence ends. With removal periods of 30 years or more, it cannot be said that the ex-convict has a second fair chance during his life. This only holds true for his position inside the criminal justice system, however. For his rehabilitation opportunities, it is much more important for what period individuals and agencies outside the criminal justice system can receive information. Fortunately for the ex-prisoner, these terms are more in his favour.

The restricted number of public employers that can get direct information from the Judicial Information Agency can only receive information about irrevocable convictions of less than eight years ago. Other employers only have the opportunity to demand conduct certificates from people applying to positions. For conduct certificates, a retrospective period of four years is common practice, although recently important exceptions are made for sexual offences and offences that can be punished by a prison sentence of 12 years or more. A change that definitely weakens the position of the ex-prisoner is that it is no longer true that only irrevocable convictions play a role in the decision making process, but also information about open cases, dismissals and out of court settlements with the public prosecutor (*transacties*).

From the perspective of rehabilitation, however, it is worrisome that the number of jobs and positions for which a conduct certificate is legally obliged have increased rapidly in recent years. Even if not obliged, a request to issue one is almost always admissible and these two changes have resulted in a doubling of the amount of requests since 2004. This increase will only intensify if a conduct certificate becomes obliged for (categories of) volunteers in the near future as is proposed by the Department of Justice. How far these developments impact rehabilitation perspectives of ex-offenders also depends on the question in how far ex-offenders prevent themselves from applying to jobs for which a conduct certificate is needed. Previous empirical research indicates that they do on a great scale (Singer-Dekker, 1980; Brok, 1999).

There seems to be some tension between the developments that have occurred in the Netherlands concerning conduct certificates and the serious efforts that are made to reduce re-offending by ambitious programs such as Push Back Recidivism and the After Care Programme. While those programs try to prepare ex-offenders to a crimeless life directly after imprisonment or probation, reintegration in some parts of society can only start after four years or more. Staff members of the Central Conduct Certificate Agency even mentioned that they refused conduct certificate for jobs that formed part of reintegration programs that were prepared by Prison or Probation Services.

The Dutch Criminal Justice System currently lacks formal rehabilitation rituals through which ex-offenders can ask the Courts or the Department of Justice to expunge (parts of) their criminal records after a period of not offending. In this paper, however, I defended the opinion that the right to object and appeal against a refusal of a conduct certificate, can be considered as a kind of rehabilitation ritual. Although this procedure is not as exclusive and highly demanding as Maruna (2001) and the French System (Herzog-Evans, 2011b) insist, it does express the same message, namely that the offender is good enough again, at least to carry out a certain position. I doubt if a more demanding ritual would really contribute to the Dutch system and facilitate the desistance process. Also the public character of a ritual as suggested by Maruna (2011) and implemented in the French system, does not really fit into the current punitive climate in which public knowledge of a criminal past could have an opposite effect. Rehabilitation opportunities for ex-convicts would increase, however, if the retrospective period for a conduct certificate became much shorter and the individual circumstances of the offence and the offender would play a more important role into the decision making process again. As such, it would also connect better to ambitious reintegration programs that are recently introduced into the Prison and Probation Service.

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